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THE  
NORTHEASTERN REPORTER,

VOLUME 7,

CONTAINING

ALL THE CURRENT DECISIONS

OF THE

SUPREME COURTS OF MASSACHUSETTS, OHIO,  
INDIANA, ILLINOIS, AND THE COURT  
OF APPEALS OF NEW YORK.

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(106 Ind. 375)

LEEPER v. CITY OF SOUTH BEND.

(*Supreme Court of Indiana.* May 19, 1886.)

TAXATION—CITY AGRICULTURAL LANDS—CONSTRUCTION OF SECTION 8261, REV. ST. 1881.

Under section 8261, Rev. St. 1881, unplatted agricultural lands, lying within the limits of a city, are subject to a tax for general city purposes, equal to the aggregate percentage of the levy in the civil township for general township purposes, leaving them subject to the general burden of state and county tax, to the city school tax, and to such special assessments as affect them in common with all other city property.

Appeal from St. Joseph circuit court.

A. Anderson, for appellant.

John Hagerty, for appellee.

MITCHELL, J. The appellant was the owner of 40 acres of unplatted land lying within the limits of the city of South Bend. The land was used exclusively for agricultural purposes, and in the year 1884 it was valued for taxation at \$2,500. The tax levy in the city was for that year \$1.25 on each \$100 valuation. The aggregate tax levy, for all purposes, on property situate in Portage township, in which the city of South Bend is situate, was \$1.19 for the same year. Of this last sum, 58 cents was for state and county purposes, while 61 cents was for township purposes, including 14 cents for school township purposes. The appellant paid to the city treasurer for city purposes an amount equal to 61 cents on each \$100 of the valuation of his property. He refused to pay more, and brought an action to enjoin the city from collecting, as it claimed the right to do, an amount equal to \$1.19 on each \$100 valuation. From the decision of the court below, which, upon a special finding of facts, was in favor of the city, this appeal is brought, and the question here is the proper construction of section 8261, Rev. St. 1881, which reads as follows:

"Lands lying within the limits of any city or incorporated town in this state, that are not platted as city or town property, and are not used for other  
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than agricultural purposes, or are wholly unimproved, together with all personal property used for the purpose of farming on such land, shall not be taxed in such city or town, for all purposes, at a higher aggregate percentage, upon the appraised value thereon, than the aggregate percentage of the tax levy in the civil township wherein such property is situate."

The appellant's claim is that the words "aggregate percentage of the tax levy in the civil township" mean such taxes as are levied in the township for civil township purposes only, and not the aggregate percentage of all taxes that may be levied for all purposes, including those levied for the state, county, and township. He also contends that it does not include the amount levied for the school township. We are not favored with a brief on behalf of the appellee.

We think the purpose of the legislature in passing the law in question, as in passing other acts of similar import which preceded it, was to prevent the imposition of a substantially higher rate of taxation upon agricultural lands lying within the limits of a city than the same lands would have been subject to if they had not been embraced within the corporate limits. Such lands are liable to taxation for state and county purposes, the same as all other property in the city or township. They are also subject to taxation for school purposes within the city, the same as other city property. *South Bend v. Notre Dame*, 69 Ind. 344. Such lands are also subject to all special taxes and assessments which affect it, the same as other property within the city. But it "shall not be taxed in such city or town for all purposes," that is, all general city purposes, at a higher aggregate percentage than the aggregate percentage in the civil township in which it is situate. The evident meaning of this provision is that such lands shall not be taxed by such city for general city purposes, etc. For general city purposes such lands are subject to taxation to an extent equal to the aggregate percentage of the tax levy in the civil township for civil township purposes; that is, for purposes such as the property has not already been subjected to taxation for. If it were otherwise, property thus situate would in effect be subjected to double taxation. It would be taxed for state and county purposes, and also for city schools. It may be taxed for other general purposes equally with all other property in the city and township. If, then, the city might for general city purposes impose a tax upon it equal to all that which, as township property, it had been subjected to for all purposes, it might often happen that such property would be subjected to a heavier burden than other city property. The language of the act, it must be admitted, is not altogether free from ambiguity; but, considered in the light of the legislation on the same subject which preceded it, we think the purpose of the act was to make property of the character there described subject to taxation for general city purposes to an amount equal to that imposed upon property in the civil township for general township purposes. This leaves it subject to the general burden of state and county tax; also to the city school tax. It is also subject to such other special assessments as affect it in common with all other city property, and to a tax for gen-

eral city purposes equal to the aggregate percentage of the levy in the civil township for township purposes.

This conclusion results in reversing the judgment of the circuit court, with costs, with directions to state conclusions of law in favor of the plaintiff, and to render judgment in favor of appellant.

(106 Ind. 404)

McKINNEY and others v. SMITH.

(*Supreme Court of Indiana*. May 21, 1886.)

HUSBAND AND WIFE—REAL ESTATE ACQUIRED BY VIRTUE OF FIRST MARRIAGE—WHEN WIDOW MAY ALIENATE AFTER SECOND MARRIAGE.

Under section 2484, Rev. St. 1881, where real estate comes to a widow, who afterwards marries again, by virtue of her first marriage, and there are no children by such first marriage, she has the power to alienate the same, no matter whether she took as heir or otherwise.

Appeal from Vigo superior court.

*Buff & Pierce*, for appellant.

*C. F. McNutt* and *I. N. Pierce*, for appellee.

MITCHELL, J. This was a suit for partition. The appellant claimed to be the owner, as tenant in common with Lorena Smith, of a certain tract of land in Vigo county. The facts, as set forth in the complaint, are as follows:

William Smith died July 3, 1866, leaving Christiana Smith, his childless widow by a second marriage, and Samuel Smith, a son by a former wife. During his marriage with Christiana, he conveyed to his son, Samuel, the tract of land in question; his wife not joining in the conveyance. After his death, his widow, in the year 1883, intermarried with Elijah McKinney, and during such subsequent marriage, her husband joining, she also conveyed her interest in the land previously conveyed by her first husband to Samuel Smith. Subsequently the grantee, Samuel Smith, died, leaving, as his widow and sole heir, the appellee, Lorena Smith.

Upon the facts stated, the sole question is whether the deed made by Christiana McKinney and her husband, Elijah, was a valid conveyance of the interest which she took as surviving wife of William Smith. As William Smith did not die seized of the lands in controversy, the estate which his surviving wife took therein did not accrue to her as heir, under section 2483, Rev. St. 1881. She took an estate in fee-simple, by virtue of her marital right, under section 2491, and the estate which she took was not subject to the proviso contained in section 2487. *Slack v. Thacker*, 84 Ind. 418; *Hendrix v. McBeth*, 87 Ind. 287. But, irrespective of the manner in which the appellant derived her title,—whether as heir, under section 2483, or by virtue of her marital rights as purchaser, under section 2491, or whether the estate which she took was subject to the above-mentioned proviso or not,—she was not subject to the disability or restraint upon alienation imposed by section 2484. By the express terms of that section, "in case there be no child or children, or their descendants, by the marriage in virtue of which such real estate came to such widow," she may, her husband joining, alienate. What-

ever, therefore, her interest was, since there was no child or children, or their descendants, as the fruit of the marriage in virtue of which she held such interest, she had the power to alienate it. Having the power, and having exercised it by the execution of a deed in due form, her entire interest, which, as we have seen, was a fee-simple in one-third, was thereby conveyed to her grantee. As it thus appeared that the appellant had no interest in the land which she sought to have partitioned, there was no error in the ruling of the court in sustaining a demurrer to the petition for partition.

Judgment affirmed, with costs.

(106 Ind. 336)

### HENNING v. STATE.

(*Supreme Court of Indiana.* May 23, 1886.)

#### CRIMINAL LAW—TRIAL—INSANITY—QUESTION FOR JURY—WEIGHT OF EVIDENCE.

The question of sanity or insanity is for the jury to determine under proper instructions; and, where there is evidence sustaining their verdict, the supreme court will not weigh it.

Appeal from Montgomery circuit court. On petition for rehearing. See 6 N. E. Rep. 803.

*John R. Courtney*, for appellant.

*The Attorney General*, for appellee.

ELLIOTT, J. The counsel for appellant petitions for a rehearing, but does not ask us to review any of the questions discussed and decided by us. We are now asked to discuss the questions presented by the evidence touching the alleged insanity of the appellant. The request is thus expressed:

"The appellant respectfully petitions the court for a rehearing of this cause, for the reason that the court, in the opinion and decision rendered, failed to pass upon the question of the insanity of the appellant as raised in the record and discussed in the briefs. It is true that the opinion speaks as to the homicide having been 'deliberately planned and executed,' but such deliberation is not inconsistent with a diseased condition of mind. Lunatics are sometimes deliberate and often cunning."

Counsel is correct in saying that we did not discuss the evidence bearing upon the question of appellant's insanity, for we devoted our attention to the important and controlling questions in the case, so ably and vigorously presented by counsel, which questions we conceived to be the decisive ones demanding express notice. We did not, however, overlook the evidence upon the question of the defendant's mental condition,—that was studied with the other evidence,—but we thought, when the original opinion was decided upon, and we still think, that the question of the defendant's mental condition was so peculiarly one of fact for the jury that, under repeated decisions of this court, we could not interfere with the decision of the jury, and that it was unnecessary to expressly announce this conclusion. We have again read the evidence, and can see no reason to change our opinion. The question of the defendant's



mental condition was properly submitted to the jury; and, as there is evidence satisfactorily sustaining their verdict, we cannot disturb it. Our duty is to ascertain whether the verdict is legally sustained by competent evidence, and we cannot, under long-settled rules, do otherwise than sustain the finding of the jury. We agree with counsel that insane persons may sometimes act deliberately; but in this case there is evidence tending to show that the deliberate acts were those of a sane man, and we cannot say that the jury did not do right in so regarding them. Petition overruled.

(106 Ind. 337)

FRYBARGER and others v. ANDRE.

(*Supreme Court of Indiana. May 18, 1886.*)

1. JUDGMENT—ASSIGNMENT—EQUITABLE ASSIGNMENT—WRONG RECORD.

Where a judgment creditor sells his judgment, and attempts to assign it upon the record to the purchaser, but by mistake the assignment is made upon the wrong record, it nevertheless operates as an equitable assignment.

2. SET-OFF—JUDGMENTS—EQUITABLE ASSIGNMENT.

The owner of a judgment by equitable assignment is entitled to have such judgment set off, as against a judgment held by the judgment debtor against him.

Appeal from Fayette circuit court.

*Claypool & Son and Chas. Roehl*, for appellants.

ZOLLARS, J. In 1876, Caldwell & Co. recovered a judgment against appellant Frybarger in the Fayette circuit court. On the sixteenth day of April, 1878, Frybarger recovered a judgment in the same court against appellee, for \$500, upon which his (Frybarger's) attorneys filed liens for \$175. On the thirty-first day of May, 1878, Frybarger assigned \$225 of the judgment to one Robt. E. Fleming. The assignment was properly made upon the record of the judgment, and attested by the clerk. Fleming was not present when the assignment was made to him, and at that time had no knowledge that it was so made. Immediately upon the assignment being made, the clerk of the court, by letter, notified him of the assignment. He retained the letter until the fourteenth day of January, 1881, when he returned it to the clerk, with an order written thereon instructing the clerk to pay to Mr. J. N. Hutson, for the benefit of Frybarger, the amount that might be collected on the judgment. This order and instruction was given without any previous arrangement or knowledge on the part of Hutson. Frybarger was at that time indebted to Hutson, but in what amount is not shown. Frybarger was an inmate of the soldiers' home at Dayton, Ohio, but was temporarily absent at the time the assignment of the judgment was made by him. It does not definitely appear who Fleming was, but there is evidence tending to show that he was also in some way connected with the soldiers' home. At the time of and subsequent to the assignment, Frybarger stated that he was indebted to Fleming, and was making the assignment for the purpose of procuring the erection of a monument after his death. In October, 1880, for a valuable consideration, Caldwell & Co. sold to ap-

pellee their said judgment against Frybarger, and attempted to assign it upon the record. By mistake, they made the assignment upon the record of another and different judgment. In pursuance of the sale, and to rectify the mistake, they made an assignment upon the record of the judgment sold, in February, 1881. In December, 1880, appellee paid to the attorneys the amount of their liens upon the judgment of Frybarger against him. This is the case, substantially, as made by the evidence.

Making Frybarger, Fleming, and Hutson defendants, appellee commenced this proceeding for the purpose of having set off, against the balance of the judgment of Frybarger against him, an equal amount of the Caldwell judgment, which he held by assignment, as above stated. He alleged in his complaint that the assignment by Frybarger to Fleming was made without Fleming's knowledge, and without any consideration whatever, and for the purpose of defrauding Frybarger's creditors; he being at that time largely indebted and insolvent. The court below found that the assignment to Fleming was without any consideration; that the sale and attempted assignment of the Caldwell judgment to appellee, in October, 1880, operated as an equitable assignment thereof; and that, as that assignment was prior in time to the order by Fleming in favor of Hutson, the equities in favor of appellee were superior to those in favor of Hutson, and accordingly adjudged and ordered that an equal amount of the Caldwell judgment so assigned to appellee should be set off against the Frybarger judgment against him.

The sale, and attempted assignment by writing, of the Caldwell judgment to appellee, in October, 1880, we think, operated as an equitable assignment of that judgment to him. *Wood v. Wallace*, 24 Ind. 226; *Scobey v. Finton*, 39 Ind. 275; *Freem. Judgm.* § 422. The evidence that the assignment to Fleming was without consideration is not strong; but the circumstances under which the assignment was made, and the fact that he made the order in favor of Hutson for the benefit of Frybarger without any kind of negotiation or understanding with Hutson, afford some evidence tending to show that the assignment to Fleming was without consideration, and that, notwithstanding the formal assignment to him, Frybarger still remained the owner of the judgment. Therefore, under the well-settled rule that this court will not reverse a judgment upon the evidence where there is evidence tending to sustain the verdict or finding below, we cannot reverse the finding and judgment of the court below upon the question of the *bona fides* of the assignment of the judgment to Fleming.

We must assume, therefore, for the purposes of this decision, that Frybarger, notwithstanding the assignment of the judgment to Fleming, remained the owner of the judgment against appellee. Therefore, when appellee became the equitable owner of the Caldwell judgment against Frybarger in October, 1880, he became equitably entitled to have it set off against the Frybarger judgment against him. See, as bearing upon this question, *Beard v. Puett*, 105 Ind. 68; S. C. 4 N. E. Rep. 671; *Butner v. Bowser*, 104 Ind. 255, S. C. 6 N. E. Rep. 889, and cases there cited. It

is not shown that Hutson in any way acted upon the faith of the records, nor that he parted with anything, or paid any consideration whatever, for the order of Fleming to the clerk to pay the amount of the Frybarger judgment to him when collected. The court below, therefore, we think, ruled correctly in holding that the equities in favor of appellee were superior, as they were prior in time, to any equities in favor of Hutson.

We cannot pass upon the questions, discussed in appellant's brief, as to the inadmissibility of portions of the evidence, and the order of its admission below, for the reason that those questions were not presented by appellant's motion for a new trial. Had these questions been properly saved, they would challenge consideration.

The record, as brought here, presents no error for which this court would be justified in reversing the judgment. Judgment affirmed, at appellant's costs.

(106 Ind. 380)

McGAUGHEY v. WOODS and others.

(*Supreme Court of Indiana. May 20, 1886.*)

JUDGMENT—JUDGMENT BY DEFAULT—MISTAKE IN PLAINTIFF'S NAME—COLLATERAL ATTACK.

Where a judgment by default has been taken against a party personally served, and by mistake, but without fraud, the plaintiff's name is given as John W., instead of James W., it cannot be treated as a nullity in collateral attack.<sup>1</sup>

Appeal from Rush circuit court.

*Adams & Michener*, for appellant.

*Smith & Henley*, for appellee.

MITCHELL, J. The complaint in this case charges that at the October term, 1880, of the Rush circuit court, a judgment was rendered against the plaintiff below for \$364.50, in favor of John H. Woods. It is averred that a complaint was filed; that the plaintiff was duly served with summons; and that the judgment above mentioned was rendered as upon a default. The judgment thus taken is alleged to be void, for the following reasons: (1) There was not then, nor is there now, any such person as John H. Woods, but that one James H. Woods, now deceased, claimed to have brought the suit, and that by mistake his name was stated in the complaint, and in the proceedings and judgment, as John H. instead of James H. Woods; (2) that the plaintiff was not, at the time such suit was commenced, nor since, indebted to John H. Woods upon the cause of action alleged in the complaint therein, nor for any other cause, and that the averments and charges alleged in that complaint are false. The relief asked is that the judgment so rendered be set aside and canceled, and that the plaintiff be enjoined from proceeding to enforce it.

The contention of appellant is that, upon the facts disclosed in the complaint, the judgment is a nullity. This view is not maintained. The appellant was personally served with notice to answer the complaint

<sup>1</sup>See note at end of case.

of John H. Woods. Without objection, he permitted the judgment which he now complains of to be taken against him in the name of John H. Woods. James H. Woods afterwards claimed that this judgment was recovered by him by mistake in the name of John H. Woods. It is too late, after a judgment has been thus taken, for a party to such judgment to assert in a collateral proceeding, such as this is, that the proceeding is a nullity. Having been personally summoned to answer the complaint of John H. Woods, if the appellant chose to permit judgment to go against him on the cause of action stated in the complaint, he took the chance that there was such a person, or that by mistake some one who claimed a right of action against him was seeking to obtain judgment in that name. Having taken the chance, he must abide the result. *Lake v. Jones*, 49 Ind. 297. The judgment having been obtained, and appearing to be regular on its face, it cannot be set aside or treated as a nullity, in a collateral proceeding, without making it appear that it was obtained by fraud. There is no pretense of any actual fraud. The most that is claimed is that, because the suit was not prosecuted in the name of the real party, it was a fictitious proceeding, and therefore fraudulent and void. That courts will not take cognizance of suits which are merely colorable and fictitious, and that proceedings in such a case are void, may be conceded. The facts disclosed in the complaint, however, come far short of making a case of that description. They make a case in which there was a real plaintiff who, by mistake, in the name of "John," instead of "James," sued a real defendant, and obtained a judgment on a valid claim. Where a judgment was taken in favor of partners by their firm name against a defendant by the name of "H. H. Greenep," it was held the judgment was not a nullity. *Jones v. Martin*, 5 Blackf. 351; *Thatcher v. Coleman*, Id. 559; *Bridges v. Layman*, 31 Ind. 384; *Hopper v. Lucas*, 86 Ind. 43. A judgment which omits the Christian names of the parties altogether, while it may not be binding on persons who in good faith acquire subsequent liens, is nevertheless good between the parties. *Ridgway's Appeal*, 15 Pa. St. 177; *York Bank's Appeal*, 36 Pa. St. 458. For the purpose of barring another suit, it is competent to show by parol that the real party in interest recovered the judgment in the name of another. *Freem. Judg.* § 175.

The conclusion is that the complaint did not state a cause of action; and, since the appellant stated no cause of action in his complaint, whatever errors may have intervened, the judgment must be affirmed on the cross-error assigned by the appellee, which calls in question the sufficiency of the complaint.

Judgment affirmed, with costs.

#### NOTE.

Respecting misnomer, see *Walter v. State*, (Ind.) 5 N. E. Rep. 735, and note, 738. The question of misnomer of the plaintiff, unless no such person as the plaintiff exists, can be raised only by plea in abatement or in bar. *Doherty v. Madgett*, (Vt.) 2 Atl. Rep. 115.

The name of the defendant in a writ of attachment was Henry F. Hawkins, but the sheriff testified to the register that he had attached the property of Henry M. Hawkins; and this was held such a misdescription as to render the attachment void. *Dutton v. Simmons*, 65 Me. 683.

(106 Ind. 361)

## HAMILTON v. STATE.

*(Supreme Court of Indiana. May 18, 1886.)*

## WAYS—OBSTRUCTION OF HIGHWAY—ABANDONMENT.

Where the public acquiesce in the occupation of a part of a road by the adjoining land-owners for miles along the line, in such a manner as to narrow it, for more than 20 years, an abandonment will be presumed, and no criminal prosecution can be maintained, for obstructing the highway, against one who in good faith sets his fence on the line with his neighbors.<sup>1</sup>

Appeal from Decatur circuit court.

*Ewing & Ewing*, for appellant.

*The Attorney General*, for appellee.

MITCHELL, J. The appellant was prosecuted and convicted upon an information in which he was charged with having, in January, 1885, unlawfully obstructed a certain public highway in Decatur county, by erecting a fence in and along the highway described. Several questions are made, but one which controls the case finally is whether, upon the undisputed facts, the conviction was right. We have concluded it was not, and therefore, without considering several incidental questions, proceed briefly to state the facts so far as necessary, and our conclusions upon them.

The highway, the obstruction of which the appellant was charged with, is commonly known as the "Michigan Road." The laying out and opening of this road has its inception in a treaty between the government of the United States and the Pottawattamie Indians, which was made on the twenty-sixth day of October, 1826. By this treaty the Indians ceded to the United States a strip of land 100 feet wide, commencing at Lake Michigan, and extending, by the way of Indianapolis, to the Ohio river. It was provided in the treaty that the general assembly of the state of Indiana should have the right to establish a highway on the land thus ceded. By an act approved January 29, 1830, the general assembly made provision for locating and opening a highway of the width of 100 feet on the strip ceded. The evidence in this case tended to show that, soon after the passage of the above-mentioned act, the road was actually opened, 100 feet wide, through that part of Decatur county at which the alleged obstruction occurred. Some 30 years or more before the prosecution was commenced, the opinion prevailed, as the testimony shows, that the legislature had authorized the width of the Michigan road to be reduced, and from that on, as fences were built and rebuilt, the road was made narrower, generally, all along through that part of the county. The appellant's father became the owner of the farm now owned by appellant some 22 years or more before the information in this case was filed. At that time a worm-fence, which then needed rebuilding, occupied, as near as can be remembered, the same line along the highway in dispute as is now occupied by the fence which is the obstruction

<sup>1</sup> See note at end of case.

complained of. From time to time, as the fence needed rebuilding, it has been rebuilt on the same line. About two years before the information was filed, the appellant, having come into possession of the farm, commenced replacing the worm-fence with one made of plank and wire, which all agree is not further out than the old fence was. The highway is, by common consent, as wide now as it has been for 25 years or more. No one claims, so far as we can discover, that the appellant's fence is out further than the fences of adjacent fence-owners in that vicinity, or that the road is not of a uniform width for miles either way.

The public having acquiesced in the occupation of the highway by the adjoining land-owners for the period of time above indicated, will the law presume an abandonment of so much of it as has been thus occupied? At all events, is not the public, in view of its long acquiescence, estopped to assert its right, if it has a right, by means of criminal prosecutions against those who had acted in good faith on the appearance of things, as they have been allowed to exist for 20 years and more? Manifestly, if none but the appellant, or if only an isolated person here and there along the line, had intruded or encroached upon the Michigan road, by merely extending the line of fence into or upon it, no presumption of an abandonment could have arisen from the fact. Something more than the encroachment merely of one person will be required to work an abandonment. No one would have the right to assume, under ordinary circumstances, that a highway had been abandoned along his field or farm, while, as to all other adjacent fields and farms, it was being maintained the width at which it was laid out and established. On the other hand, if through a given district or neighborhood, or along a particular line, a highway had been maintained, substantially of a uniform width, less than that at which it was established, for 20 years or more, an abandonment by lawful authority might well be presumed, so far as the excess is concerned along that part of the line.

We think this is the fair result of the cases, and a reasonable view of the subject. Where the public authorities had permitted the owners of property along the line of a highway to occupy and improve their property in such a way, and had acquiesced for such a length of time, as that to involve such owners in criminal consequences, although acting in good faith on the appearance of things, would be manifest injustice, an abandonment will be presumed. Where the owner or occupant of lands along a highway does nothing more than to maintain the highway at the general uniform width at which it has been maintained by adjoining owners for 20 years or more, it would be manifest injustice to maintain a criminal prosecution against such owner. Whatever else the public may do, it cannot assert its right to reopen the highway by that method. In such a case as we have assumed, a presumption of abandonment will be indulged; and when to disturb long-established lines would involve criminal consequences, or work serious injustice to valuable improvements made in good faith, such presumption will be conclusive. *Brooks v. Riding*, 46 Ind. 15; *Jeffersonville, etc., R. Co. v. O'Connor*, 37 Ind. 95; *Sims v. City of Frankfort*, 79 Ind. 446; *Louisville, etc., Ry. Co. v.*

*Shanklin*, 98 Ind. 573; *Amsbey v. Hinds*, 46 Barb. 622; Ang. Highw. § 323; Dill. Mun. Corp. pars. 667-675.

While it is true that the statute of limitations, operating alone, may not bar the right of the public to insist upon the use of a highway, yet if such appearance is created by non-user as that acts are done by an adjoining proprietor which indicate that he is in good faith claiming as his own that which is in fact a part of the highway, and is expending money on the faith of his claim, by adjusting his property to the highway as he supposes or claims it to be, the public will be estopped. *Cheek v. City of Aurora*, 92 Ind. 107.

The finding and judgment in this case are not sustained by the evidence. Judgment reversed.

ELLIOTT, J., did not participate in the decision of this case.

#### NOTE.

In *State v. Robinson*, (Iowa,) 2 N. W. Rep. 1104, the defendant was indicted for obstructing a road. The offense consisted in repairing a fence which had been erected by a former owner, and which was claimed to be across a public road. There was no notice to open the road. In deciding that the defendant had not committed the offense charged, the court say: "The mere failure to remove an obstruction placed in the road by others does not constitute the offense charged, especially in the absence of any notice to open the road. *Wiley v. Town of Brimfield*, 69 Ill. 307; *Carver v. Com.*, 12 Bush, (Ky.) 284. Nor do we think that, in the absence of such notice, the repairing of the fence constituting the obstruction could be regarded as obstructing the road. It is the fence itself, and not its condition merely, of which the public has a right to complain."

Occupation and fencing up to certain supposed boundaries of a highway, if acquiesced in for 20 years, will bind the public. *Gregory v. Knight*, (Mich.) 14 N. W. Rep. 700.

Mere non-user, even for 20 years, will not conclusively show an abandonment of a right of way. *King v. Murphy*, (Mass.) 4 N. E. Rep. 666.

(44 Ohio St. 243)

CITY OF CINCINNATI v. ANCHOR WHITE LEAD CO. and others.

SAME v. WEWELL and others.

SAME v. EGGLESTON.

(*Supreme Court of Ohio*. April 27, 1886.)

#### MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—SEWER.

In an action upon assessments for the construction of a sewer, it is an error to adjudge the entire assessment void for the reason that it includes the cost of board-sheeting, without any proposal or bid having been advertised or received for such sheeting.

Error to district court, Hamilton county.

These were actions brought by the city of Cincinnati for the use of Frank Kirchner and A. Ashman, contractors, upon assessments made for the construction of a sewer in that city.

*Wulsin & Worthington*, for plaintiff in error.

*James H. Perkins*, for defendants in error.

BY THE COURT. The only finding of the trial court is "that, by reason of the fact that the cost of the board-sheeting was included in the

amount assessed upon the property of the defendants, without any proposal or bid having been advertised or received for the said sheeting, said assessment upon the property of each of the defendants herein is invalid and void." There was no determination by that court of any other question or upon any other fact. Upon all other questions this court is appealed to as a court of first resort, not as a reviewing court. Upon no other issue is there any judgment before us for review.

From what is termed an "agreed statement of facts," it appears that all sheeting used to support the sides of the trenches, which should be left in by the direction of the engineer, should be paid for at the rate of not more than one dollar per lineal foot of sewer. It was impossible to anticipate what amount of such sheeting it would be necessary to leave in. It is shown only that it was known to the officers and agents of the city that "some such sheeting" would be necessary to be left in. Intelligent estimates and bids were impossible. It further appears that the sheeting which was left in "was necessary in the construction of said work." No fraud is complained of. No complaint is made that the work of construction was not well done. The facts so agreed upon bring this question within the rule declared in *Hastings v. Columbus*, 42 Ohio St. 585, (4th paragraph of syllabus.)

It follows that there was error in adjudging the entire assessment to be void, for the reason that it included the cost of the board-sheeting.

There is no agreed statement of the facts of the case. That which is incorporated in the bill of exceptions and termed such is in great part simply an agreement as to the evidence relative to certain facts, and from which, in connection with other evidence in the bill of exceptions, the substantive facts were to be found by the court. It is not found nor agreed, nor does it appear, that there was no jurisdiction to proceed with the improvement. The judgments of the courts below will therefore be reversed, and the cause remanded for further proceedings.

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(44 Ohio St. 273)

**BOARD OF EDUCATION OF LYME TP. v. BOARD OF EDUCATION OF SPECIAL SCHOOL-DIST. No. 1 OF LYME TP.**

(*Supreme Court of Ohio*. April 20, 1886.)

**SCHOOLS AND SCHOOL-DISTRICTS—TAXES.**

Error to district court, Huron county.  
*John M. Lemmon*, for plaintiff in error.  
*S. A. Wildman*, for defendant in error.

**BY THE COURT.** In each of the years from 1870 to 1875, inclusive, the board of education of special school-district No. 1 of Lyme township, Huron county, made a levy for school purposes which was certified to the auditor of the county, and by him placed on the duplicate, against all the lands within the district, except the property of that portion of the Lake Shore & Michigan Southern Railway and Western Union Telegraph lines running in and through the district, which, by the mistake of the auditor, were omitted therefrom; and during the same years the board of education of Lyme township made levies for like purposes, which were also certified to the auditor of the county, who, by mistake, placed the same, not only on the property in the district of the township, but also upon the property of said railroad and telegraph companies, as part of the property subject to taxa-



tion in the township district. The board of education of the special school-district now seeks to recover of the board of the township the taxes so collected by the latter, as received to the former's use. *Held*, that the taxes so received by the township board were not produced by any levy made by the board of the special district; that there is no privity between the two boards, and the action cannot be maintained.

Judgment of the district court and of the common pleas reversed, and judgment for defendant below, and for its costs.

(44 Ohio St. 277)

FORSTYHE v. WINANS, City Solicitor.

(*Supreme Court of Ohio*. April 20, 1886.)

**MUNICIPAL CORPORATION—APPROPRIATIONS—INJUNCTION—BOND.**

Error to district court, Greene county.  
*Charles Dartington*, for plaintiff in error.  
*James Winans*, for defendant in error.

**BY THE COURT.** Where, under the provisions of section 1777 of the Revised Statutes, a city solicitor of a municipal corporation brings suit to enjoin the misappropriation of money by the council, he is not required to give an undertaking; and an injunction so allowed by a court of competent jurisdiction, or a judge thereof, operates without such undertaking being given; and the members of council, or any of them, violating the injunction after notice thereof has been served upon them, are liable to be punished for the same as for a contempt of the authority of the court. Judgment affirmed.

(142 Mass. 65)

CHESMAN and others, Ex'rs, v. CUMMINGS.

(*Supreme Judicial Court of Massachusetts*. Suffolk. May 12, 1886.)

**1. WILL—DEED OF TRUST—CODICIL—DEVISE TO EXECUTORS—SPECIFIC PERFORMANCE.**

A. executed a will, in the ninth clause of which he directed and authorized the executors of the will "to have full charge of all the real estate; to lease the same, and collect the rents; and, as soon as convenient and profitable, to sell and convey the same \* \* \* at public or private sale, without any order of any court, or license therefrom; or they may turn over or convey any part or parts of the same, in discharge of any devises or bequests herein, on consent of such devisee or devisees,—all as in their judgment may appear best." After making the will, A. conveyed his real estate to three trustees, to have and to hold the same, to them, "and their heirs and assigns, forever, in trust, nevertheless, for the said A., and with full power and authority to said trustees to manage said real estate as they may deem best,—to lease, let, to sell and convey, the same, and to execute and deliver a deed or deeds of the same." After executing this deed the testator made a codicil, bestowing an additional legacy, and in all other respects confirming his will. The trustees under the deed, after the decease of A., conveyed the real estate to the executors of his will, "as executors, their heirs, successors, and assigns, for their use and behoof, forever." The executors made a contract with B. for the sale of a parcel of land included in the trust deed, and tendered to him a deed in the ordinary form, "by virtue of the power conferred upon us by said will, and every other power us thereto belonging." B. refused to accept the deed, claiming that it was impossible to determine, from the words of the deed creating the trust, the extent of the estate vested in the trustees, or that vested in the *cestui que trust*. *Held*, that the duties imposed upon the executors could not be discharged unless the reversion in the real estate was treated as devised to them, and that the title thereto passed to them by necessary implication, and that it was therefore the duty of the trustees to convey to the executors in fee the trust-estate held by them,—their trust having been completed; and that, by the execution of the power vested in the

executors by A.'s will. the latter could make a good title to B., and were entitled to a decree compelling specific performance of B.'s contract to purchase the land.

2. TRUST-DEED—ALLEGATIONS OF VAGUENESS IN—WHEN COURT WILL CONSTRUCT—VALIDITY OF TITLE.

Where it was alleged that there was vagueness and obscurity in regard to the terms of a trust-deed, giving rise to doubt and suspicion as to the purposes and objects for which the trust was created, and as to whether those purposes and objects had been fully attained, and that ulterior purposes and objects for which the trust was created might still exist, *held*, that when nothing is shown as to any other trust than that which appeared on the face of the deed, when the instruments in writing which affected the estate (in reference to which suit was brought) are before the court for construction, when all parties affected by the decree appear, the court cannot refuse to determine the validity of the title because of imaginary doubts whether there was not, under the deed, the possibility of some ulterior, undisclosed trust.

This was a bill in equity by the plaintiffs as executors of the will of William Perry, late of Brockton, who died May 29, 1884, to compel specific performance by the defendant of an agreement to accept a deed of certain land in said Brockton, and to pay the plaintiffs the price therefor. Hearing in the supreme court, before DEVENS, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

*Hutchins & Wheeler*, for plaintiffs.

*W. H. Wade*, for defendant.

DEVENS, J. It has been heretofore held, in proceedings to enforce specific performance of a contract for the purchase of real estate, that a purchaser will not be required to accept any title which is doubtful, or which, even if apparently good, may possibly be defeated by facts and circumstances, the existence of which cannot be accurately determined. *Jeffries v. Jeffries*, 117 Mass. 184. It was therefore decided, in *Noyes v. Johnson*, 139 Mass. 436, that a party was not bound to accept a title by adverse possession, which depended upon a long and difficult investigation of facts. But a title, however, cannot be considered doubtful when there can be no question of fact involved in a decision as to its validity, but one of law only, upon which the court, where the controversy is litigated, is competent finally to pass.

It is unnecessary to consider the question, whether, where only vendor and vendee are before the court, and there are other parties interested in the title, or who may be thus interested, that will not be bound by the decree, it is the duty of the court to determine, as between them, whether or not the title is good, and enforce or refuse to enforce specific performance accordingly. The later cases in England have indicated a disposition to change what has heretofore been recognized as the rule,—whether wisely or not may be doubted,—and to hold that even as between vendor and purchaser in such case, as a general and almost universal rule, the court is bound “to ascertain and determine, as best it may, what the law is, and to take that to be the law which it has so ascertained and determined.” *Alexander v. Mills*, L. R. 6 Ch. 124; *Osborne v. Roulett*, 13 Ch. Div. 774; *Forster v. Abraham*, 17 Eq. 351. It has al-

ways been held that where all parties are before the court, so that a decision would have the force and effect of an adjudication in a direct proceeding for the purpose, and thus be an end of controversy on the subject, the validity of a title which depended upon a principle of law was to be finally decided. It was there to be determined to be either good or bad, and that the purchaser was either bound to take it, or might refuse it. As, by that decision, all parties would be concluded, such a title could not be doubtful. Fry, Spec. Perf. (3d Amer. Ed.) § 862; *Sohier v. Williams*, 1 Curt. 479; *Butts v. Andrews*, 136 Mass. 221; *Cornell v. Andrews*, 35 N. J. Eq. 7; S. C. 36 N. J. Eq. 321; *Gill v. Wells*, 59 Md. 492; *People v. Stock Exchange*, 92 N. Y. 98.

In the case at bar, by the amendment of the bill, the heir at law having been brought into court, all parties in interest are before us, and we therefore proceed to pass upon the question of title. The difficulty in regard to it arises from the execution and delivery of the deed of trust by the testator, after the making of his will. This deed conveyed his real estate, including the lot of land here in question, to three trustees, to have and to hold the same, to them, "and their heirs and assigns, forever, in trust, nevertheless, for the said Perry, with full power and authority to said trustees to manage said real estate as they may deem best, —to lease, let, to sell and convey, the same, or any part thereof, at public or private sale, and to execute and deliver a deed or deeds of the same." After the execution of this deed the testator made a codicil bestowing an additional legacy, and in all other respects confirming his will, so that he cannot have intended that the deed should operate as a revocation thereof. The trustees under this deed, upon the decease of Perry, deeming that the trust created thereby was terminated by the death of the testator, conveyed the real estate to the executors of his will, "as executors, their heirs, successors, and assigns, for their use and behoof, forever." The plaintiffs, as executors, having made a contract with defendants for the sale of the parcel of land named in the bill of complaint, have tendered to him a deed in the ordinary form, "by virtue of the power conferred upon us by said will, and every other power us thereto belonging," which the defendant refused to accept.

The defendant, who contends that it is impossible to determine from the words in the deed creating the trust the extent of the estate vested in the trustees, or of that vested in the *cestui que trust*, the testator, suggests only two possible constructions of this instrument: that it may be considered to vest the legal fee of the testator's real estate in the trustees and the equitable fee thereof in the testator; or to vest only an equitable life-estate in the testator, and therefore only a legal estate for the life of the testator in his trustees; which would terminate by his death, so that the entire legal and equitable estates would thereupon vest in the heir at law. Assuming the former of these constructions to be correct, the defendant's argument concedes that the grantor had the right and power at any time to determine the trust by demanding and receiving from the trustees a reconveyance to himself of the legal title; that, although the trustees had the legal fee vested in them, the whole beneficial interest

and equitable title was in the *cestui que trust*, who might dispose, by deed or will, of the equitable fee as he saw fit. Pub. St. c. 127, §§ 1-24; *Loring v. Eliot*, 16 Gray, 568; *Smith v. Harrington*, 4 Allen, 568, 569. As the testator died without having, in his life-time, put an end to the trust created by the trust deed, the defendant further contends that there was a resulting trust of the equitable fee of his real estate to his heir at law, and the trustees, holding then only a dry trust title, were bound to convey to him. *Esterbrooks v. Tillinghast*, 5 Gray, 17-21; *Packard v. Marshall*, 138 Mass. 301.

Admitting this to be the law where there had been no disposition of the estate by devise, it is equally the duty of the trustees to convey to the devisee where there has been one; and the will must be construed as constituting a devise to the executors by necessary implication. If they had received no power to convey the real estate, this would not be inconsistent with its descent to the heir. There may be a charge of this nature on the real property, in favor of the executor, without implying any estate in him therein. But the will contemplates complete control over the real estate by the executors. They are to have full charge of it,—to lease, to collect the rents, and, as soon as convenient and possible, to sell and convey the same to any purchaser or purchasers, at public or private sale, without any order of court or license; or they may turn over and convey any part or parts of the same in discharge of any devises or bequests herein, etc.,—"all as in their judgment may seem best." The duties imposed upon the executors could not be discharged unless the reversion in the real estate is treated as devised to them, and the title thereto passes to them by necessary implication. *Walker v. Whiting*, 23 Pick. 313-317; *Greenough v. Welles*, 10 Cush. 571-577; *Cleveland v. Hallett*, 6 Cush. 403-407. It was therefore the duty of the trustees to convey to the executors in fee the trust-estate held by them,—their trust having been completed; and, by the execution of the power vested in the executors by Perry's will, they could make a good title to the defendants.

If it be held that the trust deed vested an equitable life-estate in Perry, the same result follows. There was then a resulting trust in his favor in the reversion. *McElroy v. McElroy*, 113 Mass. 509. This reversion, although to take effect only upon his own death, was still an estate vested in him during life, and disposable by will or deed. It passed, therefore, by the devise, to his executors. If it be said, as the defendant does say, that upon this construction the trustees took only a legal fee for the life of the testator, and that their estate would terminate by his death, so that the entire legal and equitable interests would, by operation of law, vest in the heir, this has been prevented by the devise made. Even if the conveyance made by the trustees to the executors was ineffectual, by reason of having no estate to operate upon, it would be superfluous only, and in no way affect their title by virtue of the devise.

The defendant further suggests that the vagueness and obscurity of the terms of the deed of trust give rise to doubt and suspicion as to the

purposes and objects for which the trust was created, and as to whether those purposes and objects have been fully attained, and that ulterior purposes and objects, for which the trust was created, may still exist. But when nothing is shown as to any other trust than that which appears on the face of the deed, when the instruments in writing which affect this estate are before us for construction, when all parties affected by the decree appear; we cannot refuse to determine the validity of the title because of imaginary doubts whether there was not, under the deed, the possibility of some ulterior, undisclosed trust.

Decree for plaintiffs.

(141 Mass. 154)

FOGEL v. DUSSAULT and others.

(*Supreme Judicial Court of Massachusetts. Bristol. February 25, 1886.*)

1. ATTACHMENT—BOND—ACTION UPON—WHERE PRINCIPAL AND SURETY ANSWER JOINTLY—PROOF OF INVALIDITY OF A JUDGMENT INADMISSIBLE.

In a suit upon a bond to dissolve an attachment brought in the superior court against the principal and sureties named in the bond, the declaration alleging a final judgment in a court below, from which the principal defendant had appealed, the defendant sureties, who have answered jointly with the principal defendant,—the answer consisting of a general denial of the allegations of the plaintiff's writ,—cannot avail themselves of any invalidity in the judgment, by plea or proof under the answer.

2. SAME—APPROVAL OF—APPEAL—VACATION OF JUDGMENT.

A bond given to dissolve an attachment, which has not been approved as required by Pub. St. c. 161, § 122, does not relieve the principal from the duty of filing a bond, with surety, before his appeal from a judgment rendered in the court in which the bond to dissolve attachment was given; and where judgment is so rendered, and the defendant fails to file the bond as required, the judgment of the court in the original action is not vacated, but remains in full force.

This was an action of contract upon a bond, which recited that Napoleon Dussault, of Fall River, etc., and Francis X. Dussault and Charles Gagne, of said Fall River, as sureties, were holden, etc., unto Julius Fogel, of said Fall River, in the sum of \$300, to the payment of which to the said Julius Fogel, or his executors, etc., "we hereby jointly and severally bind ourselves, our heirs, executors, and administrators." The condition of the bond was that, "whereas, the said Julius Fogel has caused the goods and estate of the said Napoleon Dussault, to the value of three hundred dollars, to be attached on mesne process by virtue of a writ in favor of the said Julius Fogel against the said Napoleon Dussault, bearing date," etc.; and whereas, the said Napoleon Dussault desires to dissolve said attachment according to law: now, therefore, if the said Napoleon Dussault shall, within thirty days after the final judgment in the aforesaid action pay to the plaintiff therein named, the amount, if any, which he shall recover in such action, and if said sureties shall also within thirty days after the entry of any special judgment in said action, in accordance with section one of the sixty-eighth chapter of the statutes of said commonwealth passed in the year 1875, pay to said plaintiff the sum, if any, for which such judgment shall be entered, then this obligation shall be void; otherwise it shall be and remain in full force and virtue." The bond was dated August 6, 1883, and signed and sealed by  
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each of the parties named and witnessed. The declaration alleged that on August 2, 1883, the plaintiff attached the goods of Napoleon Dussault by virtue of a writ dated August 2d, and returnable to the Second district court for the county of Bristol on the fourth Monday of said August; that, at the request of said Napoleon Dussault, the plaintiff released the said goods and chattels from attachment, and took from the defendants a certain writing obligatory, a copy of which was annexed; that final judgment was entered for the plaintiff in said action on December 3, 1883, for the sum of \$15 debt, and \$19.42 costs; that the judgment was unpaid for 30 days after date thereof, and the defendants refused, though often requested, to pay the same; and that the defendants owed the plaintiff the amount of said judgment. The answer was a general denial.

At the trial in the superior court, before ALDRICH, J., without a jury, it appeared in evidence that the defendant executed the bond to dissolve an attachment made in a suit commenced by the plaintiff against Napoleon Dussault, the principal on said bond; and in consequence thereof the property attached was released; that said bond was filed by the plaintiff on the return-day of the writ in said suit, which was duly entered in the Second district court at Fall River, and that judgment for the plaintiff was entered on the same. The defendants produced in evidence the record of the case of *Julius Fogel v. Napoleon Dussault*, in which said bond was filed, which record recited the number and name of the case, names of attorneys; that it was entered August 27th, "plaintiff's declaration and account annexed, and bond to dissolve attachment filed;" that it was continued to September 3d, when defendant's answer was filed; and noted further continuances, when defendant was defaulted, and judgment entered for plaintiff for \$15; that defendant claimed appeal; and that execution issued, etc. It appeared that the bond mentioned in the record was the bond sued upon in this action. The court then asked the clerk of the Second district court, who produced said record, how execution was issued after the appeal. The clerk thereupon showed the entry, made upon a printed trial-list of said district court for December, 1883, which was as follows, (after reciting number and name of the case:) "For trial, December, 1883. Deft. defaulted. Dft. claims appeal; surety on or before December 10, 1883, at 10 o'clock A. M." It was admitted by the defendant that the papers in the original case were not transmitted to the clerk of the superior court. The plaintiff claimed that upon the evidence the defendant in the original case not having furnished surety for his appeal, he was entitled to an execution upon his judgment, which was final, and that the bond sued upon in this action was not such a bond as is required by statute in such cases, and therefore could not avoid the requirement of furnishing other sureties or filing a bond for appeal. The defendants contended that the plaintiff's remedy, if any, was by a motion in the superior court to dismiss the appeal, or to affirm the judgment of the court below, and asked the court to rule that a bond with surety for appeal was required by the law, and that, from the time the appeal was claimed, it became perfect, and the judgment appealed from was vacated, and therefore there was no breach

of conditions of the bond in suit, because there was no final judgment; and that it was not the duty of the defendant in the original case to carry the papers to the superior court, but that it was the duty of the clerk of the district court so to transmit the same. Without passing upon the question as to whether the defendants' requests for rulings are correct statements of law, the court ruled that the defendants could not, under their answer, be allowed to impeach the judgment in the original suit against the defendant Napoleon Dussault; that being the judgment of a domestic court, having jurisdiction of the subject-matter of the suit, the judgment debtor could not collaterally impeach that judgment in the present suit; and, as the three defendants had answered jointly, the only defense open to them would be one which is common to them all; and, as the only defense they offered to make at the trial of this case was to show there was no valid judgment in the original suit, the court held they had failed in their defense altogether,—their answer being a joint answer, and that only a general denial; and the court gave judgment for the plaintiff, and the defendants alleged exceptions.

*Dubuque & Higginson*, for defendants.

*S. W. Ashton*, for plaintiff.

DEVENS, J. Parties are permitted to answer jointly when they make the same defense. Pub. St. c. 167, § 16. The answer of the defendants was joint, and consisted only of a denial of the allegations of the plaintiff's writ. The declaration alleged a final judgment for the plaintiff against the principal defendant, at a particular date, by the district court in the suit originally brought there. This denial was a defense, if successfully maintained, which was available to all the defendants. If, upon separate answer, the defendant sureties might have availed themselves of any invalidity in the judgment by plea and proof, they could not do so under the answer, which, as it stood, simply denied the existence of the judgment. So far as the principal defendant is concerned, it is established that the judgment of a domestic court of record, proceeding according to the course of the common law, is conclusive evidence of all the facts decided in subsequent suits between the same parties; and that the only remedy of a party who has been injured by a judgment erroneously rendered is by review, or by proceeding to reverse the same upon a writ of error. The party plaintiff is not allowed to treat a judgment lawfully attained by him, from a court of competent jurisdiction, as a nullity, or to proceed upon his original demand as if it had not been rendered. While it exists, he can only proceed by suit on his judgment or levy of execution. These principles apply to judgments rendered by courts such as the Second district court of Bristol county. *Loring v. Bridge*, 9 Mass. 124; *Cook v. Darling*, 18 Pick. 393; *Hendrick v. Whittemore*, 105 Mass. 23; *Wood v. Mann*, 125 Mass. 319.

It is the contention of the defendants that the case at bar is not governed by those principles which apply when a judgment is erroneously rendered by a court having competent jurisdiction of the subject-matter, but that the appeal shown by the record to have been taken by the

principal defendant vacated the judgment, thus rendering it wholly inoperative, and that, the judgment having been thus vacated, the only remedy of the plaintiff was to enter a complaint for the affirmance thereof. Pub. St. c. 155, § 33.

The principal defendant claimed an appeal from the judgment of the district court, and was ordered to file a bond, with surety, to prosecute his appeal. It is contended by the defendants that such order was wholly unauthorized; that the debtor having given bond to dissolve the attachment of his property, which had been filed at the entry of the original action, such bond was unnecessary; and that without it the appeal was completed, and the judgment vacated. Pub. St. c. 155, § 29, provides that an appeal from the judgment of a trial justice shall not be allowed except upon recognizing to the adverse party, with surety, to prosecute the appeal, and to pay all subsequent costs. Section 30 provides that the party appealing may, in lieu of filing a bond, deposit a sum of money as security for the prosecution of the appeal and the payment of costs. Section 33 provides that, when an appeal is claimed, no recognizance or deposit shall be required for the allowance of such appeal, when the defendant shall have "given a bond to dissolve the attachment made in such case as provided by law." These provisions as to appeals from trial justices (Pub. St. c. 154, § 39) applied to district courts before St. 1882, c. 95. By Pub. St. c. 154, § 52, it was provided that in the municipal courts, "instead of entering into a recognizance, the party appealing in such proceeding shall file a bond, with surety or sureties, to the adverse party, within the same time, upon the same conditions, and with the same powers in the judge and clerk, as are provided in respect to recognizances in police or district courts." By St. 1882, c. 95, the provision of Pub. St. c. 154, § 52, relating to the filing of bonds by parties appealing from the municipal courts of the city of Boston, were made applicable to district courts.

It is therefore urged that, as no recognizance was required on appeal from the district court when a bond to dissolve an attachment had been given, and as St. 1882, c. 95, only replaces the recognizance by a bond in cases where the former was required, the bond to dissolve the attachment has the same effect now as before, and obviates the necessity of any additional bond, recognizance, or deposit on appeal by defendant from the district to the superior court. If we adopt this argument, it will be necessary to inquire whether the debtor had given a bond to dissolve the attachment, such as is provided by law. The plaintiff urged that the bond in suit was not such a bond as is required in such cases, and could not, therefore, avoid the requirement of furnishing other sureties, or filing a bond, in case the debtor wished to avail himself of his right to appeal. Pub. St. c. 161, § 122, provides that any party whose goods are attached may dissolve the attachment by giving bond, with sufficient sureties, to be approved by the plaintiff or his attorney, in writing, or by a master in chancery, justice of a court of record, etc., with condition to pay to the plaintiff "the amount of the judgment, if any, that he may recover within thirty days after final



judgment in such action;" and also the amount of any special judgment which might be entered under chapter 17, providing for special judgments against the property of insolvents. This bond is to be "filed by the defendant with the clerk of the court to which the writ is returnable, or in which it is pending, within ten days after its approval by the plaintiff or his attorney, or by the magistrate; and the attachment shall not be dissolved until the bond is so filed." Section 125.

But while the bond in suit contains the same condition as that contemplated by the statute, it was not approved, nor were the same proceedings had as are provided for therein. The attachment was not dissolved upon the filing by the defendant of a bond either approved in writing by the plaintiff, or in any other of the modes prescribed. Before the delivery of the bond in suit to the plaintiff, who himself subsequently filed it in court on the return-day of the writ, he released the property from the attachment. The bond had not the approval required by the statute, nor was the attachment dissolved in the mode therein provided. While, in view of the fact that on receiving it the plaintiff released the property attached, it was available to him as a bond at common law, it was not the statutory bond provided for by chapter 161, §§ 122-125. Its existence could not, therefore, relieve the principal defendant from the duty of filing a bond, with surety, before his appeal was allowed. Having failed to do this within the time ordered by the district court, the judgment of that court was not vacated, but remains in full force. Exceptions overruled.

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(141 Mass. 580)

INHABITANTS OF READING v. CITY OF MALDEN.

(*Supreme Judicial Court of Massachusetts. Middlesex. May 8, 1886.*)

POOR AND POOR LAWS—SUPPLIES FURNISHED TO—RECOVERY FROM PLACE OF SETTLEMENT—NOTICE—TIME WITHIN WHICH SUIT IS TO BE BROUGHT.

An action by a town under Pub. St. c. 84, § 14, to recover for supplies furnished for the relief of a pauper, must be brought within two years from the time of giving the notice required by the statute.

This was an action of contract, brought by the plaintiffs to recover of the defendant payment for supplies alleged to have been furnished by the plaintiffs for one Sarah L. Penney, who, it was alleged, had a lawful settlement in the city of Malden, but was residing in the town of Reading, and was in need of relief. At the trial in the superior court, before KNOWLTON, J., the defendant admitted that the said Sarah L. Penney had a lawful settlement in Malden; but, among other defenses, claimed that the action was not seasonably commenced. It was argued that on March 2, 1881, and again on March 31, 1881, the plaintiffs gave notice to the defendant that they were aiding the said Penney, and should continue so to do, until she should be removed, or the necessity should cease, and that either of said notices would be sufficient to enable the plaintiffs to recover for supplies, if furnished to said Penney at any time during three months prior to the giving of said notices, if suit had been commenced within two years after the dates at which the notices were given. This suit was commenced September 15, 1883. The plaintiffs

offered to prove that aid had been furnished to the said Penney continuously for a period of more than a year, commencing on or about March 1, 1881, being within three months prior to giving said last notice, and terminating about April 1, 1882, being within two years prior to the commencement of this action; and that there was no period within that time when such aid was not actually required; and that no other suit had ever been brought for any portion of the amount claimed in this suit, or for anything furnished during the time in which said aid was furnished; and that there had been no settlement between the parties which covered any portion of the time during which the aid was furnished for which a claim was made in this suit. The court ruled that the plaintiffs could recover no portion of their claim because suit had not been brought within two years from the time of giving the notice required by statute, and ordered a verdict for the defendant, and the plaintiff alleged exceptions.

*S. Bancroft*, for plaintiffs.

*Jerome H. Fiske*, for defendant.

MORTON, C. J. The statute provides that where one town furnishes relief to paupers whose settlement is in another town, the expenses thereof "incurred within three months next before notice given to the place to be charged, as also of their removal or burial, in case of their decease, may be recorded by the place incurring the same, against the place liable therefor, in an action at law to be instituted within two years after the cause of action arises, but not otherwise." Pub. St. c. 84, § 14. These provisions of law have been in force since the statute of 1793 (chapter 59) was enacted, and it has uniformly been held that the cause of action arises at the time the notice is given. As is said in the opinion in *Attleborough v. Mansfield*, 15 Pick. 19:

"This notice is an indispensable prerequisite to the support of any action for the expenses incurred in the relief of paupers by a town in which they are not settled; and the right to recover is expressly limited to a period commencing three months before, and continuing two years after, notice given." *Townsend v. Billerica*, 10 Mass. 411; *Hallowell v. Harwich*, 14 Mass. 186; *Uxbridge v. Seekonk*, 10 Pick. 150.

These decisions have not been overruled or modified by any subsequent cases, and are decisive of the only questions raised in the case at bar. Exceptions overruled.

(141 Mass. 146)

#### PENN MATCH CO. v. HAPGOOD and another.

(*Supreme Judicial Court of Massachusetts. Worcester. February 25, 1886.*)

#### 1. CORPORATION — CONTRACTS MADE BY STOCKHOLDERS BEFORE ORGANIZATION CANNOT BE ENFORCED BY CORPORATION.

The plaintiff's declaration alleged that the plaintiff on a certain date was a corporation, duly organized according to law; that by the by-laws of the corporation, upon the death of a stockholder, of which there were three, the company was to be wound up, and was not to continue; that one of the stockholders died, and that A., B., and C. then agreed together to form the corporation, with the same provisions of law, and the same rights, powers, and

liabilities, as the former corporation had possessed, if they could obtain certain machinery and materials of defendants; that A., B., and C. informed the defendants of the premises, and that the projected company would proceed with its organization, and would build a factory, etc., only in case they could contract with defendants to furnish the corporation certain machinery and materials; that thereupon the defendants agreed with A., B., and C., in the name of the corporation, and with a view to the formation of and for the benefit of the plaintiff company, to furnish the plaintiff company with certain machinery and materials; that the plaintiff company ordered said machinery and materials, and built its factory in anticipation of the defendants' fulfilling their agreement, but that defendants did not furnish said machinery and materials, although said A., B., and C., for and in behalf of the projected plaintiff company, before its organization was completed, always stood ready to perform all the obligations incumbent upon them under said contract, etc. The declaration further alleged that the organization of the plaintiff company, subsequent to the agreement with the defendants, was completed, its capital paid in, etc. *Held*, that the facts alleged only showed a verbal conditional agreement of certain individuals to form a corporation under general laws; that the corporation was not in existence when the agreement with the defendants was made; and that it could not maintain an action against the defendants for breach of the agreement.<sup>1</sup>

**2. SAME—POWERS OF CORPORATIONS—VALIDITY OF CONTRACTS—RIGHT OF CORPORATION TO SUE.**

The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts made in its name and behalf before incorporation. Such a contract must derive its validity from the meeting of minds when both parties are in existence. Until then it can be nothing more than an offer by one party. And where certain persons announced their intention to form a corporation if certain contracts for supplies could be made with certain manufacturers, and the latter signed an agreement to furnish the corporation with the articles wanted, and the corporation was organized subsequent to the agreement, *held*, that no action could be maintained by the corporation upon the agreement, and that the fact that the latter was under seal was immaterial.

The plaintiff in its declaration alleged—

"That, before the matters hereinafter alleged between it and the defendants occurred, the Penn Match Company, Limited, existed according to the laws of Pennsylvania, in the city of Philadelphia, being a company in the nature of a corporation, with its capital divided into shares, with no personal liability on part of its stockholders further than the amount of the capital stock owned by each, and with the right and power to contract and do business in the manufacture of matches in said Philadelphia, until the burning of its buildings in January, 1882,—its stock being wholly and lawfully owned by William Brown, Francis R. Abbott, and Charles Kee, all of said Philadelphia; that by the articles and by-laws of said company, the same being authorized by law, on the death of a stockholder the business of the company was to be wound up, and should not continue; that said company had dealings with the defendants as partners, under the firm name of Hapgood & Smith; that, before the contracts hereinafter set forth were made, the said William Brown died, and that thereupon, and after the destruction of the buildings aforesaid, the said Abbott and the said Kee and William B. Kempton, of said Philadelphia, agreed together, as they lawfully might do, to form the plaintiff company under the same provisions of law, and with the same rights, powers, and liabilities, as the former company had possessed, if they could obtain improved machinery and wooden splints for making matches from the defendants as copartners, and to build a large factory for such manufacture

<sup>1</sup> See note at end of case.

in said Philadelphia, and thus to take up and continue the business of said former firm. And the plaintiff further says that, with the purpose and to the end aforesaid, the said Abbott, Kee, and Kempton, projectors, as aforesaid, of the plaintiff company, informed the defendants of each and every the premises, and, in the name of and for the benefit of the projected plaintiff corporation, applied to the defendants, who were the manufacturers of such improved machinery and of splints for making matches, to procure such machinery and splints, and made known to the defendants that the projected company would proceed with its organization, and would build, or cause to be built, for it, a factory only in case they could contract with the defendants as hereinafter set forth. Whereupon, the defendants, in January, 1882, agreed with the said Abbott, Kee, and Kempton, in the name of the Penn Match Company, Limited, and with a view to the formation of and for the benefit of the plaintiff company, to furnish the plaintiff company one setting-machine and one rolling-off machine for making matches, on or before April 1, 1882, and also to accept and fill orders from them for the plaintiff for four other setting and one other rolling-off machine, to be furnished as soon as possible after said April 1st, and a memorandum in writing of said agreement was executed by the parties, a copy of which is hereto annexed; and the said Abbott, Kee, and Kempton, in the name of and for the benefit of the Penn Match Company, Limited, afterwards ordered the other machines contemplated in said agreement. And the plaintiff says that, at great expense to the plaintiff, a factory was thereafter, and in anticipation of the defendants' fulfilling their agreement, built in said Philadelphia, and furnished to the plaintiff, and made ready to receive said machinery, and to manufacture matches, and that plaintiff could not procure such machinery elsewhere, as the defendants well knew; and plaintiff, and said Abbott, Kee, and Kempton, for and in behalf of the projected plaintiff company, before its organization was completed, always stood ready to perform all the obligations incumbent upon them under said contract, and to receive and pay for said machinery so contracted for, and frequently demanded the same, yet the defendants have wholly neglected and refused, and still neglect and refuse, to perform their agreement, and to furnish said machinery or any part thereof. And the plaintiff says that pursuant to the projection of the plaintiff company by said Abbott, Kee, and Kempton, so communicated to the defendants as aforesaid, the plaintiff was duly organized, and exists under the law of Pennsylvania as such company, as aforesaid, and has an actual and full capital, and is, as far as it finds it possible, since the defaults of the defendants, engaged in said manufacture; but that, by the defendants' said breach of and refusal to perform their said agreement, the plaintiff has been greatly interrupted, delayed, postponed, and stopped in its said business, has lost large sums of money and great profits, and has lost the use of said factory, built for its said business, and especially designed therefor, and other great damages has sustained at the hands of the defendants."

The agreement referred to was as follows:

"ATHOL, MASS., March 1, 1882.

"We, the undersigned, agree to furnish the Penn Match Co., Limited, of Philadelphia, Pa., one setting and one rolling-off machine, at prices named, (\$200, \$100,) cash, f. o. b., on or before April 1, 1882.

[Signed]

"HARGOOD & SMITH."

The second count of the declaration was upon an agreement under seal, to which was annexed the remaining allegations, being like those in the first count. The agreement was as follows:

"ATHOL, MASSACHUSETTS, March 1, 1882.

"We hereby agree to furnish the Penn Match Co., Limited, of Philadelphia, Penna., for one year from date, three hundred (300) gross of the best quality match splints per day, or in such quantities as they may order, (provided in car-load lots,) with cases included, at fourteen (14) cents for 4 in. and 5 in. round, and fifteen (15) cents for 5 in. square, sticks, free on board.

"In witness whereof, we have hereunto set our hand and seal this first day of March, 1882.

[Signed]

"HAPGOOD & SMITH." [L. s.]

This agreement was under seal and witnessed.

The defendants demurred to both counts of the plaintiff's declaration, assigning causes of demurrer as follows:

"*First*. Said counts do not set forth any cause of action substantially according to the statutes relating to pleading; *second*, the said counts do not show that the plaintiff existed at the time of the making of said alleged contracts, or at the time they were to be performed, and do not show that the plaintiff was a party to said contracts; *third*, the said counts do not show that the said Abbott, Kee, and Kempton had any authority from the plaintiff to make said contract, or to stipulate for the performance of the same on the part of the plaintiff; *fourth*, said counts do not show that the plaintiff has ever ordered any of the goods and merchandise named in said contracts, or ever offered or been ready to perform its part of the same; *fifth*, the said counts show that there were no sufficient parties to said alleged contracts to render them binding in law; *sixth*, the said counts show that said contracts were wholly without mutuality, and that they are void in law."

The superior court sustained the demurrer, ordered judgment for defendants, and the plaintiff appealed.

W. S. B. Hopkins, for plaintiff.

J. Mason and F. P. Goulding, for defendants.

W. ALLEN, J. The plaintiff was not in existence when the writings were made, and cannot maintain the action unless it became a party to the contracts after its incorporation. There is no ground for the contention of the plaintiff that the declaration shows the existence of the corporation, though unorganized, sufficient to be a party to a contract, as in *Vermont Cent. R. R. v. Claves*, 21 Vt. 30. All that is alleged is the verbal conditional agreement of certain individuals to form a corporation under general laws. The power of a corporation to make contracts can be exercised in accepting and adopting proposed contracts, made in its name and behalf, before its incorporation. Such a contract must derive its validity from the meeting of minds when both parties are in existence; until then, it can be nothing more than an offer by one party. The writings, as between the plaintiff and the defendants, show no more than proposals by the defendants, revocable at any time before acceptance by the plaintiff after its incorporation. The fact that one is under seal is immaterial in this respect. The only consideration shown for the defendant's promises is the acceptance of them by the plaintiff, and the promise to accept and pay for the goods implied in that; and the acceptance must be by some act or assent of both parties, which will fix the rights of both, and is as essential to a promise under seal as by pa-

rol. The defendants could not be bound until such acceptance by the plaintiff as would give them a right of action against it for a refusal to accept and pay for the goods. There is no allegation of acceptance by the plaintiff after its incorporation. The demand is not stated as an act of acceptance respecting the contract, but, in connection with the refusal, to show a breach of an existing contract.

The plaintiff contends that it was a consideration of the contract, moving from it, that it should perfect its organization, and purchase a building and prepare to carry on business; or that the proposals of the defendants were made in view of these acts, and of the expectation that the plaintiff should accept them when it should be competent to, and should do the other acts relying on the contracts; and that the plaintiff has done the acts accordingly. A corporation may become bound to fulfill a contract made, in its name and behalf, in anticipation of its existence, by afterwards accepting the benefits of the contract, as it may acquire a right to enforce such a contract against the other party by his acceptance of performance by the corporation. *Low v. Connecticut & P. R. R. R.*, 45 N. H. 370, relied on by the plaintiff, is an instance of the former; and the common liability of subscribers of stock, of the latter.

In the case at bar the formation of the corporation and procuring a building were no part of the contract, or of the consideration of it. There was no agreement to do the acts, and the doing of them was not made by the parties a consideration upon which the contract was to arise. The promises or proposals of the defendants, though a motive for doing the acts by the plaintiff, are not alleged to have been inducements offered by the defendants, nor are the acts alleged to have been done at their request. The defendants are not so connected with the acts to be done by the plaintiff that they would have a right to regard the doing of them as the acceptance of the proposals so that, without other acts of acceptance by the plaintiffs, they could have maintained an action against it upon refusal to accept and pay for the goods. See *Dayton, etc., Turnpike Co. v. Coy*, 13 Ohio St. 84. The declaration alleges contracts made before the plaintiff had a legal existence, and does not show any contract to which the plaintiff was a party.

Judgment for the defendants.

#### NOTE.

A contract with persons contemplating the formation of a corporation, in reference to matters relating to such corporation when it shall be formed, is a contract with such persons personally, and not with the corporation. *Carmody v. Powers*, (Mich.) 26 N. W. Rep. 801.

(142 Mass. 71)

#### COMMONWEALTH v. RICHARDSON and another.

(*Supreme Judicial Court of Massachusetts. Middlesex. May 12, 1886.*)

#### 1. EVIDENCE—PUBLIC RECORDS—SIGNATURES OF PUBLIC OFFICERS—PROOF OF.

A certificate of a public officer that certain facts exist, or appear by the records of his office, is not competent evidence of such facts; and at the trial of a complaint against the defendants, charging them with unlawfully fishing in a pond alleged to have been leased to the complainant, a certificate of the

secretary of the commonwealth, attached to what purported to be a lease of the pond in question to the complainant, certifying that certain signatures borne upon the lease were genuine, and that two of the persons named were "commissioners of inland fisheries at the date of the lease," the lease not being in the custody of the public officers, is extraofficial, and inadequate to make the proof required of the validity of the lease. He may properly certify the record, but cannot certify that certain facts appear by the record.

**2. WATERS AND WATER-COURSES—LEASED PONDS—UNLAWFUL FISHING IN—COMPLAINT—SUFFICIENCY OF.**

A complaint charging the defendants with unlawfully fishing in a leased pond, which complaint follows the language of the statute, is sufficient, when the offense alleged is set forth fully, directly, and expressly, and without any uncertainty or ambiguity; and a particular detail of facts and circumstances is not necessary.

**3. SAME—LEASE OF, TO TOWN—EVIDENCE—ACTS OF TOWN SUFFICIENT TO SHOW LEASE.**

Evidence of votes by the inhabitants of a town, appointing committees to manage a pond and stock it with fish, and of acts of appropriation of money to stock the pond with fish, taken in connection with the fact that the lease of the pond was in the possession of the town officers, and produced by them at the trial of a complaint charging the defendants with unlawfully fishing in the pond, is sufficient evidence, against the defendants, that the inhabitants of the town were lawfully the lessees of the pond.

**4. SAME—USEFUL FISH—COMPLAINT FOR UNLAWFUL FISHING—EVIDENCE INADMISSIBLE THAT DEFENDANTS WERE FISHING FOR OTHER FISH.**

Upon the trial of a complaint charging the defendants with illegally fishing in a pond leased by the commissioners for the cultivation of useful fishes, evidence is inadmissible that the defendants were fishing for other than useful fish; and where one of the defendants was fishing, and the other paddling the boat, *held*, that the jury might properly find both guilty of unlawfully fishing as charged in the complaint.

This was a complaint, under Pub. St. c. 91, for illegally fishing in Martin's pond, a great pond in North Reading; the complaint charging "that Loami G. Richardson and Henry Harnden, both of Reading, \* \* \* unlawfully did fish in a certain pond there situate in North Reading, commonly known as 'Martin's Pond,' the whole of said pond being then and there a place where fish, to-wit, land-locked salmon, were then and there lawfully cultivated and artificially maintained by the inhabitants of the town of North Reading, aforesaid, and they, the said Loami G. Richardson and Henry Harnden, not then and there having permission from the said inhabitants of the said town of North Reading to so fish as aforesaid, and the said inhabitants of the said town of North Reading being then and there the proprietors of said pond and said fish, and said pond not being then and there one of a number, not exceeding six in number, which the commissioners on inland fisheries may occupy, manage, and control, and get leased by them, for the purpose of cultivating useful fishes, and of distributing the same within said commonwealth, and against the peace," etc. The defendants at the trial in the district court filed a motion to quash the complaint, which the court overruled. At the trial in the superior court, before BACON, J., upon facts which appear in the opinion, the jury returned a verdict of guilty, and the defendants alleged exceptions.

*A. V. Lynde and W. P. Harding*, for defendant.

*E. J. Sherman*, Atty. Gen., for the Commonwealth.

DEVENS, J. In order to show that the pond in which the defendants were alleged to have fished, was one which had been leased by the commissioners of inland fisheries, the government offered in evidence what purported to be a lease of said pond by them to the inhabitants of North Reading, together with a certificate of the secretary of the commonwealth. This lease bore date on the first day of July, A. D. 1880, was produced by the town officers, and appeared to have been recorded in the town records. It purported to be signed by two of the commissioners, and also by five other persons; two of whom were selectmen of the town, and two of a committee on fisheries, and one a committee to look after the pond,—all chosen by the town. These latter signatures did not show in what capacity the signers assumed to act. The certificate of the secretary, under the seal of the commonwealth, bore date March 16, 1885, and states that at the date of the lease the persons whose names are borne on the lease, as commissioners, were of the board of commissioners, and "that to their acts and attestations, as such, full faith is and ought to be given." There were no subscribing witnesses to any signature, nor any evidence of the genuineness of the handwriting or signatures except said certificate. Against the objection of the defendants, the court admitted this lease and certificate as evidence, without further proof of the signatures or genuineness of the handwriting.

Pub. St. c. 91, § 16, provides that the commissioners shall have the custody of all leases that may be made by them under the provisions of that chapter. By chapter 169, § 70, "copies of books, papers, documents, and records in the executive and other departments of the commonwealth, duly authenticated by the officer having charge of the same, shall be competent evidence, in all cases, equally with the originals thereof, if the genuineness of the signatures of such officer is attested by the secretary of the commonwealth under its seal." That which the certificate of the secretary is to attest, is the authenticity of the signatures of those officers having charge of the document, of which copies are to be offered, and who themselves are to attest the authenticity of the copies. It is as the proper custodians of the document that they attest its authenticity, and not as having themselves executed it, and the secretary does not attest the signatures of those who signed the original, but of those who now have it in charge. The government did not seek to put in evidence a copy authenticated by those having the lease properly in charge, and the genuineness of whose signatures was attested by the secretary under the seal of the commonwealth. Had it done so, it may be that no proof would have been necessary of the signatures or handwriting of the fish commissioners who executed it, or of the town officers. Such a duly-authenticated copy of a public document, showing an official act done by commissioners in discharge of a lawful duty, and produced from proper custody, having been made competent evidence, proof of handwriting or signatures is necessarily dispensed with. Such proof would, indeed, be impossible in relation to a copy where an office copy of a deed may be put in evidence. It is not, *prima facie*, necessary to call attesting witnesses, or prove the handwriting of the signer, of the



original, or its due delivery by him, although the party affected thereby may controvert them. *Samuels v. Borrowscale*, 104 Mass. 207; *Gragg v. Larned*, 109 Mass. 167.

The lease offered in the case at bar was not in the lawful custody of those persons who are now the commissioners of inland fisheries. It had been left in the custody of the town officers, and it was by putting the original in evidence that the government sought to establish its case. It was necessary to establish the fact that at least those who signed as commissioners were such at the date of the lease, and to prove their handwriting. The certificate of the secretary did not aid in this. If the records of his office enabled him to state who were the commissioners at a former time, when the lease was executed, he may properly certify the record which shows this, but he cannot certify that this fact appears by the record. A certificate from a public officer that certain facts exist, or appear by the records of his office, is not competent evidence of such facts. *Robbins v. Townsend*, 20 Pick. 345; *Wayland v. Ware*, 109 Mass. 248, *Hanson v. South Scituate*, 115 Mass. 336. Nor is the certificate of the secretary competent upon the question whether the signatures to the original lease are genuine. He is not authorized by law to attest them. As to matters which he is not authorized by law to attest, his certificate is extraofficial, can have no higher weight than that of a private citizen, and is therefore inadequate to make the proof required. *Oakes v. Hill*, 14 Pick. 442-448. The lease offered as an original required some additional proof of its authenticity, and was therefore improperly admitted. For this reason a new trial will be necessary.

We proceed to consider briefly such other questions raised by the bill of exceptions which it seems probable may hereafter be presented.

The motion to quash the complaint was properly overruled. It followed the language of the statute, and comes within the well-settled rule that an indictment may be made in the words of a statute, without a particular detail of facts and circumstances, when, by using those words, the act in which an offense consists is fully, directly, and expressly alleged, without any uncertainty or ambiguity. Pub. St. c. 91, § 27; *Com. v. Welsh*, 7 Gray, 324; *Com. v. Barrett*, 108 Mass. 302; *Com. v. Tifany*, 119 Mass. 302.

The defendant further contends that even if the lease, or a proper copy, be admitted, the facts do not furnish any evidence that the inhabitants of North Reading were the proprietors or lessees of the pond. There was no formal vote to accept a lease of the pond; but there were repeated votes appropriating money to stock the ponds with fish, there being another pond included in the lease; choosing committees to stock the ponds, other committees to look after the ponds; receiving and acting on the reports of their fish committees; accepting the rules and regulations made by them for the use of the ponds; changing the times of fishing therein; directing their fish committee to apply for changes to the fish commissioners. These facts, taken in connection with the fact that the lease was in the possession of the town officers, and produced by them at the trial, and appeared to have been recorded in the town records, afforded

ample evidence, as against the defendants, that the inhabitants were lawfully the lessees of the pond.

The ruling requested, that fishing for any other fish than land-locked salmon (which was the only useful fish claimed to be cultivated in the pond) was not illegal, should not have been given. The taking of any other fish there would be illegal. Pub. St. c. 91, §§ 12-24, 27.

The requests that Harnden could not be convicted on evidence that he was only paddling the boat should not have been given. The instruction to the jury "that they might find, from all the facts disclosed in evidence, that these parties were fishing, and that they must so find beyond a reasonable doubt in order to convict either of the defendants," was all to which he was entitled. *Com. v. Pease*, 137 Mass. 576.

Exceptions sustained.

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(142 Mass. 80)

KENNEBEC FRAMING Co., Petitioner, v. PICKERING.

(*Supreme Judicial Court of Massachusetts. Middlesex. May 22, 1886.*)

**MECHANIC'S LIEN—MATERIALS FURNISHED ON ENTIRE CONTRACT—WHEN CERTIFICATE MUST BE FILED.**

A person who furnishes materials for a building under an entire contract cannot maintain a petition to enforce a mechanic's lien under Pub. St. c. 191, § 6, unless his certificate is recorded within 80 days after the last of the materials are furnished and actually used upon the building.

This was a petition to enforce a mechanic's lien. At the trial in the superior court, before KNOWLTON, J., without a jury, the petitioner introduced evidence tending to show that petitioner made a contract in writing, dated March 1, 1884, to furnish frame and other building material for a skating-rink in Wakefield. The petitioner commenced shipping this lumber about March 7th following the date of the contract by cars from Fairfield, Maine, to Wakefield. This lumber was furnished to build the rink according to plans and specifications. The last car-load, which was a part of the material originally contracted for by and between these parties, was shipped on June 12, 1884. It consisted of Maple upper-floor boards, for the upper hall of the structure, and were to be used in laying such floor according to the original plan and contract; but this floor was not laid, and this last car-load, instead of being so used, was piled up in said building. This car-load was necessary to complete the building as first intended. The last lumber shipped under this contract, before said last car-load, was so shipped about May 16, 1884, and all but said last car-load were used actually in the construction of the building. The petitioner had no knowledge of the failure of the defendant to use this car-load to complete the building for which it was contracted and furnished. The defendant is in insolvency, and his assignees defend this suit. On the tenth day of July, within 30 days of the shipping of said last car-load of lumber, petitioner duly filed his certificate according to law, and his petition to enforce lien was duly filed within the time required by law. Upon the hearing, the presiding judge found that the petitioner's certificate was not recorded

within 30 days of the time of their ceasing to furnish material, within the meaning of the statute, because the lumber of the last car-load, furnished June 12, 1884, was not used upon the building; and ruled as matter of law that, to entitle the petitioner to enforce a lien, such certificate should have been filed within 30 days from the time of delivery of lumber or material which was actually used upon the building. The contract referred to was an offer by petitioner, and accepted by defendant, to furnish the defendant "with the materials for your proposed skating-rink building, delivered on cars at Wakefield, for the prices named below; being cash on delivery, to be paid in installments of \$500 when three car-loads are delivered, and so on, \$500 whenever an additional three car-loads have arrived; and the balance, deducting freight-bill, which you will pay on arrival of each car, when the order is filled." The prices named were for different kinds of lumber, to be furnished in each case at so much per thousand feet. The enforcement of the lien as prayed for by the petitioner was refused, judgment for defendant ordered, and petitioner alleged exceptions.

*A. H. Briggs*, for petitioner.

*F. S. Hesselbine*, for defendant.

HOLMES, J. Where, as here, the price is fixed by the thousand feet, we will assume that a lien can be maintained for materials furnished and actually used, although furnished under an entire contract, which calls for a larger quantity, part of which is not actually used. *Felton v. Minot*, 7 Allen, 412. But in *Gale v. Blaikie*, 129 Mass. 206, the court say that "it is clear that the statement of account is intended to embrace only those charges which the lien secures, and that it is to be filed within thirty days after the last of the items charged and secured is furnished. The only 'materials' which are the subject-matter of provisions of the statute are materials furnished and actually used." In the opinion of a majority of the court we cannot fairly distinguish this case from that, consistently with its reasoning, on the ground that the present contract was entire. We cannot reconcile it with that reasoning, to say that when the contract is entire the materials referred to by Pub. St. c. 191, § 6, are the last materials which are furnished under the contract, and which, although not actually used, must be furnished before a debt can arise in respect of the portion actually used. The language cited imports that the statement must be filed within 30 days of the furnishing of that part of the materials which is actually used, and in respect of which a lien can be claimed. It would be consistent with *Gale v. Blaikie*, perhaps, either to presume conclusively that the last car-load of lumber was used, or to say that that previously delivered was not furnished, in the sense of the statute, until a debt had arisen in respect of it. But neither of these suggestions commends itself to us, and we must adhere to what has been decided. The hardship seems greater, technically, when the contract is entire, and the petitioner has precluded himself from filing his certificate before complete performance, if that is the effect of such a contract, which we do not intimate. But we doubt if there is much prac-

tical difference, except when the purchaser refrains from using part of the materials for the purpose of defeating the lien, which is not suggested to have been the fact in the case at bar. Exceptions overruled.

(141 Mass. 76)

DAVIS v. SULLIVAN.

(*Supreme Judicial Court of Massachusetts*. Suffolk. February 26, 1886.)

EQUITY—DECREE—INJUNCTION—APPEAL—DECREE JUSTIFIED WHEN IT FOLLOWS  
FRAME OF BILL.

The owner of personal property brought a bill in equity against B., alleging that the property had been loaned him, and that he refused to return it, and prayed for an order to compel B. to deliver the property to the plaintiff, and for an injunction to restrain B. from disposing of the same. B. denied that he had the property in his possession. The court ordered an injunction to issue, and referred the case to a master, who found that the property was in the possession of B. at the time the injunction was issued, and the court issued a decree that the property be delivered to the plaintiff. No other facts appeared. *Held*, upon an appeal by B. from the final decree of the court, that the decree clearly followed the frame of the bill, and was justified by the record.

This was a bill in equity, alleging that the plaintiff, in the year 1880, was the owner of certain personal property, consisting of a watch, gold rings, a diamond ring, and other jewelry, which were gifts from her husband, and which she loaned to the defendant, relying upon his promise to return the same; that the plaintiff requested the defendant to return the same; and that the defendant promised to return the same, but did not. The prayer of the plaintiff was that the said defendant might be ordered to deliver up said articles of personal property so loaned to him, or that he might be ordered to expose and exhibit the same, so that they might be taken on a writ of replevin, and that he be restrained from selling, secreting, or disposing of any of said articles of personal property so loaned to him. An injunction was issued on March 15, 1883. The answer of the defendant admitted that he had possession and control of the said personal property at different times, but alleged that some time prior to the service of plaintiff's writ upon him he had disposed of said articles, which fact was well known to plaintiff before filing said complaint, and said articles were entirely beyond the control of defendant at and for a long time before the service of plaintiff's writ upon him, and that part of the property had been returned. On January 5, 1885, an interlocutory decree was passed, in which it was decreed that all of the property specified in plaintiff's bill was the property of the plaintiff, and it was ordered that the same be returned and delivered to her if it should be found that the same was in the possession of the defendant at the time of the service of the injunction in the case. It was further ordered that the case be referred to a master to determine whether, at the time of the service of the injunction upon the defendant, he had sold the property specified in the plaintiff's bill; and, if the defendant had at that time sold the property specified, to find the value of the same. The master found that, at the time of the service of the injunction in this cause upon the defendant, the defendant had not sold the property spec-

ified in the plaintiff's bill. The court then decreed that the defendant forthwith surrender and deliver to the plaintiff, her agent or attorney, each and every of the articles of personal property mentioned in plaintiff's bill of complaint, and that the plaintiff have execution for costs. The defendant appealed from this order.

*Z. S. Arnold*, for defendant.

*H. J. Edwards*, for plaintiff.

BY THE COURT. This is an appeal from a final decree of a single justice of the court, without a report of the facts or evidence upon which the decree was founded. The decree clearly follows the frame of the bill, and is justified by the record, and no other question is presented in the case as it comes before us. Decree affirmed.

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(142 Mass. 4)

CAVERLY, Adm'r, v. EASTMAN and others.

(*Supreme Judicial Court of Massachusetts. Middlesex. May 8, 1886.*)

EQUITY—BILL OF REVIEW—BOND TO CONVEY LAND—APPEAL.

A bill in equity was brought by the administrator of the estate of D. E. to compel the conveyance of certain real estate described in a bond in which D. E. was the obligee, and was dismissed March 2, 1882, for want of equity. Upon a bill subsequently brought by the heirs and devisees of D. E. upon the bond a decree was entered for the plaintiffs, July 14, 1884. On October 14, 1885, all the parties to the original bill filed a bill of review of the last cause, which was dismissed. An appeal to the full court from the decree of dismissal was dismissed, as was also a petition for leave to file a bill of review in the first suit. On July 14, 1885, the probate court, upon petition of the administrator, gave him leave to sell the real estate mentioned in said bond. *Held*, upon an appeal from the decision of the probate court, that by the lapse of time all the interest of the estate of D. E., and of all persons who claimed under his will, in the bond and real estate therein described, had determined, whether the decree of the probate court authorizing the petitioner to sell was right or not on the facts as they existed when the decree was entered, and that the cause should be remitted to the probate court, with directions to dismiss the petition.

This was an appeal by Luman E. Eastman, Charles J. Eastman, and Daniel J. Eastman, by Francis W. Qua, their attorney, from the decree of the probate court on the petition of Robert B. Caverly, administrator with the will annexed of the estate of Daniel Eastman, deceased, licensing him to sell the whole of the real estate of said deceased described in the petition, and all rights and interests which the devisees and heirs of said deceased have in the same. Hearing in the supreme court, before FIELD, J. upon the following facts:

Daniel Eastman, Sr., died testate June 5, 1879. The real estate described in the petition is the real estate described in the bond of Benjamin F. Simpson to said Eastman, dated June 19, 1877. There remains unpaid a legacy given by the will of said Eastman to his son, and the charges of administration, and there is nothing to pay them with except the property described in the petition for license to sell. By the seventh article of the will of Daniel Eastman, he directed "that the residue of my personal estate, if any, after payment of the above several legacies and bequests, shall be divided between the several children of my son Ebenezer S. Eastman, share and share alike."

v.7N.E.no.1—5

Ebenezer Eastman died soon after Daniel Eastman, leaving as his children Luman E. Eastman, Mary E. Eastman, Harvey J. Eastman, Daniel J. Eastman, and Charles J. Eastman, of whom the appellants are these. The appellants claim an interest in the property under the seventh article of the will of Daniel Eastman. The property which the petitioner desires leave to sell, is the rights which Daniel Eastman died possessed of in the real property under the bond he held. This bond is described in *Caverly v. Simpson*, 132 Mass. 462, and it was agreed that the condition as therein printed was correct. The bill in equity there reported was dismissed March 2, 1882. Subsequently the five children of Ebenezer S. Eastman, with Martin V. B. Eastman, brought a bill in equity on the same bond against Benjamin F. Simpson, which on his death was defended by Elizabeth Simpson, executrix of his will, and this case is reported in 139 Mass. 348, and 1 N. E. Rep. 346. The final decree in this last case was entered July 14, 1885. Luman J. Eastman, Mary E. Eastman, Harvey J. Eastman, Daniel J. Eastman, and Charles J. Eastman did not pay or tender the sum prescribed by this decree to Mrs. Simpson within three months of the date of it, or at any time. The date of the petition to the probate court was May 26, 1885, and the date of the decree licensing the petitioner to sell was July 14, 1885. On October 14, 1885, all the parties to the original bill filed a bill of review of this cause in this court, signed in their names, by Robert B. Caverly, as administrator of Daniel Eastman, and solicitor for the plaintiffs. December 10, 1885, this bill of review came on to be heard upon demurrer filed by Mrs. Simpson, and the presiding judge sustained the demurrer, and dismissed the bill. From this decree sustaining the demurrer and dismissing the bill, Caverly, in behalf of the plaintiffs, appealed to the full court, and on the same day Francis W. Qua, as solicitor for all parties plaintiff, except M. V. B. Eastman, filed a motion that such appeal be stricken from the docket on the ground that Caverly was not authorized by the parties either to bring the bill of review or to take an appeal. The decree entered in the case of *Eastman v. Simpson*, referred to, ordered that the defendant in that suit, within three months from the final determination of the cause, to-wit, July 14, 1885, execute a proper conveyance of the estate described in plaintiff's bill to the plaintiffs, upon the payment to the defendant, by the plaintiffs, of the sum of \$9,887.18.

The presiding judge found that the charges of administration of the estate of Daniel Eastman were largely due to Caverly for money disbursed by him, and for professional services in the conduct of the suits mentioned and other suits; that the children of Ebenezer S. Eastman were poor, and if the property was sold the proceeds would be used to pay the legacy of M. V. B. Eastman and the charges of administration, and they would probably receive nothing; and upon these facts reported the case for the consideration of the full court.

*R. B. Caverly*, for plaintiff.

*Chas. G. Saunders* and *F. W. Qua*, for defendants.

FIELD, J. The petition for leave to file a bill of review, and the bill of review brought to reverse the final decree entered in the suit of *Luman J. Eastman v. Elizabeth Simpson, Executrix*, having both been dismissed, and the appeal to the full court from the decree dismissing these proceedings having also been dismissed, it follows that, by the lapse of time, all the interest of the estate of Daniel Eastman, and of all persons who claim under his will in the bond, and in the real estate therein described, has determined, whether the decree of the probate court au-

thorizing the petitioner to sell said real estate was right or not, on the facts as they existed when the decree was entered. The decree must now be reversed, and the cause remitted to the probate court, with directions to dismiss the petition. So ordered.

(142 Mass. 601)

OPINION OF THE JUSTICES.

*In re* WARD DIVISIONS BY CITIES.

(*supreme Judicial Court of Massachusetts. May 27, 1886.*)

1. STATES AND STATE OFFICERS—LEGISLATURE—SENATORIAL DISTRICTS—TWENTY-SECOND AMENDMENT TO CONSTITUTION.

The constitution of the commonwealth, in the twenty-second amendment thereof, requires the commonwealth to be divided by the general court into senatorial districts according to boundaries of towns and cities, and the wards thereof, as they existed on the first day of May in the year in which the census of legal voters is taken, that applies to said apportionment and division.

2. SAME—DIVISION OF ASSIGNMENTS OF REPRESENTATIVES.

The same amendment requires the aldermen of the city of Boston and the county commissioners of the other counties than Suffolk, (in case no special commissioners are provided therefor,) to divide the assignments of representatives to the several counties apportioned by the legislature according to the boundaries of the towns and cities and their wards as they existed on the first day of May in the year in which the census of the legal voters is taken, that applies to said apportionment and division.

3. SAME—APPORTIONMENT OF SENATORS.

Under the terms of the same amendment, the general court cannot, in making the apportionment of senators, and in the division of the commonwealth into districts therefor, recognize, and take as a basis for the same, the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken, that applies to such apportionment or division, or the wards in cities which have been established under the general law, being chapter 7 of the Acts of the year 1865, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of legal voters is taken, that applies to such apportionment or division.

4. SAME—BASIS OF DIVISION OF REPRESENTATIVE DISTRICTS.

Under the same amendment the aldermen of the city of Boston and the county commissioners of the other counties than Suffolk, (in case no special commissioners are provided therefor,) cannot, in making the division into representative districts, recognize or take as a basis therefor the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken, that applies to said apportionment or division, or the wards in cities which have been established under the general law, being chapter 7 of the Acts of the year 1865, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of voters is taken, that applies to said apportionment or division.

The following is the opinion of the justices of the supreme judicial court upon the questions propounded by the two branches of the general court on the division of the commonwealth, under the twenty-first and twenty-second amendments of the constitution, into senatorial and representative districts. The resolve, and questions propounded to the justices, were as follows:

"Whereas, in the year eighteen hundred and sixty-five the legislature did pass an act entitled 'An act empowering cities to re-establish their wards,' which act has ever since been in force, and divers cities in the commonwealth have re-established their wards according to the provisions of said act; and whereas, divers cities and towns have been incorporated and organized under

and by virtue of certain acts of the legislature relating thereto; and whereas, the general court, at its present session, is required to divide the commonwealth into senatorial districts, and to provide for the apportionment and division of the commonwealth into representative districts, and to this end has certain bills, orders, and other proceedings now pending before it relating thereto; and whereas, the authority to make such apportionments and divisions, according to the territorial boundaries of towns and cities and their wards, as now existing and established, or hereafter to be established, under said acts of the legislature, is brought into question, and the constitutionality thereof disputed: therefore, it is ordered by the general court, in each branch thereof, that the opinion of the justices of the supreme judicial court be required upon the following important questions of law:

*"First.* Does the constitution, in the twenty-second amendment thereof, require the commonwealth to be divided by the general court into senatorial districts according to the boundaries of towns and cities, and the wards thereof, as they existed on the first day of May in the year in which the census of legal voters is taken, that applies to said apportionment and division?

*"Second.* Does the constitution, in the twenty-first amendment thereof, require the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk, (in case no special commissioners are provided therefor,) to divide the assignments of representatives to the several counties apportioned by the legislature according to the boundaries of the towns and cities and their wards as they existed on the first day of May in the year in which the census of the legal voters is taken, that applies to said apportionment and division?

*"Third.* Under the terms of the twenty-second amendment to the constitution, can the general court, in making the apportionment of senators, and in the division of the commonwealth into districts therefor, recognize and take as a basis for the same the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken, that applies to such apportionment or division, or the wards in cities which have been established under the general law, being chapter seven of the Acts of the year eighteen hundred and sixty-five, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of legal voters is taken, that applies to such apportionment or division?

*"Fourth.* Under the terms of the twenty-first amendment to the constitution, can the aldermen of the city of Boston, and the county commissioners of the other counties than Suffolk, (in case no special commissioners are provided therefor,) in making the division into representative districts, recognize or take as a basis therefor the towns incorporated or organized after the first day of May of the year in which the census of legal voters is taken, that applies to said apportionment or division, or the wards in cities which have been established under the general law, being chapter seven of the Acts of the year eighteen hundred and sixty-five, or under any other law, special or general, relating thereto, after the first day of May of the year in which the census of voters is taken, that applies to said apportionment or division?"

*To the Honorable the Senate and the House of Representatives of the Commonwealth of Massachusetts:*

The justices of the supreme judicial court, having considered the questions proposed in the joint order of the twenty-first of May present, respectfully submit the following opinion:

The twenty-second article of amendment of the constitution provides that "a census of the legal voters of each city and town, on the first day



of May, shall be taken, and returned into the office of the secretary of the commonwealth, on or before the last day of June in the year one thousand eight hundred and fifty-seven; and a census of the inhabitants of each city and town, in the year one thousand eight hundred and sixty-five, and of every tenth year thereafter. In the census aforesaid a special enumeration shall be made of the legal voters, and in each city said enumeration shall specify the number of such legal voters aforesaid residing in each ward of such city. The enumeration aforesaid shall determine the apportionment of senators for the periods between the taking of the census. The senate shall consist of forty members. The general court shall, at its first session after each next preceding special enumeration, divide the commonwealth into forty districts of adjacent territory, each district to contain, as nearly as may be, an equal number of legal voters according to the enumeration aforesaid: provided, however, that no town or ward of a city shall be divided therefor."

The first and third questions proposed to us are whether, in dividing the commonwealth into senatorial districts, the general court must be governed by the boundaries of the towns and wards as they existed on the first day of May of the year in which the census is taken, or whether they can make such division according to the boundaries of towns and wards as they exist at the time of the division, if there has been any change in such boundaries since the first day of the next preceding May. We have no doubt that the amendment imposes upon the general court, in each tenth year, the duty of providing by suitable legislation that a census and enumeration of legal voters shall be taken, and returned into the office of the secretary of the commonwealth. The great object of the amendment was to establish the senate upon the basis of legal voters, and to provide for a method of ascertaining the number of legal voters so as to furnish a guide to the general court in dividing the state into senatorial districts. The fundamental idea is that an enumeration shall be made under the authority and direction of the commonwealth, and that this enumeration shall guide the general court in making the division. Such enumeration must "determine the apportionment of senators," and the division must be made "according to the enumeration aforesaid." The general court is to be governed entirely by this enumeration, and is not at liberty to look to any other source for information as to the number of legal voters in any territory which it proposes to erect into a senatorial district. It must act upon the enumeration returned to the office of the secretary of the commonwealth, and by him laid before the legislature. The provision that the enumeration shall specify the number of legal voters in each ward of a city necessarily refers to each ward as it existed on the first day of May; and the accompanying provision, that "no town or ward of a city shall be divided," we think, by its fair construction, refers to such town or ward; that is, the town or ward as it existed on the first day of May of the year in which the census is taken. The intention of the framers of the amendment seems to have been to establish such town or ward as a unit of division. The scheme was to ascertain the number of voters in each town

and ward as found on the first day of May; and then, as soon as could be thereafter, to divide the state into senatorial districts according to that enumeration. It regards the apportionment as a continuing act or process, beginning with the enumeration of voters in the several towns and wards, and ending with the assignment of the same towns and wards to senatorial districts. There seems to be no reason for requiring the enumeration by wards as they exist on the first day of May, unless such enumeration is to regulate the division into districts. If a town is divided, or the wards of a city are changed, after the first day of the preceding May, and before the time when the division is made, the constitution does not furnish the general court with the means of ascertaining the number of voters who resided in the new town or ward on the first day of May. If the division is to be made according to the boundaries of the new towns or wards, how is the general court to ascertain the number of legal voters in such new towns or wards? The official returns, which are by the constitution the only basis upon which it can act, do not show it. It might, perhaps, by other means, more or less to be relied on, ascertain approximately the number; but this would be a violation of the provision that the official enumeration shall determine the apportionment. The constitution does not intend that the apportionment of senators, which affects the people of the whole state, shall be determined by any enumeration taken by officials of cities or towns, or by the number of voters ascertained in any other mode than that which it provides. On the contrary, as we have before said, it does clearly intend that the official enumeration, taken and returned to the office of the secretary of the commonwealth, under the authority of and by officers of the commonwealth, shall be the sole guide of the general court in making the apportionment.

We are therefore of opinion that, by the sound construction of the twenty-second article of amendment, the general court is required to divide the state into senatorial districts according to the boundaries of the towns and wards as they existed on the first day of May last. If the question were a new one, we should have adopted this construction without any hesitation. We have considered the subject with more care because the fact cannot be overlooked that, in apportioning the senators in the years 1866 and 1876, the general court proceeded upon a different construction of the twenty-second amendment. It is true that, when a provision of the constitution is obscure and doubtful, the construction adopted by the legislature, or any other department of government, is entitled to great weight. But the constitution is supreme, and no number of legislative acts will justify a construction against its plain meaning.

The provision we are considering is intended to be permanent, and we think that its meaning is reasonably clear, and that the construction implied in acts of previous legislatures ought not to control our opinion. Nor do we overlook the fact that a division according to the old wards in the city of Boston will, so long as the present statutes remain in force, lead to the inconvenience that there will be one system of wards for the

purpose of electing councilors, senators, and representatives, and a different system of wards for all other purposes. But this is an inconvenience which is not an incident of or created by the constitutional provision. It is the result of subsequent legislation, and can be cured by legislation. An inconvenience thus created cannot be of weight in determining the true construction of the constitutional provision.

The twenty-first amendment, so far as the provisions we are considering are concerned, is in substance, and very nearly in language, the same as the twenty-second, and must receive the same construction.

It follows that the first and second questions proposed to us must be answered in the affirmative, and the third and fourth questions in the negative.

MARCUS MORTON.

WALBRIDGE A. FIELD.

CHAS. DEVENS.

WILLIAM ALLEN.

CHARLES ALLEN.

OLIVER WENDELL HOLMES,

WM. S. GARDNER.

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(142 Mass. 56)

SHATTUCK v. BILL.

(*Supreme Judicial Court of Massachusetts. Middlesex. May 11, 1886.*)

**FALSE IMPRISONMENT—PRINCIPAL LIABLE FOR ACTS OF ATTORNEY—EVIDENCE.**

A., as attorney for B., brought an action against C., and recovered a judgment. Execution was issued thereon, and A.'s clerk, seeing the execution in the office of A., and deeming it needed attention, went before a master in chancery for S. county, and applied for a certificate, upon which C. was arrested. The arrest was illegal; C. not being a resident of S. county, and having no place of business there. A.'s clerk, in procuring the certificate and causing the arrest, acted without the knowledge of or any instruction from A. or B. *Held*, that B. was liable for the acts of A. or his clerk in making the false arrest. *Also held*, that evidence was admissible tending to show the presence and acts of B. at hearings before the master in chancery, before whom C. was brought after his arrest upon said certificate, although the hearings were had subsequent to the commencement of proceedings in the action for the false arrest.<sup>1</sup>

This was an action of tort for false arrest. At the trial in the superior court, before ROCKWELL, J., it appeared that the defendant in this action brought an action against the plaintiff in the superior court for Suffolk county, and, after trial before a jury, recovered judgment. The action was brought by one Way, an attorney at law, and he conducted the case at the trial for Bill. Execution was issued to said attorney, and was in his office. One Clarence F. Eldridge, who was, and had been for about three years, a clerk in general employ in the attorney's office for him, and who assisted the attorney at the trial, seeing the execution in the office, and deeming it needed attention, went before a master in chancery for Suffolk county, and applied for a certificate, and made affidavit in the form provided by statute under clause 5, § 17, c. 162, Pub. St., and the

<sup>1</sup> See note at end of case.

master annexed his certificate, authorizing the arrest of Shattuck, to the execution, as well as the said affidavit of Eldridge. Shattuck was described in the execution as of Natick, in the county of Middlesex, and it appeared his residence was there, and that he had no usual place of business in Suffolk county. Eldridge placed the execution in the hands of a deputy-sheriff, and caused the arrest of the plaintiff, Shattuck, thereon, who was taken by the deputy-sheriff before the same master in chancery for Suffolk county, when he recognized in the usual form prescribed by the provisions of said chapter 162. Eldridge, who was called by the plaintiff, Shattuck, testified that he made said affidavit, procured said certificate, and caused the arrest, without the knowledge of or any instruction from said attorney, or from the defendant, Bill. Bill testified that he neither specially authorized his attorney to make said affidavit nor cause said arrest, and that he did not give any instruction to any one about making said affidavit or procuring such certificate or arrest, and that he had no knowledge of either of them until after this action was commenced. The plaintiff, Shattuck, gave notice of his application to take the oath for the relief of poor debtors, and hearings were had. The plaintiff offered evidence tending to show the presence and acts of the defendant at said hearings, which were had after the date of the writ in this action, as competent to prove authority on the part of Eldridge from the defendant to make said affidavit, and cause said arrest in his behalf. The defendant objected to the admission of this evidence, but it was admitted by the court. The defendant requested certain rulings, which the court refused to give, and ruled that the arrest was illegal.<sup>1</sup> The jury found for the plaintiff, and the defendant alleged exceptions.

*E. M. Bigelow*, for defendant.

*P. H. Cooney* and *H. G. Sleeper*, for plaintiff.

DEVENS, J. The plaintiff resided in Middlesex county, and had no usual place of business in Suffolk county. The application for a certificate authorizing the arrest was made before a magistrate in Suffolk, and the arrest made by authority of this certificate, was illegal. Pub. St. c. 162, § 17. As the defendant employed the attorney in whose custody the execution was, if he authorized the arrest either in terms, or by the directions which are properly to be implied from the employment of the attorney and the authority conferred, he would be responsible for the wrong done in the performance of the duty intrusted to his agent. Story, Ag. § 452; *Moore v. Fitchburg R. R.*, 4 Gray, 465. The plaintiff, after his arrest, gave notice of his intention to take the oath for the relief of poor debtors, and evidence was offered of the presence and conduct of the defendant at these hearings, as tending to prove authority from him to make the affidavit and cause the arrest on his behalf. To the admission of this evidence the defendant has no just cause of exception. If the whole proceeding in relation to the arrest was without authority from defendant, it was not reasonable to suppose that he would take part in opposition to the application by the plaintiff to relieve himself therefrom; and his acts in relation thereto, although occurring after the ar-

rest, had a tendency to show that it was initiated by his authority almost as directly as if he had thus expressly assented. *Collett v. Foster*, 2 Hurl. & N. 356.

The affidavit upon which the certificate was founded, was in fact made by a clerk in the attorney's office, and the defendant requested an instruction that "if a clerk in the office and employ of the attorney of record in the original suit in which judgment was obtained, and the execution was issued thereon, without the knowledge and without any instructions from said attorney, or from the defendant in this action, (the plaintiff in the original action,) so to do, applied to a master in chancery, and said master thereupon received such application and annexed the affidavit and his certificate to the execution, and on account thereof, and without any knowledge on the part of the defendant that the arrest was to be made, this plaintiff was arrested, the plaintiff cannot recover." Unless it is true that the attorney himself, who has in his hands an execution to collect, cannot proceed to levy it by arrest of the person of the defendant without some special authority or direction of his client, to have given this instruction would have been erroneous, and have led to grave misunderstanding. There was evidence that the clerk, Eldridge, who made the affidavit, was in the general employment of the attorney, and had assisted him in the trial of the case which had resulted in the judgment on which execution had issued; that he had deemed the execution needed attention, had therefore made the necessary affidavit, and placed the execution in the hands of a deputy-sheriff. Even if the clerk had received no special instructions from the defendant or his attorney, it might well have been proved to the satisfaction of the jury that in so doing he had acted by virtue of a general authority from the attorney, and as managing clerk, intrusted with the collecting of claims which were deposited in the office for that purpose, in taking the steps that he did, and that his acts in the matter were to be treated as those of the attorney himself. That this was the view of the presiding judge is quite clear. His instruction permitted the plaintiff to recover only upon one or the other of two grounds: *First*, upon the ground that the defendant himself had actually directed the arrest, or had had antecedent knowledge of the certificate and the arrest; or, *second*, upon the ground that "the arrest had been procured by Mr. Way, the attorney of the plaintiff in the original action holding the execution for collection."

Upon the first of these grounds, had the fact been proved, we do not understand the defendant to contend that he would not be liable; but he does contend—and such was in substance the second request for an instruction made by him—that he was not responsible for the act of the attorney in the original action, in applying to the master for a certificate which would authorize the arrest, and in proceeding to make it, if these acts were done without knowledge or direction from the defendant himself. While it does not clearly appear from the bill of exceptions what were the instructions as to the liability of the defendant for the acts of the clerk of the attorney, as the only ground, except that of express authority, upon which the plaintiff was allowed to recover was by reason

of the act of the attorney, we must assume, in favor of the defendant, that the acts of the clerk were treated as his acts only if done within the general scope of his employment, and that knowledge of or instruction to do the particular act by the attorney was not necessary. This was correct. Details of law business, especially such as that of the collection of claims, are often not done by the attorney, but intrusted to the subordinates, whose acts in the conduct of a business are his, so far as civil responsibility therefor, either on his own part or that of his clients, is concerned.

But if this be conceded, the defendant still contends that the attorney had no authority himself, without express directions, to take the necessary steps, and to proceed to arrest the plaintiff. Certain early English cases have been cited by defendant, to the effect that the authority of an attorney terminates with obtaining judgment and execution. They do not require comment except to say that they proceed upon the ground that all the attorney is required to do by his warrant is thus terminated. But the warrant of attorney is not used in this commonwealth, and in this respect there is a difference between the English practice and our own. Nor would it appear that obtaining the execution is now recognized in England as the termination of the duty of the attorney, if it ever was so formerly. In *Collett v. Foster*, 2 Hurl. & N. 356, the principal was held liable for the act of his attorney in causing a plaintiff improperly to be arrested on *ca. sa.*, no order to this effect having been given by him. In *Smith v. Keal*, 9 Q. B. Div. 340, it is said by Lord Justice LINDLEY: "It was the duty of the solicitor to conduct the action in the ordinary way; and, if his client obtains judgment, it is his duty to do such acts as are necessary to obtain the fruits of his judgment. If a *fi. fa.* is necessary, he must issue it, and make the proper indorsement on the writ; and if he makes a mistake in so doing, his client is responsible." In *Buller v. Knight*, L. R. 2 Exch. 109-113, it is said, in substance, the distinction between powers of attorney before and after judgment is less marked than formerly. The attorney has a reasonable discretion in the attainment of the object in view, and the selection of remedies. It would be mischievous to hold, where there is any evidence that the authority of the attorney was continued after judgment, that the attorney had not authority to act according to the exigency of the case.

It has always been held in this country that an attorney is invested with a large discretionary power, in anything pertaining to the collection of a demand intrusted to him for that purpose, and that his client must answer in damages if injury is occasioned by his conduct in the general scope of this employment. While he cannot discharge a debt or an execution without receiving satisfaction, he has control of the selection of legal remedies and processes which he may deem most effectual in accomplishing his object. The confidence reposed in him by his client, the supposed ignorance by the latter of the most appropriate remedies, require this. *Willard v. Goodrich*, 31 Vt. 597, 600; *Jenney v. Delesdernier*, 20 Me. 183; *Fairbanks v. Stanley*, 18 Me. 296; *Turner v. Austin*, 16 Mass. 181; *Gordon v. Jenney*, Id. 465; *Caswell v. Cross*, 120 Mass. 545; *Carle-*

*ton v. Akron Sewer Pipe Co.*, 129 Mass. 40; *Moulton v. Bowker*, 115 Mass. 36; *Schoregge v. Gordon*, 29 Minn. 367; S. C. 13 N. W. Rep. 194; *Clark v. Randall*, 9 Wis. 135. Proceedings in the execution are proceedings in the suit which the attorney is authorized to bring. *Union Bank v. Geary*, 5 Pet. 98-112; *Erwin v. Blake*, 8 Pet. 18-25; *Flanders v. Sherman*, 18 Wis. 575; *Planters' Bank v. Massey*, 2 Heisk. 360; *Mayer v. Hermann*, 10 Blatchf. 256. It has been held that he may receive seizin on levy of execution; may discharge execution; may direct it to be issued in a particular manner; may, in his discretion, take out *fi. fa.* or *ca. sa.*, and cause defendant to be arrested thereon. *Pratt v. Putnam*, 13 Mass. 363; *Langdon v. Potter*, Id. 319; *Corning v. Southland*, 3 Hill. 552; *Hyams v. Michel*, 3 Rich. Law, 303. In *Gray v. Wass*, 1 Greenl. 257, it is said by Chief Justice Mellen: That "the power of an attorney does not cease until he has collected the debt committed to him for collection is admitted." In *Heard v. Lodge*, 20 Pick. 53, it is said by Mr. Justice DEWEY:

"It is within the scope of the power of the attorney to institute all such further proceedings as are necessary to render the judgment effectual to the creditor for the recovery of his debt. It has been held to be the imperative duty of an attorney in the original action, when the body of the debtor was arrested, to institute a *scire facias* against the bail, and if he neglect to do so he is held responsible." *Dearborn v. Dearborn*, 15 Mass. 816.

In the case at bar the principal was therefore properly held liable for the act of his attorney. Exceptions overruled.

#### NOTE.

The negligence or act of an attorney's clerk will be imputed to the party for whom the attorney acts. *Hayward v. Goldsburly*, (Iowa,) 19 N. W. Rep. 307.

A client is liable in trespass where his attorney causes property to be taken and sold under an execution wrongfully issued. *Foster v. Wiley*, 27 Mich. 244.

In the last case the court say that "it is sometimes said that the authority of an attorney ceases with recovery of judgment; but this is not so for all purposes. He is, in general, presumed to have authority to cause execution to be issued, and to receive the money in payment thereon. *Langdon v. Potter*, 13 Mass. 320; *Commissioners v. Rose*, 1 Desaus. 469; *Gray v. Wass*, 1 Greenl. 257; *Brackett v. Norton*, 4 Conn. 517; *Silvis v. Ely*, 3 Watts & S. 420."

(142 Mass. 83)

#### SHATTUCK v. RAND.

(*Supreme Judicial Court of Massachusetts. Suffolk. May 27, 1896.*)

#### NEGLECTANCE—HOTEL ELEVATOR—ACCIDENTAL FALL OF—OWNER NOT LIABLE—REASONABLE CARE IN CONSTRUCTION.

In an action against the defendant, the owner of an apartment hotel, for injuries to the plaintiff, caused by the fall of an hydraulic elevator, which fell by reason of the admission of air to the cylinders, caused by the shutting off of the water from the pipes connecting with the elevator, by the city authorities, there was evidence of experts that the elevator was well built; that an examination, after the accident, showed the machinery to be in perfect order and nothing broken; and that there were no appliances known to the witnesses to prevent air from getting into the cylinders when the street pipe was opened, except such as were attached to this machinery. *Held*, that if the accident happened from the shutting off the water from the street-main, and if there was nothing to put a man of reasonable intelligence and information on the watch, to guard against the water being shut off, and if he did not know,

and by the exercise of reasonable care on his part could not ascertain, that there was danger to the elevator by shutting off the water, then defendant ought not to be held liable for the accident.

This was an action of tort for personal injuries alleged to have been sustained by the falling of an hydraulic elevator in Hotel Garfield, owned by the defendant, while plaintiff was riding therein. The building in which the accident occurred is a family hotel on West Rutland square, Boston, built and owned by the defendant. The elevator was run by water entering cylinders in the basement of the building, and was intended for the use of the tenants and occupants of the building, and others having business there, and was operated by the person using it; being stopped or started by a hand-rope running through the car, and connecting with the valves in the basement, which controlled the flow of water into the cylinders. To the top and bottom of this hand-rope were secured tappets in such a manner that the elevator would strike them, and automatically close the valve when it reached the first floor in coming down, or the fifth floor in going up. The plaintiff testified that she looked at the rooms before hiring them, and soon afterwards, in December, 1882, the defendant called at the place where she was then living, and she engaged the rooms of him for herself and husband; that she asked the defendant if the tenants ran the elevator, and operated it herself; that the defendant had a janitor at the hotel, and she had seen him put an obstruction in front of the elevator door, to prevent persons using it if it was out of order, and had seen a notice, "Elevator Closed;" that on August 3, 1883, she left the house in the morning, returned about 1 o'clock, opened the door, and stepped into the elevator on the lower floor; started it, and went up to her rooms on the fifth floor, and got out of it there; that at about 3 o'clock she came into the hall, and, finding the elevator there, at her door, took her seat in it to go down; the elevator started apparently as it usually did, and she noticed nothing unusual until it got between the second and third floors, not past the last door, when it began to tremble; that she immediately got up, and before she remembered anything she was down to the bottom; that when it fell, it shook her badly, and it went down with great violence; it went right down to the bottom, and she was injured; that she received no notice that the water had been shut off, or that it would affect the running of the elevator, or that it was not safe to use it; that after the accident she saw the defendant, and asked him how it happened, and he said the city shut off the water in the street, and did not give any notice; that he was at his house, at dinner, at the time of the accident; that it was the city's business to give notice, but if he had been there, notice or not, he would have seen if the elevator was closed; that he would go to city hall, and see why he and his tenants were not notified; that he did so, and reported that the man in charge said he presumed notice was given. A witness called by plaintiff testified that he was an engineer, and somewhat familiar with elevators, but had never seen this one; that if air got into the cylinders under the pistons it would be compressed, but the elevator would come down faster with air in the cylinders than with water,



but he could not tell how much faster. One McKenna testified, for the plaintiff, that he was employed in the water department of the city; that August 3, 1883, about 9 o'clock, he went, with several laborers, to West Rutland square to lay a pipe from the street-main to the cellar wall of Hotel Rand, adjoining the Garfield; that the Rand was in process of erection, and contained an elevator; that the purpose of putting in this pipe was to connect this elevator with the pipe in the street; that the men dug the trench, and then shut off the water; he gave notices to two men, and saw them going along both sides of the street; that he saw these men leave notices at doors on both sides of the street; that he couldn't say that he saw one left at the door of the Garfield; that after the water was shut off, a hole two inches in diameter was drilled in the center of the street-pipe, and the connection made, and the hole in the street from the pipe to the cellar wall filled up; that the hole was drilled after 1 o'clock. There was other evidence tending to show that notices were left at all the houses on the side of the street where the Garfield was situated. It was admitted that the plaintiff was in the exercise of due care, and was rightfully using the elevator. No claim was made or evidence offered by plaintiff tending to show that, up to the time of the accident, the elevator was not in proper running order. No evidence was offered that any part of the elevator, or its ropes, machinery, or appliances, were broken, disconnected, or injured by the alleged fall; but there was the testimony of one Ellis that the day after the accident he examined the shut-off valve in the cellar pipe, (between the street-main and the valves which controlled the flow of water into the cylinders,) and found the shut-off valve did not close on account of a board behind the valve, which would prevent it from being closed.

At the close of the plaintiff's evidence the defendant requested the court to rule that there was no evidence of negligence on the part of the defendant, and no evidence to justify the jury in finding a verdict for the plaintiff; but the court refused so to rule unless defendant would rest his case. The defendant refused, and testified, among other things, that he had no notice of the shutting off of the water, and did not know and had no notice as to when the work of making the connection was to be done. One Brewer, the builder of the elevator, testified that he examined the elevator after the accident, and found the machinery, valves, and connections in perfect running order, and nothing broken or injured. Brewer and three other witnesses, called by defendant as experts, testified that they had been engaged for many years in manufacturing, putting up, and running hydraulic elevators, similar in construction to the one in question; that all appliances for safety in general use on such elevators were used in connection with this one, and were in good order; that they had examined the elevator, its machinery and connections; and found everything in good working order; that there was no appliance in use, or known to them, to prevent air from getting into the cylinders when the street-pipe was opened, except such as were on this machine; that if the valve referred to had been closed before the water was shut off in the street, and opened after it was let on, it would not have affected

the running of the elevator afterwards, as the pipe between it and the cylinders would have remained full of water all the time, whether the shut-off pipe was closed or opened, owing to the fact that the pipes in the cellar were lower than the pipe connecting with the street-main.

The defendant, among other things, asked the court to rule that if the defendant employed a skilled and competent man to construct and equip the elevator, and it was constructed and equipped in a proper manner, with all known appliances for safety, and was in good running order and condition at the time, and he had no knowledge, at the time, that the water was to be cut off, and the accident happened by reason of the escape of air into the cylinder from the opening in the street-pipe, he was not liable therefor. The court refused to give the instruction requested, the jury found for the plaintiff, and the defendant alleged exceptions.

*N. Morse and H. G. Allen*, for plaintiff.

*W. Gaston and D. C. Linscott*, for defendant.

GARDNER, J. The defendant offered evidence tending to show that, immediately after the accident, the builder of the elevator examined its machinery, valves, and connections, and found them in perfect order, and nothing broken or injured, that he had examined the shut-off valve in the cellar, from time to time, and had always found it in perfect order. The defendant called certain experts, who testified, in substance, that all appliances for safety in general use were connected with this elevator, and were in good working order; that there were no appliances known to them to prevent air from getting into cylinders when the street-pipe was opened, except such as were attached to this machine; that the closing of the shut-off valve in the cellar would have no effect on the running of the elevator, as the pipe between it and the cylinders would remain full of water all the time, whether closed or open, owing to the fact that the cellar pipe was lower than the street-main; and that they did not consider there was any danger to hydraulic elevators from opening the street-mains. Among other prayers for instructions, the defendant requested the court to instruct the jury that "if the elevator had all known safety appliances, and defendant had no knowledge or reasonable cause to believe that there was any danger from air coming from the street-pipe, and an accident happened therefrom, he would not be liable, even if he had knowledge that the water was being shut off." The court refused so to instruct the jury.

The defendant had introduced evidence tending to show that the fall of the elevator was not attributable to any negligence on the part of the defendant, and that he was not responsible therefor, for the reasons assigned in his prayer for instructions. Although this prayer was defective in the form in which it was presented, it sufficiently informed the court of the law upon which he relied for defense. The attention of the jury should have been called to this claim of the defendant, and the law given them governing the case upon this evidence. If the accident happened from the shutting off the water from the street main, and if there

was nothing to put a man of reasonable intelligence and information on the watch, to guard against the water being shut off, and if he did not know, and by the exercise of reasonable care on his part could not ascertain, that there was danger to the elevator by shutting off the water, then the defendant ought not to be held liable for the accident.

The general principles of law as to negligence were properly stated to the jury; but we think that the defendant was entitled to more specific instructions than those actually given. *Hunt v. Lowell Gas-light Co.*, 1 Allen, 343; *Shaw v. Boston & W. R. R.*, 8 Gray, 45.

We have not considered the other exceptions raised, as upon a new trial they may become unimportant. Exceptions sustained.

(102 N. Y. 665)

SALOMON v. STERNFELD and others.

(*Court of Appeals of New York*. April 13, 1886.)

1. TROVER AND CONVERSION—WHAT CONSTITUTES CONVERSION.

Where defendant acquired possession of money, and deposited it to the credit of a surety, knowing, at the time, that the surety's right thereto had ceased, and that the money belonged to plaintiff, and refuses to pay it over to plaintiff on demand, such acts constitute a conversion of the money.

2. TRUST—TERMINATION OF TRUST.

The purpose for which a trust was created having ceased, the trust itself ceases, and the property reverts to the creator of the trust.

3. JUDGMENT—FORM—ITEMS INCLUDED.

A judgment for a certain sum of money, being "the balance of cash on hand" and certain specified bills, includes such items only.

Appeal by defendants from a judgment of general term of New York common pleas, affirming judgment for \$1,429 in favor of plaintiff upon verdict of jury.

This was an action brought to recover \$879.89, with interest from June 10, 1876, being the proceeds of certain leather consigned by plaintiff to one Alexander, in Germany, a few days before making an assignment for the benefit of his creditors. Defendants, who were among the principal creditors, claimed the shipment to be fraudulent, and induced plaintiff to believe that they had secured control of the leather by some legal process. Plaintiff compromised with his creditors by giving his notes indorsed by one David Moral, to whom he transferred all his property as security for his indorsement. These notes were all paid by plaintiff. Moral failed to account for the property in his hands, and plaintiff obtained a judgment against him for the amount. The leather was, by direction of defendants, sold by one Schroeder, and the proceeds deposited, without the knowledge or consent of plaintiff, with one Balin, a banker in Paris, to the credit of Moral. Defendants knew at the time that Moral was not entitled to the money, as his liability on plaintiff's notes had ceased. Plaintiff duly demanded this money or the leather from defendants, which was refused. Any right which Alexander or any other party in Germany had to the leather or the money had been assigned to plaintiff, before demand, with defendants' knowledge. The court below rendered judgment for plaintiff for the full amount claimed, from which defendants appealed.

*M. L. Townsend*, for appellant, Rudolph G. Salomon.

*A. Dyett*, for respondents, Adolph Sternfeld and others.

FINCH, J. The evidence made it possible for the jury to conclude that the defendants obtained control of the leather shipped to Hamburg by a process which began in deception, and ended in an infringement of the rights of the true owner. While in form the property was delivered to Schroeder, to be sold for the benefit of David Moral, who, at the time, was entitled to the proceeds,—and this was done with the consent of plaintiff,—in fact Schroeder was but the agent of defendants, selling the property under their direction, accounting to them, and in the end paying the proceeds over upon their order. Before that occurred the rights of David Moral were gone. He took merely as surety to guard against his own liability. The plaintiff had compromised with his creditors, giving his notes indorsed by David Moral, and further secured by the mortgage of the latter upon real estate; and for his security all the assets were turned over to him, by the assent of assignor and assignee and of the creditors. When the compromise notes were all paid out of the assets so transferred, and the liability of David Moral was extinguished, he ceased to have any interest in or ownership of the assets remaining, and Schroeder held for the plaintiff, who was the true owner. When defendants drew their draft for these proceeds, and obtained them, their duty was to pay them over to plaintiff. They perfectly understood the situation. They drew upon Schroeder in the fall of 1876, or the first half of the next year. In the July preceding, judgment went against David Moral, demonstrating that, after all his liability as surety was extinguished, he had left of the pledged property about \$4,000, and judgment went against him for that amount.

We must assume that the Hamburg shipment was not included in that accounting and embraced in the judgments, for two reasons. At that time the property had not been sold, and the referee's report shows that Moral was charged with "balance of cash on hand," and certain specified bills receivable, collected and uncollected, and these items alone make up the judgment. No evidence to the contrary was given, and that might easily have been done if the Hamburg shipment had in any manner been included in the accounting. The judgment in that action was brought to the knowledge of the defendants by the formal service of a copy upon them. In addition, there was then pending against them an action by the plaintiff for the conversion of the leather, which involved a direct assertion of his title, and a denial of David Moral's, and which failed in the end, because, when commenced, the defendants had not caused it to be sold, or meddled with its proceeds. When, therefore, they drew from Schroeder, through their assumed agency for David Moral, the proceeds of the leather, and deposited them to his credit with their French bankers, they took money which no longer belonged to Moral, but did belong to plaintiff, and paid it over to the credit of one not the owner, with full knowledge of the termination of the surety's right, and the restoration of the plaintiff's. Their interference was

needless, except as they stood bound for the safety of the fund in the hands of Schroeder, whose fidelity they had guaranteed, but their guaranty was to Moral alone, and for his protection. When the latter ceased to have an interest in or right to that fund, and the defendants were fully informed of plaintiff's title, their interference had no justification. Apparently, they chose to champion David Moral's lost right, and invade the plaintiff's. They procured the latter's consent to the transfer to Schroeder, and his direction to the consignee to make such delivery, if not by the false assertion that they had attached the leather, at least by encouraging plaintiff's belief, in some manner acquired, that such was the fact. Practically, Schroeder's custody was their custody, for he did nothing without their consent, and everything upon their demand. While David Moral's right lasted, and they acted for him and with his assent, they could defend upon his title; but when that disappeared, and they knew it, no shadow of an excuse remained for their interference. Their taking and deposit of the money amounted to a conversion.

Other points raised have been examined, but do not convince us that the judgment rendered was erroneous. .

The judgment should be affirmed, with costs.

(All concur, except RAPALLO, J., absent.)

(102 N. Y. 305)

### CORN EXCH. BANK v. BLYE.<sup>1</sup>

(*Court of Appeals of New York. April 27, 1886.*)

#### 1. REPLEVIN — UNDERTAKING GIVEN BY DEFENDANT AFTER JUDGMENT, AND CHATELS RECLAIMED PENDING APPEAL.

Plaintiff sued to recover certain bonds, giving a proper undertaking to the sheriff, and recovered judgment, November 5, 1885, notice of which was served on defendant, November 7th. Defendant served an undertaking to reclaim the bonds, with notice of justification, November 9th. Plaintiff moved to set it aside, and obtained a stay of proceedings. Pending the motion to set aside the undertaking an appeal was taken from the judgment by defendant. The motion was denied on the ground that plaintiff had not secured the right to enforce the judgment, and therefore could not cut off defendant's right, under section 1704. Code Civil Proc. *Held* no error.

#### 2. SAME—CONDITION OF UNDERTAKING—WHEN FIXED.

The condition of the undertaking does not become fixed and determined until the final determination of the action, and this cannot be until the appeal is disposed of.

#### 3. SAME—STAY—FAILURE OF SURETIES TO JUSTIFY.

Where defendant's sureties failed to justify because of a stay of the proceedings granted in an order to show cause why the undertaking should not be set aside, the stay becomes vacated when the motion is denied, and the defect in justifying may then be corrected.

Appeal from an order of the general term of the supreme court, First department, affirming an order of special term, denying plaintiff's motion to set aside an undertaking, and notice of justification of the sureties therein named, in an action for the recovery of chattels.

*L. A. Gould*, for appellant, Corn Exch. Bank.

<sup>1</sup>See 37 Hun, 473.

*Elihu Root*, for respondent, Alphonso W. Blye.

**PER CURIAM.** The plaintiff brought an action to recover certain bonds of the defendant, and caused to be executed and delivered to the sheriff a proper undertaking and requisition to take possession of the same pending the action. On November 5, 1885, the cause came on for trial, and a verdict was directed in favor of plaintiff, and a judgment entered thereon, which judgment, together with a notice of entry, was duly served upon defendant, November 7, 1885. The defendant served an undertaking to reclaim the bonds, with notice of justification, on November 9, 1885, two days after entry of judgment. Plaintiff moved to set aside the defendant's undertaking, and obtained a stay of proceedings. Pending the motion to set aside the undertaking, and before the hearing thereon, an appeal from the judgment was taken by the defendant. The motion, when heard by the special term, was denied, and, according to the opinion of the general term, it was disposed of upon the ground that the plaintiff had not secured the right to enforce the judgment obtained, and could not, therefore, cut off the defendant's rights initiated by the proceedings under section 1704 of the Code of Civil Procedure.

The appellant claims that there is no right in the defendant to reclaim chattels after a trial of the action upon the merits, and the entry of a judgment against defendant, which adjudges the delivery and possession of the chattels to the plaintiff; and it relies upon certain provisions of the Code relating to the subject, viz., sections 1694, 1703, 1704, 1717. The answer to this position is that the condition of the undertaking did not become fixed and determined until the final determination of the action, and this could not be until the appeal had been disposed of. The defendant only became bound to deliver the chattels recovered when the plaintiff had a right to enforce a judgment in its favor. This right did not exist so long as the appeal was pending. Upon the judgment being finally affirmed upon appeal, the contingency would happen upon which the liability of the sureties would be fixed and determined, and a delivery of the chattels would be finally adjudged. In the mean time the proceedings had for justification of the sureties, before judgment was entered, could be completed afterwards, and before judgment was obtained, upon which the final liability of the sureties depended. The failure of the sureties to justify, and the allowance of the undertaking, was caused by the stay of proceedings granted on the order to show cause why the undertaking should not be set aside, and the defendant was thus prevented from perfecting the undertaking. The stay mentioned became vacated when the motion was denied. If the defendant's undertaking, the perfecting of which had been stayed, was defective and insufficient, ample provision is made for amending it, which amendments may be allowed by the court in furtherance of justice. It is not now necessary to determine how this should be done, as it is for the supreme court to regulate its own practice.

There is no sufficient reason for setting the undertaking aside, upon the motion, because it is not in conformity with the provisions of the

Code. Such objection would properly arise upon the application for the allowance of the undertaking; and if, at that time, the objections were deemed valid by the judge, it could be amended. The opinion of the general term mainly covers all the questions raised.

The order should be affirmed.

(All concur, except ANDREWS, J., not voting.)

(117 Ill. 88)

TUCKER v. PEOPLE.

(*Supreme Court of Illinois. May 15, 1886.*)

1. BIGAMY—EVIDENCE—MARRIAGE—REGISTER OF MARRIAGE IN SISTER STATE—INADMISSIBLE UNLESS KEPT PURSUANT TO STATUTE.

A register of a marriage, kept in a sister state, by a clerk of a court of record, or a certified copy thereof, is inadmissible to prove a marriage unless it appears that such register is kept pursuant to a statute.

2. SAME—GENERAL ADMISSION INSUFFICIENT—TIME AND PLACE OF ADMITTED FACT, ESSENTIAL.

A general admission by a defendant on trial for bigamy that he "had married A. B." is not evidence of the time and place of such marriage, and, in the absence of evidence to sustain the allegations of time and place alleged in the indictment, will not be sufficient to sustain a conviction.

Error to Kankakee.

PER CURIAM. This was an indictment for bigamy, upon which the defendant was convicted and sentenced to two years' imprisonment in the penitentiary, and to pay a fine of \$500. The indictment charged that the defendant, on the fifteenth day of April, 1872, in Cook county, Illinois, married one Mary I. Bennett, who then became his lawful wife; that afterwards, on the nineteenth day of September, 1883, at St. Paul, in the county of Ramsey, in the state of Minnesota, he unlawfully married one Mary E. Markham, while the defendant was yet the lawful husband of the said Mary I. Bennett, never having been divorced from her, and she being then living; and that afterwards the defendant did unlawfully cohabit with the said Mary E. Markham in the county of Kankakee, in this state. The charge makes the offense under our statute.

Proof was made of the previous marriage to Mary I. Bennett in this state. Objection is made that there was not competent proof of the marriage to Mary E. Markham, in Minnesota; or that such marriage was by the law of Minnesota unlawful. To prove the alleged marriage in Minnesota there was introduced in evidence a certificate, under the hand and seal of the clerk of the district court of the Second judicial district of the state of Minnesota, that there was in such office a certain record of marriage license and certificate whereof the marriage license and certificate is in the words and figures following, to-wit, (showing a marriage license, and certificate of a clergyman that on the nineteenth day of September, 1883, at St. Paul, in the state of Minnesota, he joined in marriage the defendant and Mary E. Markham.) There was the accompanying certificate of the judge that the attestation of the clerk was in due form. There was no evidence whatever of any law or usage of Min-

nesota upon the subject. We have a statute making the register of marriages in this state evidence of a marriage. It not only does not appear that there is any such statute in Minnesota, but it does not appear that by the law of Minnesota there is any provision for the keeping of a register of marriages. It is laid down in 1 Greenl. Ev. § 484, that registers of births and marriages made pursuant to the statutes of any of the United States are competent evidence. It is because of their being made by public authority, and under the sanction of official duty, that they, and exemplified copies of them, are received in evidence. It does not here appear that the registry in question was made by any such authority or sanction; it appearing merely that there were in the clerk's office such a marriage license and certificate of marriage, copies of which were given.<sup>1</sup> We are inclined to hold there was error in admitting the certificate of the register in evidence.

It is contended that the second marriage was otherwise proved by the admission of the defendant. His admission, as testified to, was, he said he had married Mary E. Markham. This was not evidence of the place of the marriage,—that it was in Minnesota, as charged in the indictment, and which charge, we think, made it necessary to prove that the second marriage was in Minnesota. There is a further count in the indictment alleging the second marriage to have been in this state; but the admission equally fails to prove this allegation.

For the error indicated the judgment will be reversed, and the cause remanded.

(117 Ill. 145)

**DEVINE v. HARKNESS and others.**

*(Supreme Court of Illinois. May 15, 1886.)*

1. **GUARDIAN AND WARD—GUARDIAN'S SALE—AGREEMENT BY PURCHASER WITH OTHERS TO PREVENT BIDS VITIATES SALE.**

An agreement by a person intending to purchase at a guardian's sale, with another party intending to bid at such sale, to convey the lands purchased to such bidder at a slight advance in price if such intending bidder will abstain from bidding, vitiates the sale, and is ground for setting it aside.<sup>1</sup>

2. **SAME—PAYMENT OF INCUMBRANCES BY PURCHASER—APPLICATION OF PURCHASE MONEY—WRONGFUL PURCHASER HAS NO SUBROGATION.**

Where the purchaser at such a sale pays part of the amount of his bid by paying off certain incumbrances on the land, such payment is a mere application of the purchase money of the land; and where the original purchase is wrongful, such payment will not entitle the wrongful purchaser to subrogation to the rights of the incumbrancers as against the *cestuis*.

3. **SAME—PURCHASER LIABLE FOR USE AND OCCUPATION.**

The wrongful purchaser, who has obtained possession under such a sale, is liable to pay a reasonable sum for use and occupation.

Appeal from De Kalb.

SHELDON, J. This was a bill in chancery filed by the appellees, the widow and minor children and heirs of John B. Harkness, deceased, to set aside a guardian's sale of the real estate belonging to said children. The court below decreed in favor of the complainants, and the defendant

<sup>1</sup> See note at end of case.



appealed. It appears that John B. Harkness died March 18, 1878, intestate, seized of the premises in question, an improved farm of 210 acres in De Kalb county. The widow was appointed guardian of the children, and was also administratrix of the estate of her husband. During the fall of 1879, Mrs. Harkness was endeavoring to get a purchaser for the farm, and met the appellant, Devine, when an arrangement was made that the farm should be sold at public auction as soon as an order of court could be obtained for the purpose; that Devine would bid at the sale \$35 per acre for the land, and in the mean time should go into possession of the premises. In pursuance of this arrangement, Devine, in October, 1879, took possession, and did from 80 to 100 acres of fall plowing, with the understanding that if he did not secure the land he was to be paid for the plowing at the rate of one dollar per acre. On February 2, 1880, the guardian filed, in the county court of De Kalb county, her petition for the sale of the land. It was subject to a mortgage for \$5,000, bearing 10 per cent. interest, and to a judgment for \$262.40. On February 12, 1880, the county court granted an order of sale, authorizing the sale at not less than \$35 per acre, and out of the proceeds providing for paying off said mortgage and judgment, and the dower right of the widow. The guardian's sale was had under the order, March 10, 1880. Devine bid at the sale \$35 per acre, and 54 cents per acre in addition, for interest from January 1, 1880, and the land was sold to him for that price. The widow made to him a quitclaim deed of her interest, and he received a guardian's deed, and paid off the mortgage and judgment. This bill to set aside the sale was filed April 20, 1880. The ground alleged for setting aside the sale is that one Varty was present at the sale, intending to bid for the land, and Devine made an agreement with Varty to the effect that, if the latter would refrain from bidding, he (Devine) would get the land at the bid he had agreed to make, and would then convey the same to Varty for \$37.50 per acre, and that, in pursuance of said arrangement, Varty refrained from bidding, when but for the arrangement he would have bid as high as \$40 per acre in order to get the land.

No question is made upon the legal effect of such an agreement as affording sufficient ground for setting aside the sale, but it is denied that there was such an agreement made, and it is insisted the decree is not sustained by the evidence. There is a direct conflict in the testimony of Varty and Devine upon the subject. Varty testifies that some time before the sale, about two months, he had a conversation with Devine; that he told Devine he would like to buy the place; that Devine said he had paid out considerable money looking up the title, and if he (Varty) or any one else bought the place at the sale, he would lose what he had paid out, but said he did not need the place, but that Mrs. Harkness wanted him to make a bid on it, and that, if Varty would let him have it, he would let Varty have the place by paying what trouble and expense he had been to; that he (Varty) was present at the sale; that he came to bid on the place if he could not make the arrangement with Devine previously talked of. He says:

"On the day of the sale I saw Devine, and asked him, if he got the place on his bid of \$35 per acre, what he would let me have the place for. He asked what I would give. I told him \$37.50 per acre, and he said I should have it for that. I also told him that, if I could not make arrangements with him as to what I was to have it for, I should bid at the sale. This was prior to fixing the price at which I was to have the place. \* \* \* I intended to bid at the sale, and had made up my mind to bid as high as \$40 per acre."

All this is contradicted by Devine, as respects the transaction with him. There was some corroborative evidence as to Varty, which we need not particularly advert to. There appears a preponderance of evidence in favor of the alleged agreement, and we cannot say that the decree, in the respect of setting aside the sale, is not sustained by the evidence.

Exceptions are taken to the account as stated by the master. It is claimed there was error in allowing appellant only 6 per cent. interest on the amount of the mortgage indebtedness he paid off, the mortgage debt bearing 10 per cent. interest; that having paid the mortgage on the land, bearing 10 per cent. interest, he should be subrogated to the rights of the holder of the mortgage; that the setting aside of the sale leaves appellant in the position of a purchaser of the mortgage debt and security. Paying the mortgage debt to the mortgagee was no more than paying the amount of it to the guardian, and was but paying appellant's bid for the land. The payment was one made in wrong, in the carrying out of a wrongful purchase, and is no case for the application of the equitable doctrine of subrogation.

The master allowed against the appellant \$3.25 per acre as the yearly rental value of the land for six years. In this we think there was error. Upon the evidence appearing in this record we are of opinion that at the utmost three dollars per acre should have been the extent of the allowance for rent. For this error the decree will be reversed in respect of the amount adjudged to be paid to the appellant, but in all other respects affirmed, and the cause will be remanded for further proceedings not inconsistent with this opinion.

#### NOTE.

An unlawful combination by purchasers at a judicial sale (in this instance a tax sale) not to bid against each other, so as to prevent competition, invalidates the sale. *Crumb v. Davis*, (Iowa,) 6 N. W. Rep. 53.

Any agreement which has for its object the diminution of competition at a public sale of property, for the purpose of procuring the same at a price below its value, is void. *Greenh. Pub. Pol.* 183; citing *Brisbane v. Adams*, 3 N. Y. 129; *Corrothers v. Harris*, 23 W. Va. 177; *Cain v. Cox*, Id. 594.

It is said in *Gardiner v. Morse*, 25 Me. 140, that to allow bidders at a public judicial sale to buy off each other, which is but a species of bribery, and so to combine as to prevent a fair competition as that a sale may be rendered iniquitously fruitless, cannot be tolerated. See *Durfee v. Moran*, 57 Mo. 374; *Wooton v. Hinkle*, 20 Mo. 290; *Hook v. Turner*, 22 Mo. 333.

Such combinations on the part of bidders being conspiracies to defraud the vendor of his right to have a free, unrestrained competition, any sale procured through their influence is void. *Greenh. Pub. Pol.* 187; citing *Abbey v. Dewey*, 25 Pa. 413; *Hamilton v. Hamilton*, 2 Rich. Eq. 355; *Durfee v. Moran*, 57 Mo. 374; *Grant v. Lloyd*, 12 Smedes & M. 191; *Newman v. Meek*, 1 Freem. Ch. (Miss.) 441; *Jackson v. Ludeling*, 21 Wall. 616; *Jones v. Caswell*, 3 Johns. Cas. 29; *Benedict v. Gilman*, 4 Paige, 58;

Brown v. Lynch, 1 Paige, 147; Easton v. Mawkinney, 37 Iowa, 601; Martin v. Evans, 2 Rich. Eq. 368; Weld v. Lancaster, 56 Me. 453; Fleming v. Hutchinson, 36 Iowa, 619; Underwood v. McVeigh, 23 Gratt. 409.

(118 Ill. 41)

CHICAGO, R. I. & P. RY. CO. v. LONDERGAN, by his Next Friend.

(Supreme Court of Illinois. May 15, 1886.)

**1. MASTER AND SERVANT—MACHINERY—ABSOLUTE SAFETY NOT REQUIRED—RISKS OF BUSINESS ASSUMED BY EMPLOYEE.**

An employee who engages in the service of a railway company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility from accidents resulting from its use. If the machinery be of an ordinary character, and in sound repair, and such as can with reasonable care be used without danger to the employee, this is all that is required.<sup>1</sup>

**2. SAME—INSTRUCTION AS TO MASTER'S DUTY AND LIABILITY FOR DEFAULT MISLEADING UNLESS EVIDENCE SHOWS DEFAULT.**

An instruction stating the rule of a master's duty to provide safe machinery, and his liability for default in the performance of such duty, is misleading unless the evidence tends to show that the master has not performed his duty. A failure to block the joints of a switch with a new blocking which is still an experimental device is not a failure justifying such an instruction.

**3. TRIAL—INSTRUCTION—"ACTS COMPLAINED OF IN THIS CASE"—PERMANENT INJURY FROM.**

An instruction to the jury that the plaintiff might recover damages for any permanent injury sustained by him if they found from the evidence that the plaintiff has sustained permanent injury "from the acts complained of in this case," criticised as telling the jury that the acts complained of, viz., a failure to block the joints of a switch, were wrongful.

MULKEY, C. J., SHOPS and MACRUDER, JJ., dissent.

Appeal from appellate court, Second district.

CRAIG, J. This was an action on the case, brought by Thomas Londergan against the Chicago, Rock Island & Pacific Railway Company, to recover for an injury received on the eighteenth day of December, 1883, resulting in the loss of an arm. The declaration contains but one count, in which it is averred that the defendant owned and operated a railroad from Chicago to Rock Island, through the village of Bureau Junction, and also a branch from Bureau Junction to Peoria; that on the eighteenth day of December, 1883, plaintiff was in the employ of the defendant as a brakeman on freight trains, and at way stations, such as Bureau Junction, to assist in switching, coupling, and uncoupling cars; and that while so employed it was the duty of the defendant, to enable engines and cars at said Bureau Junction to pass from one track to another, to provide a safe turn-out, and properly block the joints thereof, so as to enable plaintiff, and others employed in like service, to perform the same with reasonable safety. Yet the defendant, not regarding, etc., did not use proper care and skill in constructing its turn-out at said Bureau Junction from its main line to said branch railroad, and neglected to properly block the joints thereof; and the plaintiff avers that,

<sup>1</sup>See note at end of case.

at the date above mentioned, at said Bureau Junction, while the plaintiff was engaged in coupling or uncoupling cars, and was using due care and caution, and without notice of the defective manner in which said turn-out had been constructed, and the dangerous way in which the joints had been left, and of which the defendant had due notice, the foot of the plaintiff became fastened in the joint of said turn-out, when a car of the defendant then in motion threw him upon the track of the railroad, and the wheels of a car of the defendant passed over his left arm, crushing the same so that it had to be amputated, and the plaintiff was thereby greatly hurt, bruised, and became lame and disordered, and so remained hitherto, during all which he suffered great pain, etc.

It will be observed that the only negligence upon which the plaintiff bases his right of recovery against the railroad company is that the switch at Bureau Junction in which plaintiff's foot was caught, was unblocked. It will only be necessary to look at the evidence introduced on the trial for the purpose of determining whether the instructions given for the plaintiff presented the law to the jury which should govern the case as made by the testimony. The evidence introduced in regard to the use of locks in switches is not voluminous. The first witness called upon this question was the general agent of the Chicago, Burlington & Quincy Railroad at Peoria. He testified that the frogs and parts of tracks where one track diverges from another are nearly all blocked in the company's yard in Peoria. Blocks have been in a year or a year and a half. The same is the case in the Burlington road in Galesburg and Burlington. Many of the guards and frogs of the Peoria & Pekin Union are blocked in Peoria. The witness stated that he had been at Peoria three years, and no one had been injured in a switch either before or after the blocks were put in. On cross-examination the witness testified that the Burlington road has 4,000 miles of road, and he did not know whether the blocks add to the safety of the men operating the road or not. Also, Brewer, a switchman in Peoria & Pekin Union, testified that with few exceptions that company in Peoria has its switches blocked. They are put in to keep any one from being caught. There is danger when they are not blocked, if a man would get his foot caught, and the cars were moving towards him. By having blocks put in it would be pretty hard for a man to get his foot below the ball of the rail. He also states that the only other road he ever saw use blocks was the Burlington. That was a different block. His acquaintance with blocking is limited to Peoria and Galesburg. T. B. Burnett, superintendent of the Peoria & Pekin Union Railroad, testified that he was using Holt's patent block. There are other appliances. He has tried filling in between the rails with cinders. That is used in the Wabash. Something of that kind is used on many different roads, not universally. The blocking is to keep men from catching their feet between the rails. There is no absolute safety. It is more safe than without them. The necessity for something for a foot-guard is known and recognized. As to the practice of using blocks, could not say. It is not universal; not half the roads use them. The Hart patent block was first recommended to witness by the defendant.

The defendant owns this patent, and uses it on its road. James Redman testified that the tracks of the defendant were blocked in Peoria. S. L. Cunningham, yard-master for the Burlington road, testified that the Burlington road used oak blocks, sawed to fit the rail or switch. The idea was to keep the men from getting their feet in the frogs. The Peoria & Pekin Union use blocks, but of a different kind. On cross-examination he stated the blocks were an experiment, and are yet. The witness also shows that no blocking was used by the defendant at Bureau Junction.

The foregoing is the substance of the evidence introduced in regard to blocking frogs and switches, and upon the evidence thus presented the court gave, for the plaintiff, an instruction as follows:

"You are instructed by the court, on the part of the plaintiff, that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turn-outs, and other appliances required for the reasonable safety of its employes; and if it fails to do so, and in consequence of such failure on its part an injury happened to one of its employes or servants when in the line of his employment as such servant, and while in the exercise of due and reasonable care and caution, then in such case the railroad company would be liable for the injury or injuries thus received."

As an abstract proposition of law it is not claimed that this instruction is incorrect, but it is contended that, under the pleadings and evidence in this case, that the instruction was improper, and that it could do no less than mislead the jury. The running of trains on a railroad is a dangerous service, and the employes of a railroad company, engaged in that service, are subject to many hazards which are not incident to other departments of labor. An employe who engages in the service of a railroad company in the running of its trains is presumed to do so with a knowledge of the dangers incident to such service, and he assumes the risks of its ordinary hazards. An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation in order to save himself from responsibility from accidents resulting from its use. If the machinery be of an ordinary character, and such as can with reasonable care be used without danger to the employe, it is all that can be required from the employer. *Payne v. Reese*, 100 Pa. St. 306. It is also a well-settled proposition in this and in the courts of other states that a railroad company is not bound to furnish absolutely safe machinery for its employes. The law imposes upon the company the obligation to use reasonable and ordinary care and diligence in providing suitable and safe machinery, tracks and switches, engines, etc., for the use of those engaged in its service. The machinery and other devices furnished the employe in operating the road are not required to be the best or of the most improved kind, or or to be absolutely safe. It is sufficient if the same are reasonably safe. *Camp Point Manuf'g Co. v. Ballou*, 71 Ill. 418; *Simons v. Chicago & T. R. Co.*, 110 Ill. 340. The rule on this subject is stated in *Lake Shore & M. S. Ry. Co. v. McCormick*, 74 Ind. 445, as follows:

"The master's obligation is not to supply the servant *with absolutely safe machinery, or with any particular kind of machinery*; but his obligation is

to use ordinary and reasonable care not to subject the servant to extraordinary and unreasonable danger. When a master employs a servant to do a particular kind of work, with a particular kind of implements and machinery, the master does not agree that *the implements and machinery are free from danger in their use, but he agrees that such implements and machinery, to be used by such servant, are sound, and fit for the purpose intended*, so far as ordinary care and prudence can discover; \* \* \* and the servant agrees that he will use such implements with care and prudence. If, under such circumstances, harm or injury come to the servant, it must be ranked among the accidents, the risk of which the servant must be deemed to have assumed when he entered into such service. \* \* \* *Neither companies nor individuals are bound, as between themselves and their servants, to discard and throw away their implements or machinery, upon the discovery of every new invention which may be thought or claimed to be better than those they have in use;* but if they take ordinary care and exercise ordinary prudence to keep their implements or machinery in sound repair, so that harm does not result to the servant for want of such sound condition of the implements or machinery used, then such individuals or companies will not be responsible to servants for any injury which may occur to them in the use of such implements and machinery."

See, also, *McGinnis v. Canada Southern Bridge Co.*, 49 Mich. 466; S. C. 13 N. W. Rep. 819; *Smith v. St. Louis, K. C. & N. Ry. Co.*, 69 Mo. 32.

Keeping in view the principles of a law above announced, which should control the responsibility of employer to employe, and the relation existing between them, it is quite apparent that the instruction complained of was calculated to mislead the jury in their deliberations upon the evidence. It will be observed that the only negligence charged in the declaration is that the defendant, in constructing its turn-out or switch, had failed to block the joints thereof, and the purpose of the evidence introduced by the plaintiff, in reference to the use of blocks, was to prove this averment of the declaration. When, therefore, the court instructed the jury, for the plaintiff, that the law requires a railroad company to use reasonable and ordinary care and diligence in providing and maintaining reasonably safe structures, tracks, side tracks, switches, turn-outs, etc., and if it fails to do so, and an injury happen in consequence thereof to an employe in the exercise of due and reasonable care, then the railroad company would be liable, the jury must have understood from the instruction that the railroad company was absolutely required to use blocks in its switches and turn-outs. There was no other negligence charged in the declaration to which this instruction could refer. Had it been proven that an unblocked switch or turn-out was unsuitable or unsafe, or that defendant had not used proper care and skill in constructing its turn-out or switch at Bureau Junction, a different question might be presented; but such was not the case. It is apparent from the evidence that unblocked switches have been in use on the various railroads all over the country for years, and it is a fair inference from the evidence that the blocking of switches is yet but an experiment. The invention is yet in its infancy. At all events the utmost that can be claimed for the new appliance is that where blocks are used it may be safer for the employe than where the switch is constructed according

to the old plan. Conceding this to be true, as we have seen from the authorities cited, the failure to use the new device does not render the company liable. It must appear, before the defendant can be held liable, that the switch or turn-out, as constructed and used, was not reasonably safe, or that it was not constructed with the usual care and skill. An employer is not required to change his machinery in order to apply or adopt any *new invention*. Whart. Neg. 213. The fact that a few of the railroads of the country have adopted the new device, or that the defendant has used it on a part of its road, is not enough to establish its utility, and establish negligence in every other road that adheres to the old system. The old system of constructing switches must be condemned; it must appear that unblocked switches are unfit for the purpose for which they are constructed. It is not enough to prove that in the opinion of witnesses, that blocked switches are safer for the employe, as the law does not require the employer to furnish absolutely safe machinery, or the most approved pattern; he is only required to furnish that which is shown to be reasonably safe and proper for the purpose for which it is constructed. Under the facts as established by the evidence, we think the instruction was calculated to mislead the jury.

The second instruction given was also calculated to mislead. By it the jury was told plaintiff might recover damages for any permanent injury sustained by him if they found from the evidence that the plaintiff has sustained permanent injury from the acts complained of in this case. What acts were complained of? Only the omission to block the joints of the turn-out; and, clearly, it was not the province of the court to tell the jury that omission was a wrongful act. If the jury understood the instruction that way, as they might well do, it was obviously prejudicial to defendant, and the giving of it was error.

The judgment of the appellate and circuit courts will be reversed, and the cause remanded.

MULKEY, C. J., SHOPE and MAGRUDER, JJ. We do not concur in the opinion in this case.

#### NOTE.

Respecting the risks assumed by a servant upon entering the services of his employer, see *Copper v. Louisville, E. & St. L. R. Co.*, (Ind.) 2 N. E. Rep. 749, and note, 752-758; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, (Ind.) 5 N. E. Rep. 187, and note, 197; and *Sweeney v. Berlin & Jones Envelope Co.*, (N. Y.) Id. 358.

Respecting the duty of the master to provide reasonably suitable and safe machinery and appliances, and to keep them in repair, see *McGee v. Boston Cordage Co.*, (Mass.) 1 N. E. Rep. 745, and note; *Stringham v. Stewart*, (N. Y.) 3 N. E. Rep. 575, and note, 578, 579; *Marsh v. Chickering*, (N. Y.) 5 N. E. Rep. 56, and note, 58, 59; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, (Ind.) Id. 187, and note, 197; *Sweeney v. Berlin & Jones Envelope Co.*, (N. Y.) Id. 358; and *Benzing v. Steinway*, (N. Y.) Id. 449, and note, 451.

#### HARLAND v. EASTMAN.

(*Supreme Court of Illinois*. May 15, 1886.)

#### 1. EJECTMENT—POSSESSION UNDER CLAIM OF TITLE—PRIMA FACIE PROOF OF TITLE.

Proof of possession of land under claim of ownership is *prima facie* proof of a fee-simple title in the occupant so claiming to be owner. The plaintiff's evidence in this case is held to make such a *prima facie* case.

2. EJECTMENT—DEMAND OF POSSESSION UNNECESSARY IN ABSENCE OF PRIVITY.

A notice to quit, or a demand of possession, which is the same thing so far as it applies to the action of ejectment, is never required where there is a want of privity between the parties. Where parties claim under independent hostile titles, notice to quit, or demand of possession, has no application.

8. TAXATION—TAX TITLE—REDEMPTION—NOTICE AND AFFIDAVIT FOR—CHANGE OF STATUTE—PENDING CASES GOVERNED BY NEW LAW.

The amendment of 1879 to section 218 of the revenue act, (1 Starr & C. St. c. 120, par. 218,) requiring notice of redemption to be given to *owners or parties interested* in the land sold for taxes, to redeem the same, applied to pending cases of tax sales. A redemption notice of a previous tax sale, the notice being made after the amendment to the statute took effect, must comply with such amendatory act, and the affidavit, under section 217, must recite facts showing such compliance.

4. HUSBAND AND WIFE—DEED BY MARRIED WOMAN—RECITAL, "FORMERLY WIFE OF A. B."—DEED SUFFICIENT PRIMA FACIE.

A deed signed by Adaline B. Pate, mentioning her as "having formerly been wife of R. C. Pate," is *prima facie* sufficient without joinder of husband. Burden is on opponent to show that husband was living, but a deed by her, duly acknowledged, is sufficient to pass her title without joinder of husband, though living.

Appeal from superior court, Cook county.

MULKEY, C. J. On the third day of January, 1882, Henry B. Eastman commenced an action of ejectment in the superior court of Cook county against Charles K. Harland, to recover lot 45, block 47, School Section addition to Chicago. The defendant filed the plea of "not guilty," and also a special plea, verified by affidavit, alleging that no demand for possession of the premises was made by plaintiff "at or before the beginning of the suit." There was a trial upon the merits, resulting in a judgment for the plaintiff, which, on appeal, was reversed by this court at its September term, 1883. See *Harland v. Eastman*, 107 Ill. 535. The cause, on being remanded, was tried again, resulting in a second judgment for plaintiff, to reverse which the present appeal is brought. The judgment below is assailed on a number of grounds. It is contended, in the first place, that the evidence relied on by plaintiff to show title in himself is insufficient. We think otherwise. The evidence clearly shows he was in possession of the lot, claiming it as owner, as far back as 1855, and so continued until the time of his death, in 1873; that his widow, Mary B. Adams, who died in 1881, lived on the premises several years after his death. The proof of these facts, in the absence of anything to the contrary, was sufficient to show title in Adams' heirs, from whom plaintiff deduces title through a succession of regular conveyances.

The doctrine is well recognized that proof of possession of land, under claim of ownership, is *prima facie* evidence of a fee-simple title in the occupant so claiming to be owner. *Barger v. Hobbs*, 67 Ill. 592; *De Witt v. Bradbury*, 94 Ill. 446; *Keith v. Keith*, 104 Ill. 397. It is objected, however, that under the special plea the plaintiff was bound to prove a demand for possession before suit. This position is not tenable. Under the facts disclosed by the record, no such demand was necessary. A notice to quit, or demand for possession, which in law, so far as this action is concerned, means the same thing, is never required where there



is a want of privity between the parties to the suit with respect to the premises sought to be recovered. In other words, where the parties respectively claim under independent hostile titles, the notice to quit, or demand of possession, has no application. *Gregg v. Von Phul*, 1 Wall. 274; *Herrell v. Sizeland*, 81 Ill. 457; *Prentice v. Wilson*, 14 Ill. 93; *Dean v. Comstock*, 32 Ill. 173; *Adams, Ejectm.* (4th Amer. Ed.) top page 140 *et seq.* Here the plaintiff, as we have just seen, claims through conveyances from the heirs of Abraham B. Adams, while the defendant seeks to show an outstanding paramount title in Mary F. C. Bluhm, derived through a sale of the premises for taxes. There was also a feeble attempt to show an outstanding title in the heirs at law of Mary B. Adams, but the evidence offered for that purpose is so manifestly insufficient that it does not admit of serious discussion.

With respect to the tax title of Mrs. Bluhm, two objections are urged against it: (1) That the tax judgment relied on is for a greater amount than was due on the lot; (2) that the affidavit relied on to show a compliance with the provisions of section 216 of the revenue act is insufficient. If either of these objections is well founded, it follows, as a matter of course, the tax deed is invalid.

In the view we take of the last objection, it is unnecessary to consider the first. By the plain, unambiguous provisions of the statute, every purchaser of real estate at a tax sale, or his assignee, before he is entitled to a deed, is bound to show strict compliance with the requirements of the above-mentioned section. For this purpose he is required, by section 217, to make and deliver to the officer authorized to execute a deed for the property purchased an affidavit setting forth specifically the facts relied on as a compliance with the requirements of said section 217. The provisions of these sections, which are in part but a repetition of the constitution on the same subject, have uniformly been construed to be mandatory, and their strict observance by the purchaser at a tax sale, or his assignee, to be a condition precedent to the execution of the tax deed. *Chappell v. Spire*, 106 Ill. 472; *Smith v. Hutchinson*, 108 Ill. 662. That such is the proper construction of the statute is not seriously controverted. It is also, in effect, conceded that the affidavit relied on does not show a compliance with the provisions of section 216, as amended by the act of 1879; but it is claimed by appellant that the affidavit does show a compliance with the provisions of that section as it existed before the amendment.

It is also further contended that, as the tax judgment was rendered and sale made in 1878, the sufficiency of the affidavits, notice, and other proceedings is to be determined by the law as it existed before the amendment, although the giving of the notice and making of the affidavit occurred after the amendatory act of 1879 took effect. Section 216, as amended, requires the notice to be given by the purchaser to be served, not only upon the occupant and the party in whose name the property was taxed, as required by that section before amended, but *also upon the owners or parties interested therein*; and if, upon diligent inquiry, they cannot be found, and are unknown, and have no tenant in the actual pos

session and occupancy, then public notice is to be given, as in said section provided, to "the *unknown owner or parties interested.*" The affidavits in this case do not show any attempt to comply with this additional requirement of the amended section; but, as already stated, the contention is that this case is to be governed by the law as it stood before the amendment, and an attempt has been made to show that the affidavit, notice, etc., conform to the requirements of that law. Without stopping to inquire whether counsel has been successful in this attempt, the question is directly presented whether the tax proceeding now under consideration, in so far as any steps became necessary to be taken after the amendatory act of 1879 went into effect, is to be governed by the old or the new law? If by the latter, the tax title relied on is confessedly bad, and it would therefore be a useless task to inquire whether the old law has been complied with or not.

It is claimed by appellant that *Garrick v. Chamberlain*, 97 Ill. 620, is a direct authority in support of the view that the old law is to govern. In that case the tax judgment was obtained before the present constitution was adopted, but by reason of an appeal from the judgment to this court the sale was not made till afterwards. The judgment was for city taxes, and upon its affirmance by this court the city collector proceeded to sell under the law as it existed at the time the judgment was suspended by the appeal. To the tax title thus acquired it was objected that the sale, being made by the city collector after the new constitution went into effect, was violative of that provision of it which requires all sales of land for delinquent taxes or assessments to be made by some general officer of the county having the authority to receive state and county taxes. Article 9, § 4, Const. But it was held that provision of the constitution did not apply to cases where the judgment was obtained before the adoption of the constitution.

The decision in the case is rested upon the express ground that the first section of the schedule to the constitution continued in force the old law as to pending tax proceedings, where judgments had already been obtained before the constitution was adopted. The analogy between that and the present case entirely fails, in this: that there is no special provision of law taking the present case out of the operation of the amendatory act of 1879. But, on the contrary, in order to secure uniformity in tax proceedings, and to remove all doubt as to what law should be applied in cases like this, it is expressly provided by section 223 of the revenue act that "the foregoing six sections shall apply to all sales of real estate for taxes *heretofore made*, as well as to all sales for taxes and special assessments hereafter to be made." The six sections here mentioned, it will be observed, include sections 216 and 217. This, of course, is conclusive of the question, and it follows the tax proceeding under consideration is invalid.

There are other fatal objections to it, which we will not stop to consider.

The point is also made that the court erred in admitting in evidence the deed from Adaline B. Pate, one of the heirs of Abram B. Adams, to

appellee. When offered in evidence, it was objected to "as incompetent, and because not joined in by her husband." We fail to discover any evidence tending to show that Mrs. Pate had a husband at the time of the execution of this deed, unless it can be said the mere objection, unsupported by proof, affords such evidence. The only evidence we discover on the question is a recital in the deed, wherein she is described as "*having formerly been wife of R. C. Pate.*" The implication is very clear that she was not his wife at the time of making the deed. But, outside of this, we think the deed was properly admitted in evidence. Assuming Mrs. Pate had a living husband, the fee of the land was in her, and the deed was duly acknowledged before an officer authorized to take such acknowledgments. This was sufficient to pass her title, whether the husband joined in the deed or not. *Bute v. Kneale*, 109 Ill. 652.

The judgment will be affirmed.

(117 Ill. 640)

#### BRANT v. GALLUP and others.

(*Supreme Court of Illinois.* May 15, 1886.)

#### APPEAL—REHEARING—TIME FOR NOTICE AND FILING PETITION—RULE OF COURT.

Under the rules of the supreme court (of last resort) an applicant for a rehearing must give notice within 15 days after the filing of the decision, and file his petition within 30 days after the filing of such decision. The facts in this case—viz., that one rehearing had already been granted at the prayer of the opposite party, on which the judgment, favorable to the present applicant, was reconsidered and modified, and that applicant and his counsel did not learn, until after the expiration of the time, that the rules of this court would admit of a further petition for rehearing—are not sufficient to justify the entertainment of the petition after time.

Appeal from First district. Petition for rehearing.

PER CURIAM. In this case an opinion was filed, and judgment rendered reversing the judgment of the appellate court. At the September term, 1884, on motion of the appellees, a rehearing was granted. On the twenty-second day of January, 1885, an opinion was filed, receding from the conclusion reached in the former opinion, and affirming the judgment of the appellate court, and judgment was then entered accordingly. The March term, 1885, of the court passed without any further step in the cause having been taken. At the September term, 1885, the appellant, Brant, moved the court for leave to file his petition for a rehearing of the case. The rule of the court upon the subject is that a party desiring a rehearing shall, within 15 days after the opinion is filed, give notice to the opposite party of his intention to file a petition for a rehearing, and shall, within 30 days after the filing of the opinion, file the petition for rehearing. Upon the rehearing granted on the application of the appellees, there having been rendered a decision adverse to appellant, he would have been entitled to file his petition for a rehearing upon compliance with the rule of court in that regard; each party being allowed to petition for a rehearing where the decision is against him, but the same party not being allowed a second petition for a rehearing; but there

was not here a compliance with the rule. In excuse therefor, the affidavits of appellant and his attorney are presented to the effect that, immediately after the filing of the last opinion, appellant applied to his attorney, and urged that whatever was possible should be at once done to secure a reconsideration of the case, and was then advised by his attorney that nothing further could be done in the case, and that the last opinion was a finality; that appellant believed as he was thus advised, and did not learn, until a considerable time after the 30 days prescribed by the rule had elapsed, and not until after the adjournment of the court at its March term, that a petition for rehearing could have been filed in his behalf to secure the reconsideration of the last opinion.

Reference is made to *Chicago Planing-mill Co. v. Merchants' Nat. Bank*, 97 Ill. 299, as in favor of the motion. It appears there that a rehearing was granted, without any petition therefor having been filed in compliance with the rule. But that was a case where, by inadvertence, the judgment of this court was made to affirm the *judgment* of the court below, when it was intended to affirm only an *order* of that court allowing an amendment to the sheriff's return to the summons, and to *reverse* the judgment of the court below. At a subsequent term, upon having our attention called to the mistake, we, of our own motion, ordered a rehearing of the cause. That was quite a different case from this. There is here nothing of mistake, or anything of that kind, or any new matter presented by the petition for rehearing asked to be filed, but only matter already considered by this court upon the former arguments in the cause. In *Blatchford v. Newberry*, 100 Ill. 484, it was said:

"We do not undertake to say that in no case will this court, of its own motion, set aside a judgment at the second term after the same is rendered, or grant a rehearing. \* \* \* When the case has been twice heard and considered, and the same result reached at both hearings, and a judgment has been rendered. \* \* \* public policy and the stability of legal proceedings demand that such judgment should not, after one entire term has intervened, be disturbed for no other cause than that some of the judges may have changed their views of the law."

Though this was said in reference to another sort of case, where a party who had already been granted a rehearing moved the court to grant another hearing of its own motion, we think it may be pertinently repeated here, upon this application for a rehearing not under the rule of the court. It is important there should be a period when litigation shall come to an end, when the judgment of the ultimate tribunal may be reposed upon as final and secure from disturbance.

We are of opinion that, upon the case presented, there should not be granted leave to file the petition for a rehearing, and the motion must be denied.

(118 Ill. 9)

PYNCHON, for Use, etc., v. DAY and others.\*

*(Supreme Court of Illinois. May 15, 1886.)*

## 1. TRIAL—PRODUCTION OF DOCUMENTS—SEALING UP IRRELEVANT PORTIONS—AFFIDAVIT OF DEFENDANT AS TO RELEVANCY, SUFFICIENT.

Under section 9 of the evidence act on the production of documents, (1 Starr & C. St. c. 51, § 9,) it is proper practice for the court to give the defendant leave to seal up and conceal all such parts of them as, according to his affidavit, do not *relate to the matters in question*. An order in this case confining the production of documents to "entries of all matters and transactions *between* plaintiff and defendants" is approved.

## 2. SAME—PRODUCTION BY VERIFIED COPY SUFFICIENT.

In this case it appeared to the court that all entries of the defendant's books, pertinent and proper to be examined by the plaintiff were to be found on five named pages, and that the entries of said transactions were so intermingled upon each page with entries of transactions between the defendant and persons other than the plaintiff; and it was ordered that the defendant be permitted to present in court, for the plaintiff's use, in lieu of the originals, a *verbatim* copy of all entries of transactions *between* the plaintiff and defendant, verified by his affidavit, and compared by the clerk of the court.

Appeal from appellate court, First district.

*Thos. J. Sutherland*, for appellants.

SHELDON, J. This is an appeal from a judgment of affirmance, by the appellate court of the First district, of a judgment of the superior court of Cook county, in favor of the defendants in an action of *assumpsit*, brought by Pynchon against Day and another, for the recovery of moneys placed in the hands of the latter by the former as margins or security in the purchase and sale of stocks and bonds by the defendants, as the agents and brokers of the plaintiff. Two certain rulings of the superior court on motions made by the plaintiff, prior to the trial, for the production and examination of books, are assigned for error.

The first motion, supported by affidavit, was for an order on the defendants to produce before the court, for the examination and inspection of the plaintiff and his attorney, and that they be allowed to inspect the same, the books of account kept by defendants during their dealings with the plaintiff, showing all their dealings in stocks and bonds during that period, and the names of the different persons for whom defendants during that period bought and sold stocks and bonds of the kind claimed to have been bought and sold for plaintiff, the amount and kind thereof, and the persons from and to whom they were bought and sold. The court denied the motion; but of its own motion made an order that it appearing to the court that all the accounts relating to transactions between the plaintiff and defendants were embraced in a journal and ledger of defendants, it was ordered that those books be produced in court, and placed in the possession of the clerk of the court; and, it further appearing that all of the ledger entries pertinent and proper to be examined by the plaintiff were to be found upon five named pages, it was ordered that the examination and inspection by the plaintiff be restricted to those pages, and that the defendants be at liberty to seal up the remaining portions of the

\* A petition for rehearing is pending in this case.

ledger; and, it appearing that the journal entries of said transactions were so intermingled upon each page with entries of transactions between the defendants and persons other than the plaintiff, so that an inspection of those pages would necessarily expose such outside transactions, it was ordered that the defendants be permitted to present in court, for the use of the plaintiff, and in lieu of inspection of original entries, a *verbatim* copy of all the journal entries of all matters and transactions between plaintiff and defendants, showing pages where entered; the copy to be verified by the affidavit of the defendants, or one of them, and to be further verified by certificate of the clerk of the court, upon actual examination and comparison with the original entries, provided the plaintiff or his attorney should so request. A subsequent motion was made by the plaintiff for an order on the defendants to produce before the court, for the like examination and inspection of plaintiff and his attorney, and that they be allowed to inspect the same, all books of account kept by the defendants containing all accounts of the purchases and sales of stocks like those claimed to have been bought and sold by the defendants, which they made through their agents, Lapsley, Field & Co., in New York, and during the period of defendants' dealings with the plaintiff; also all of the accounts of defendants with said firm of Lapsley, Field & Co. This motion the court refused to grant; but of its own motion did order as follows: That the account-book containing the account of the defendants with Lapsley, Field & Co. having been produced in court, and it appearing by affidavit, and by an inspection of said account, that it contains items and entries relating to transactions between the defendants and parties other than the plaintiff, and in nowise connected with the transactions between plaintiff and defendants, it was ordered that the defendants, under the direction of the clerk of the court, be at liberty to seal or cover the names of such parties other than the plaintiff, as they appear in said account, and that thereupon the plaintiff or his attorney have full liberty to inspect said entire account, except the names so sealed or covered, and to take copies thereof.

The provision of our statute is:

"The several courts shall have power, in any action pending before them, upon motion and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings in their possession or power which contain evidence pertinent to the issue."

There was here full liberty given for the examination and inspection of all accounts pertaining to transactions between plaintiff and the defendants; the refusal only being to allow the examination and inspection of the accounts which appellees kept with their other customers. Certainly, ordinarily the accounts with other persons would be entirely immaterial, and would not contain evidence pertinent to the issue; but in this special case appellant's counsel contends that it would be otherwise, and that appellant's stock dealings with other persons would be material and contain evidence pertinent to the issue. An affidavit was submitted to the effect that if appellees' books were properly kept, it could

be verified or disproved by them whether the statements in the personal account of plaintiff were true or not; that, in order thereto, it would be necessary to inspect appellees' accounts with all their customers during the period of appellees' dealing with appellant; and that certain necessary facts should be shown by the books, among them being the total amounts of stocks like those bought and sold for appellant which appellees, on each day during the time of such dealing, bought and sold, with names of persons from and to whom the same were bought and sold, and the numbers and amounts of the several certificates for such stock. It was made to appear that the stocks in question, as is the usage with stock-brokers in Chicago, were bought and sold by appellees through their agents in New York, on the New York exchange; that the books of appellees do not, and the books of stock-brokers in Chicago, as customarily kept, would not, show some of the said facts said to be needful for testing the accuracy of appellant's personal account; and that they can only be shown by the books of the New York correspondent. It seems, therefore, that in this case the inspection of appellees' accounts with other persons would not serve the purpose of determining as to the correctness of appellant's account; and that for the court to have gone further than it did in its ruling, and to the extent asked by appellant, would have been but a needless exposure of appellees' transactions with their other customers.

The court's action was in conformity with the authorized practice in respect of the production of books generally. In Greenl. Ev. § 301, it is laid down:

"And where books are to be produced, the defendant will have leave to seal up and conceal all such parts of them as, according to his affidavit previously made and filed, do not relate to the matters in question."

In *Dias v. Merle*, 2 Paige, 494, the court say:

"While the course of judicial investigation frequently requires a party to produce parts of his books in which the adverse party has an interest, for the inspection of the latter, it may frequently be of great importance to the former that his accounts and transactions with other persons should not be exposed to the examination of strangers, and particularly of an enraged adversary. Where his books are subjected to inspection, it is the uniform practice of the court to permit a party to seal up those parts which do not relate to the subject of litigation."

In *Gerard v. Penswick*, 1 Swans. 533, an agent had books of account which contained some accounts relating to his agency, and others relating to his own private business, and the order was that the defendant should leave the books with his clerk in court, sealing up those parts which did not concern the plaintiff, and pledging himself by oath that he had sealed up those parts only.

We cannot say that there was anything erroneous in the court's mode of exercise of its power in respect to the production of books for examination and inspection.

Upon the plaintiff resting his case, the court, on motion of the defendants' attorneys, instructed the jury to find a verdict for the defendants,

which the jury did. This is assigned for error. The evidence for the plaintiff was that of the witness Day, one of the defendants, called for the plaintiff, who testified to the amount received from the plaintiff as \$19,166.99. He was followed by the plaintiff, called on his own behalf, who testified that of the money he had paid to defendants he had received from them \$9,011.01; that what they owed him, the difference between the amount paid them and the amount received, was \$10,390.98. On cross-examination he stated that he had advanced to the defendants on stock transactions \$19,000 and something; that he had got back \$9,011.01, so that his losses were \$10,398; that defendants had rendered him statements of the purchase and sale of stocks as they were severally made, and monthly statements of account each month; that when the account was finally closed there was a balance shown to be due plaintiff by defendants' books somewhere about \$2,511.01; that defendants gave him the two checks shown him, for the payment of \$2,511.01, dated respectively October 1, 1881, and October 5, 1881, to balance the account, they claiming it was all they owed him; that the account of defendants was not before him at the time. As thus appears, the plaintiff stated that the difference between what he had advanced to the defendants and what he had received back, was his losses; that he received a statement of every purchase and sale as it was made, and a monthly statement of account each month; that at the close of the dealing he received a check as the payment to him of the balance of the account. With all this, as not being correct, no complaint or sign of dissatisfaction ever appeared or does now appear, the plaintiff himself testifying; nor is there the intimation of any mistake or incorrectness. Surely, under such circumstances, the acceptance of the check as the payment of the balance due upon the account must be taken as an adjustment of it. There was not evidence tending to show a cause of action. To have rendered a verdict for the plaintiff for any amount would have been mere guess-work. There would have been no evidence to base it upon. Any verdict for the plaintiff must have been, on motion, instantly set aside by the court, without hesitation.

Some other points have been made by appellant's counsel, which we have considered, but regard as without merit.

Finding no error in the record, the judgment of the appellate court must be affirmed.

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(117 Ill. 568)

WISNER and others v. CHAMBERLIN.

(*Supreme Court of Illinois*. May 15, 1886.)

1. MORTGAGE—FORECLOSURE—FORFEITURE—DECLARING WHOLE DEBT DUE FOR DEFAULT ON PART—UNEARNED INTEREST ON PURCHASE MONEY RECOVERABLE.

In a foreclosure of a mortgage under a power to declare the whole debt due for a default on part, however the rule may be as to unearned interest, yet where the mortgage is for purchase money, and several notes are given, one representing the cash price, and the others representing 10 per cent. interest thereon, such smaller notes will be treated as for part of the purchase money,



and as representing the advance in price by reason of the credit extended, and they may be forfeited and declared due, although their date of payment has not arrived.

**2. SAME—NOTES FOR INCREASED CREDIT—PRICE FORFEITABLE, THOUGH PRINCIPAL BE NOT.**

So, where the note representing the cash price is made payable on the purchasing in of an outstanding title, but the other notes, representing the increased credit price or interest on the purchase money, are payable absolutely, the latter may be forfeited, and foreclosure had thereon, although the condition precedent to the payment of the principal be not performed.

**3. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—PAYMENT OF TAXES AND COLOR OF TITLE BOTH ESSENTIAL—ACT INAPPLICABLE TO EXEMPT LAND.**

Under section 6 of the limitations act, (2 Starr & C. St. c. 88, § 6,) seven years' possession under color of title, accompanied with payment of taxes, is necessary to bar other titles. Where land is exempted from taxation, the statute has no application, and a title cannot be acquired under it.

**4. TAXATION—REDEMPTION, NOTICE, AND AFFIDAVIT, CONDITIONS PRECEDENT.**

The notice and affidavit by a purchaser for taxes desiring a deed, required by sections 216 and 217 of the revenue act (2 Starr & C. St. c. 120, pars. 218, 219,) must be made in accordance with the statute, as conditions precedent to the right to a deed.

**5. SAME—TAX DEED—NOTICE FOR REDEMPTION—INACCURACY IN, AS TO EXPIRATION OF TIME, FATAL.**

An inaccuracy in the notice by a purchaser that he intends to apply for a deed, and warning owners to redeem, as to the time when the period for redemption will expire, is fatal, although it be to extend the time beyond the statutory period.

**6. SAME—TAX DEED—REDEMPTION—AFFIDAVIT OF NOTICE—INACCURACY IN, FATAL.**

The affidavit, by a purchaser for taxes, of his having given due notice for redemption, must show delivery of notice to the persons in possession. An affidavit that A. B. was in possession on April 19th, and that a notice was served on A. B. on May 20th, is insufficient. The possession may have changed in the interim.

SCOTT, J., dissents.

Error to Cook.

SHELDON, J. The opening paragraph of the brief of counsel for plaintiffs in error is as follows: "As no questions were raised in the trial but such as called for a decision on the sufficiency of the foreclosure of the Embree mortgage, and of the tax title, it will not be necessary to discuss any other, excepting, perhaps, *laches* and possessory titles." The inquiry before us, then, is quite limited, and hardly even reaches to the extent of the sufficiency of the foreclosure of the Embree mortgage, as that matter was before us on a former occasion, in the case of *Gibbons v. Hoag*, 95 Ill. 45, where we passed upon the question of the validity of the sale and deed made by Joseph W. Wiltberger to Egbert W. Wiltberger under the power of sale in the mortgage from Jesse Embree, and of the deed from Egbert W. to Joseph W., and decided that they were valid, and made the better title as between a subsequent purchaser from Joseph W. Wiltberger in 1863, and one under Embree in 1869. That was a like proceeding as the present, under the burnt records act, for the establishment of title in the petitioner there, who claimed under Wiltberger. We are entirely satisfied with the conclusion reached in that case, and think it must be held decisive upon this point, unless

there are different facts shown in this record which should vary the decision. We do not understand counsel as claiming otherwise, but it is insisted there are additional facts presented in this case, which should cause a different determination. Such additional facts are a stipulation in this case that the \$2,400 notes secured by the Embree mortgage were given for the interest upon the principal sum of \$48,000, which was represented by the \$48,000 note secured by said Embree mortgage. It is said it was assumed in the former case that the 18 \$2,400 notes were principal notes, and that the foreclosure was only for those of the \$2,400 notes then due, whereas it was for the \$48,000 note as well; that, as it now appears the smaller notes were for interest only, no interest could be declared due unless it was then earned; that the \$48,000 note could not be made due until the title of the minors to one-fourth of the land had been secured to Embree; and that so a want of power under the mortgage to make the sale, that was made, is apparent.

The mortgage described all the notes alike, saying nothing of the \$2,400 notes being for interest. The deed from Wiltberger to Embree showed a consideration of \$94,550. It would seem that third parties purchasing under the Wiltberger title might well rely upon the representations made in these instruments, as against Embree and those claiming under him, and have the right to regard the \$2,400 notes as principal notes. However it might be with strictly interest notes, that no interest could be declared due unless it was then earned, we do not regard these smaller notes as being for interest properly, but as really installments of purchase money for property bought on a credit. The property, as would appear from all the facts in evidence, was bought November 18, 1858, on a credit of \$48,000, payable January 1, 1868, and two payments of \$2,400 each on January 1 of each intervening year. The smaller notes represented the difference between a cash sale for \$48,000, and a credit sale on the time given, calculating the difference on the basis of 10 per cent. interest on the \$48,000; and calling the latter principal, and the smaller notes interest, did not alter the essential character of the transaction. All the notes represented purchase money for land sold on a credit, and on default in payment, for the time specified, of any of the smaller notes, we think, under the mortgage, all the smaller notes might be declared to be due. The lot in question is situated in the N.  $\frac{1}{2}$  of N.  $\frac{1}{2}$  of N. W.  $\frac{1}{4}$  of section 15, and at the mortgagee's sale that 40 acres was first sold for \$16,000. There were 18 of the \$2,400 notes; and if there was right, as we find, to declare them all due, their aggregate amount was sufficient to authorize the sale, not only of the 40, but of the whole 120, acres. There was no necessity, then, to declare the \$48,000 note due, or that it should be due, to warrant the sale.

Reference is made to Jones, Mortg. § 1178, in support of the proposition that, when the principal of a mortgage debt cannot be declared due for non-payment of interest, there can be no foreclosure for such non-payment. That rule surely cannot apply in such a case as this, where the so-called principal note is given, with other notes, in consideration

of land conveyed, and may not be declared due because of its being made condition of its payment that an outstanding title to one-fourth of the land shall first be gotten in for the benefit of the mortgagor; a title to the other three-fourths being conveyed, and the other notes not being subject to such condition, but payable absolutely, and there being an express covenant of the mortgagor that the other notes may all be declared due upon default of payment of any one of them for a certain time after becoming due.

It is insisted that the possession of the north 134 feet of the property in question by the South Park commissioners, from 1870 to 1872, under the deed thereof from Rees, makes good title in the park commissioners under the seven-years limitation law. It is seven years' possession under color of title, accompanied with the payment of taxes, which bars title under the limitation act. There was here no payment of taxes on the land during the seven years; but being park property, and as such exempt from taxation, it is claimed that such exemption is equivalent to payment of taxes. We do not so think. If the land was exempt from taxation, and so there were no taxes to pay, then this limitation act could not be made to apply here. Seven years' possession under color of title, without payment of taxes, will not bring a case within the act.

Wisner's tax-title claim was under a quitclaim deed from P. E. Stanley, the holder of a tax deed made to him as assignee of two tax-sale certificates under two tax sales; one for the seventh installment of the South Park assessment, made September 3, 1879, of the east one-half of lot 8, for \$25.49, to the South Park commissioners; and the other for the state and county taxes of 1878 of "ex parkway, E.  $\frac{1}{2}$  lot 8," for \$25.16, September 8, 1879, to D. G. Hamilton. It is sufficient for the defeat of the claim of title under the last-named sale, for state and county taxes, that the notice of the sale required to be served upon the persons in possession of the property sold, did not truly state when the time of redemption would expire. The time of redemption would expire September 8, 1879. The notice stated that it would expire on October 18, 1879. It was held in *Wilson v. McKenna*, 52 Ill. 43, and *Gage v. Bailey*, 100 Ill. 530, that the misstatement, in the notice, of the expiration of the time of redemption, would render invalid the tax deed. Section 216 of the revenue law makes it a condition that, before the purchaser at a tax sale shall receive a deed, he shall serve, or cause to be served, a written notice on every person in possession of the land or lot sold, three months before the expiration of the time of redemption, in which notice he shall state, among other things, when he purchased the land or lot, and when the time of redemption will expire; and there is the further provision that the purchaser must, before he shall be entitled to a deed, make an affidavit of having complied with such condition, stating particularly the facts relied on as showing such compliance; the affidavit to be delivered to the person authorized by law to make the deed, to be filed and entered of record in the proper office. These requirements were held, in the case first above cited, to be conditions precedent to the right to have a deed.

In answer to the cases cited it is said that in both the cases the date given as the expiration of the time for redemption was earlier than that allowed by the statute, and it is supposed that must have been the reason for the holding; but that in the present case the date named as the expiration of the time of redemption was later than that fixed by the statute, giving the owner the full statutory time, and over a month more, for redemption, so that no one was injured or misled. It is insisted that this distinction between the cases calls for a contrary decision here. We do not regard it as matter for inquiry whether or not there has been the misleading or injuring of any one from wrongly stating in the notice when the time of redemption will expire. The title to be made under a tax deed is one *stricti juris*, and we need look no further, where there has been non-compliance with what the law makes a condition precedent to the right to have a tax deed. We find there was such a non-compliance here, in not stating in the notice the right time of the expiration of the right of redemption, and that that of itself avoids the tax deed. We attach no importance to the distinction in the wrong date of the expiration of the time of redemption, as being earlier or later than that allowed by the statute.

As to the tax deed under the sale for the seventh installment of the South Park assessment, we deem it a sufficient objection to the validity of that deed that the affidavit of service of notice of the purchase for taxes, etc., fails of showing compliance with the prerequisite condition of service of the notice upon the person or persons in the actual possession or occupancy of the lot at the time of such service. The affidavit in this respect is that the lot described in the notice was, on the nineteenth day of April, 1881, in the actual possession of the South Park commissioners, and that a copy of the notice was delivered to the South Park commissioners, May 20, 1881. The affidavit does not state who was in possession on the last-named day. Since the nineteenth of April, preceding, the possession may have changed, and the affidavit should have shown service of the notice upon the person or persons in actual possession at the time the notice was served. It is not sufficient, as is urged, that other evidence in the case shows the park commissioners were in possession at that time. The statute is express, that the purchaser or his assignee, by himself or agent, shall make an affidavit of having complied with the provisions of the section, stating particularly the facts relied on as showing such compliance before he shall be entitled to a deed. Such affidavit was not made, and the purchaser had no right to a deed. We cannot go so far, to sustain a tax title, as to dispense with a condition precedent to it.

We find no foundation in the facts of the case for any imputation of laches to the defendant in error which should affect her title to relief. The decree of the circuit court should be affirmed.

SCOTT, J. I do not concur in this opinion.

(116 Ill. 643)

## GORMLEY and another v. UTHE.

*(Supreme Court of Illinois. May 15, 1886.)*

## PUBLIC LANDS—SWAMP LANDS—GRANT OF UNSOLD LANDS TO STATE—PRIOR ENTRY OF BOUNTY WARRANT PREVAILS.

As between a title founded on a patent of the state of Illinois, resting on the grant, by the United States government to the state, of all *unsold* swamp lands, (September 28, 1850.) and a prior location of a United States bounty warrant on those same lands, followed by a United States patent subsequent to the date of the swamp-land grant, the title based on the bounty warrant will prevail. "Unsold" will not, in such case, be technically construed to apply to everything not sold for money.

## Error to First district.

MULKEY, C. J. Gertrude Uthe, the defendant in error, recovered a judgment in the circuit court of Cook county against Michael Gormley and Morton Culver, plaintiffs in error, for \$7,039. A *remittitur* of \$39 was subsequently entered, reducing the judgment to \$7,000, which was affirmed on error by the appellate court for the First district. The action below was *assumpsit*; the plaintiff counting upon 11 promissory notes given by the defendants to the plaintiff for a certain quarter section of land near Chicago, which the plaintiff conveyed to them with the usual covenants of warranty. To the declaration, which was in the usual form, the defendants pleaded (1) *non assumpsit*; (2) total failure of consideration; (3) set-off. Issues of fact were joined on these pleas, and tried before the court and a jury, with the result stated. The lower courts, to reach the conclusion they did, must have found that the defendant made the notes as charged in the declaration; that there was no failure of the consideration for which they were given, and also that the plaintiff was not indebted to the defendants by way of set-off. So far, therefore, as the case depends upon these findings of the lower courts, plaintiffs in error clearly can have no relief here. The controlling question in the trial court was whether the title to the land in question was in the defendant at the time of her conveyance to plaintiffs in error.

The plaintiff, on the trial, made out a *prima facie* case by putting in evidence the 11 notes sued on, and thereupon rested. The defendants then proved the notes were given to secure the purchase money for the quarter section of land in question, and that contemporaneously with their execution, and as part of the same transaction, the plaintiff conveyed the land to the defendants by general warranty deed. It was further shown that said land is swamp land, and was so, on the twenty-eighth of September, 1850, when the act of congress granting the *unsold* swamp and overflowed lands to the state was passed. The act itself was also put in evidence, together with an *exemplified* copy of the patent from the United States for the land, issued on the tenth of February, 1851, to Christopher F. Uthe, the father of the plaintiff, and through whom she derives title. The defendants then rested. Upon this showing, grant to the state being anterior to the issuing of the patent, the title to the land appeared to be in the state. To meet the *prima facie* defense thus

made the plaintiff then proved, by an exemplified copy of so much of the records of the land-office as relates to the location of military bounty land-warrant No. 37,714, that the same was on the tenth day of July, 1850, duly located by the said Christopher F. Uthe on said quarter section of land, in pursuance of which the patent of the tenth of February, 1851, was issued to him, as above shown.

This being all the evidence, the court on the trial refused to instruct the jury, at the instance of the defendants, that if they found the facts as above set forth the law was with the defendants, and that they should find accordingly. The ruling of the court in this respect presents the only question necessary to be considered. As the grant by congress extends to all swamp and overflowed lands in the state remaining "*unsold*" at the time of the passage of the act, it is contended by plaintiffs in error that, notwithstanding the location of the warrant by Uthe upon the land, the title thereto nevertheless passed to the state under the grant, and that, therefore, Uthe took nothing by his patent. This contention is founded upon the technical doctrine that, where land or other property is bargained and disposed of for a consideration other than *money*, the transaction, in contemplation of law, is not a *sale*, but a mere barter or exchange. This we concede to be the general doctrine on the subject. But it does not necessarily follow that in construing the word "*sale*" or "*sold*" where it occurs in a statute, that it may not be used in a different sense, or have a more extended meaning. In giving a construction to words in a statute many things are to be kept in view, such as the object or purposes of the act, the connection in which they are used and the consequences that will probably result from the proposed construction. Influenced by these considerations, the same word may mean one thing in one statute, and a different thing in another. In one enactment the ordinary meaning of a word may be enlarged; in another, contracted. In the present case we do not think the word "*sold*," occurring in the first section of the act in question, is used in its strictly technical sense, as claimed; but in a more extended sense of the term, so as to exclude from the operation of the grant all lands which the United States had by any valid agreement already disposed of at the time the act took effect, whether technically a sale or not. The location of the warrant was authorized by law, and, when made, was a valid act, mutually binding upon the government as well as the party making it. It is unreasonable to suppose, therefore, that congress, in making the grant of swamp lands to the state, could have intended, even conceding it had the power to do so, to defeat and abrogate by mere legislative enactment all entries of land by military bounty warrants for which patents had not been issued at the time of the passage of the act. But if counsel for plaintiffs in error is correct in his reasoning, it is not readily perceived how the issuing of a patent would have helped the matter; for the mere issuing of the patent could not have changed the character of the consideration paid for the land, and, according to the technical common-law rule there can be no sale in any case where the consideration is anything other than money.

The case of *State, etc., v. McFarland*, 110 U. S. 471, S. C. 4 Sup. Ct. Rep. 210, cited by counsel, we do not regard as in conflict with the view here taken. The court in that case construed the word "sale," as it occurred in the statute then under consideration, according to its strict technical signification, and we fully concur in the conclusion reached. The context and presumed intention of congress, under all the circumstances, we think demanded that construction. That case, so far from being in conflict with the view here taken, well illustrates what we have said in this.

It is also objected that the court erred in admitting in evidence the exemplified copy of the land-office record showing the location of the land-warrant in question. There is no force in this objection. 1 Greenl. Ev. § 485.

It follows from what we have said the defense in the case was not made out, and the judgment will therefore be affirmed.

(117 Ill. 549)

#### HEINSEN v. LAMB.

(*Supreme Court of Illinois. May 15, 1886.*)

1. EXCEPTIONS—BILL OF EXCEPTIONS—AMENDMENT BY TRIAL COURT DURING TERM, WITHOUT NOTICE, PROPER—AFTER TERM, NOTICE AND ORDER NECESSARY.

When a bill of exceptions is executed and filed during term, the trial judge may amend it, during such term of his court, to conform to the facts, without notice; but after the expiration of the term he loses all power to change it on his own motion, or on mere suggestion. Amendments to the bill may still be made at a subsequent term, but only on notice, motion, and order in open court.

2. EVIDENCE—BURNT RECORD ACT—ABSTRACT MADE BEFORE FIRE, IN COURSE OF BUSINESS, HELD EVIDENCE OF TITLE.

The present case is held to be a proper one, under section 24 of the burnt record act of April 9, 1872, (2 Starr & C. St. c. 116, par. 29,) for the admission of an abstract made in course of business prior to the destruction of the records; and the abstract offered in this case is held to be such an abstract.

3. SAME—ABSTRACT IN EVIDENCE—METHOD OF MAKING ABSTRACT—ABSTRACT MADE FROM MINUTES TAKEN FROM RECORD HELD AN ORIGINAL AND NOT A COPY.

An abstract made by the clerks of a firm engaged in the business of making abstracts from minutes taken from the records themselves, and signed by the firm, all in the course of the business of making an abstract, is held an original abstract, and not a copy.

4. SAME—ABSTRACT DEFINED.

An abstract of title is a summary or epitome of facts relied on as evidence of title. It must contain notes of all conveyances, transfers, or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair it.

5. SAME—ABSTRACT OFFERED IN EVIDENCE IN PART—OPPONENT MAY INTRODUCE REMAINDER.

Where a party, relying on an abstract of title as evidence of his title, introduces such portions thereof as he deems relevant, he is not obliged to introduce the whole of the abstract; but the opposing party may offer the remainder of the document in evidence.

6. SAME—ABSTRACT OF DEED RECORDED, THOUGH NOT ENTITLED TO RECORD, ADMISSIBLE.

The abstract of a deed recorded, though not entitled to record by reason of defective acknowledgment, may be introduced in evidence, and relied on in proof of title.

**7. APPEAL—OBJECTIONS HEARD ABOVE, ONLY WHEN RAISED BELOW.**

An objection to the proceedings in the trial court cannot be raised for the first time in the court of appeal.

**8. TRIAL—DIRECTING VERDICT FOR PLAINTIFF SUSTAINED.**

Where there is no evidence to controvert that of the plaintiff, and the trial court is of opinion that the plaintiff's evidence tends to prove every material point of the plaintiff's case, it is proper for such court to direct a verdict for the plaintiff.

Appeal from Cook.

**MULKEY, C. J.** On the eighteenth of September, 1883, Augustus Lamb brought an action of ejectment, in the circuit court of Cook county, against Nicholas Heinsen, for the recovery of lot 9, block 63, in South Chicago, being a subdivision by the Calumet & Chicago Canal & Dock Company, of the E.  $\frac{1}{4}$  of the W.  $\frac{1}{4}$  and part of the E. fractional  $\frac{1}{4}$  of section 6, township 37 N., range 15 N. of Indian boundary line, and that part of fractional section 6, township 37 N., range 15 S. of Indian boundary line, lying north of the Michigan Southern Railroad, and fractional section 5, township 37 N., range 15 N. of the Indian boundary line,—all in sections 5 and 6, township 37 N., range 15 E. of third P. M. The suit was subsequently dismissed, on the plaintiffs own motion, as to all the premises except a small part in the actual possession of the defendant, which is described in the record by metes and bounds. The cause was heard in January, 1886, before the court and a jury, resulting in a verdict and judgment for the plaintiff. The defendant took an appeal from the judgment to this court, and the cause was submitted at its March term, 1886. Upon filing the record here, appellee first discovered, as he claims, that certain important facts, materially affecting some of the questions raised by appellant, had been omitted in making up the bill of exceptions. He thereupon called the attention of appellant's counsel to the matter, and requested him to consent to an amendment of the record so as to make it truly represent the facts as they occurred. On failing to obtain such consent, appellee's counsel thereupon served appellant's attorney with a written notice that he would, "on Saturday, the twentieth day of March, 1886, at 10 A. M., or as soon thereafter as counsel could be heard, appear in open court, before the judge who tried the cause," and move the court to amend the bill of exceptions in the respect indicated. The motion was entered and allowed by the court in pursuance of the notice, and the bill of exceptions amended accordingly. Upon filing in this court a certified copy of the amendment, the appellant entered a motion to strike it from the files, which was reserved for the hearing.

As the question raised by this motion is of a preliminary character, it will be first disposed of. When a bill of exceptions is once signed and sealed by the judge who tried the cause, and is properly filed in court, it becomes a part of the record of the case to which it relates, and it stands precisely upon the same footing of any other record. If the bill of exceptions is executed and filed during term time, it may be amended at any time before the term expires, without notice. During the term time



the presiding judge who signed it may make any changes or alterations in it which he thinks necessary to make it accord with the facts; but after the term expires he loses all power to alter or change it on his own motion or mere suggestion. In case of amendments of this kind during the term the proper practice is to call attention of counsel to the fact. But where a bill of exceptions, through inadvertence or mistake, has been so made up as to not fairly and truly represent what actually transpired in court, it may, upon due notice, be amended by order of the court at a subsequent term, as was done in this case, so as to make it conform to the real facts. That a bill of exceptions may be thus amended, has been expressly held by this court. *Goodrich v. City of Minonk*, 62 Ill. 121; *Newman v. Ravenscroft*, 67 Ill. 496. The motion to strike the transcript of the amended record from the files must be denied.

The appellee derives title to the property in dispute through a short and direct chain of conveyances from the Calumet & Chicago Canal & Dock Company. So far as this branch of the case is concerned, there is little or no difficulty. That company claimed title through numerous meane conveyances from Samuel C. George, the patentee of the land. The records of the latter conveyances were all burned in the great fire at Chicago in 1871, and many of the conveyances themselves were either lost or destroyed, so that they could not be produced on the trial. Under these circumstances the plaintiff, in order to prove the contents of the lost or destroyed deeds, was compelled to rely on an abstract of title which had been prepared and delivered in due course of business, before the destruction of the records. The chief controversy in this case relates to the admissibility of this abstract in evidence for the purpose stated. It would be almost an endless task to follow counsel, in his very elaborate argument, for the purpose of replying in detail to the numerous objections urged against the title of appellee as presented by the record, and we shall not attempt to do so. Many of them are manifestly without force, and some of them are based upon an assumed state of facts of which the record affords no evidence; and, if not noticed in the present discussion, counsel will understand it is because they are regarded as belonging to one or the other of these classes. Assuming the contents of the lost or destroyed deeds in plaintiff's chain of title to be sufficiently established by the abstract of title used for that purpose, there is but little, if any, reason to doubt that the verdict and judgment in the case were warranted by the evidence; and as appellant has not shown, or even attempted to show, title in himself, or in any one else, it is only necessary to consider the more important objections urged against the appellee's title.

The first question to be considered, and by far the most important one in the case, is whether the abstract was made out in such manner and under such circumstances as to warrant its admission in evidence. The conditions upon which such an instrument, or any part thereof, may be admitted in evidence, are prescribed by statute with great particularity; hence there is no occasion for considering the question from a common-law aspect. By section 29, c. 116, Rev. St., it is provided that "when-

ever, upon the trial of any suit or proceeding which is now or hereafter may be pending in any court in this state, any party to such suit or proceeding, or his agent or his *attorney* in his behalf, shall *orally*, in court, or by affidavit to be filed in such case, testify and state under oath that the *originals of said deeds*, or other instruments in writing, or records of any court relating to any lands, the title or any interest therein being in controversy in such suit or proceeding, are lost or destroyed, or not within the power of the party to produce the same, and that the records thereof are destroyed by fire or otherwise, it *shall be lawful for any such party to offer, and the court shall receive, as evidence, any abstract of title made in the ordinary course of business*, prior to such loss or destruction, showing the title of such land, or any part of the title of such land, that may have been delivered to the owners or purchasers or other parties interested in the land, the title, or any part of the title, of which is shown by such abstract of title."

The abstract in question was made in 1869, and bears date July 15 of that year. It was prepared in the office and by the clerks of Jones & Sellers, well-known abstracters doing business in Chicago at that time. The abstract, or at least so much of it as was put in evidence, was prepared for and delivered to Elliot Anthony in due course of business; he at the time having an interest in the tract of land of which that now in controversy was a part. This is positively sworn to by him. It is also shown by the testimony of others that Jones & Sellers were doing a regular abstract business in the city for years before and after this abstract was made. This evidence, we think, was sufficient to warrant the admission of so much of it as related to the lost or destroyed deeds in the plaintiff's chain of title, upon satisfactorily showing their loss, destruction, or plaintiff's inability to produce them, as required by the section of the statute above cited. This we think was done. Indeed, no complaint is made on this ground. The admission of the abstract is assailed mainly on the ground that it is not an original instrument, but at most a mere copy of a copy. It appears from the testimony of Mr. Goode, who was a clerk in the office of Jones & Sellers at the time the abstract was prepared, that quite a number of clerks was required to conduct the business of the office; that some four or five of them were occupied in making notes from the records respecting titles. These notes were taken in pencil in short form, many of the words used being mere abbreviations. When completed, they were handed over to a Mr. Earle, a clerk in the office, who there wrote them out at length, when they were then signed by Jones & Sellers. All abstracts furnished by them were prepared in this manner, and the evidence shows that the same course was pursued in most of the other offices of the city. In all this we see nothing to justify the claim that the abstract in question was nothing but a mere copy of a copy. The *data* collected from the records in abbreviated expressions, many of which were probably intelligible only to those connected with the office, did not constitute the abstract. They were only the materials out of which it was constructed. The objection is not well taken.

It is also contended that the court erred in permitting the plaintiff to put in evidence a part of the abstract only; the contention being that the abstract should have been put in evidence as an entirety or not at all. To this it is answered by appellee that the *memoranda* furnished by the abstracter respecting each conveyance in the chain of title is an abstract within the meaning of the statute. The appellant's position is without doubt wholly untenable, and that of appellee is not entirely accurate. We understand an abstract, in a legal sense, to be a summary or an epitome of the facts relied on as evidence of title. Such being its meaning, it might consist of a note of a single conveyance, as it always does where the patentee furnishes an abstract of his title. But an abstract, properly so called, must contain a note of all conveyances, transfers, or other facts relied on as evidences of the claimant's title, together with all such facts appearing of record as may impair it. But it by no means follows that because an abstract means a synopsis of all the facts relied on in support of a particular title, that the whole of it must be put in evidence when it is only necessary to prove a part of the facts in that way. An abstract is not admissible in any case, nor is any part of it, to prove such facts as the party is prepared to prove by a higher grade of evidence. The claim that, if the whole of the abstract had been put in evidence, it would have shown affirmatively that the title to the whole of the property was not in the plaintiff, is unsupported by evidence. We cannot tell how that may be. We are concerned with the facts that were actually proved, and not with such as might have been. The latter lie in the domain of pure conjecture, where we are not permitted to enter, even if disposed to. If the remaining portion of the abstract not put in evidence would have shown no title in the plaintiff, no reason is perceived why it was not put in evidence, as it was there in court, and appellant's counsel clearly had the right to use it for that purpose if he desired to do so.

It is also objected that the *memoranda* in the abstract failed to show that some of the deeds which counsel was unable to produce, were properly acknowledged. It is sufficient to say that the statute providing for the admission of such instruments in evidence contains no such limitation. The existence of the original deeds is shown by the preliminary oath, and the abstract is admitted for the purpose of "showing title." Moreover, the specific objection now urged does not seem to have been made in the court below, and it cannot be raised here for the first time, even if it would have been good in the trial court. *Wright v. Smith*, 82 Ill. 528.

It is also assigned for error that the court improperly instructed the jury to find for the plaintiff. Where the right of recovery depends upon the existence of certain extrinsic facts about which the evidence is conflicting, the court has no right to take the case from the jury; nor has the court, in such case, the right to make remarks in the presence of the jury expressive of its opinion as to the weight of the evidence, as is claimed was done in this case. There is no difference in this respect between an ejectment suit and any other. This, however, is not a case of

the kind suggested. Looking at the abstract as supplying the place of the conveyances which could not be produced, we think the court, in the absence of any countervailing testimony, was warranted in taking the case from the jury as it did; and, if so, any expression of opinion by the court with respect to the force or effect of the evidence, in the hearing of the jury, before doing so, could have made no difference whatever in the result. The complaint, therefore, on that ground cannot avail. Judgment affirmed.

(117 Ill. 184)

**FLETCHER and another v. PEOPLE.**

(*Supreme Court of Illinois. May 15, 1886.*)

**1. HOMICIDE—MURDER—DEGREES OF PUNISHMENT—MITIGATING CIRCUMSTANCES MAY BE SHOWN—EXCLUSION, GROUND FOR REVERSAL.**

Every technical element of murder may be present in an offense, and yet the circumstances be such that the jury would be justified in imposing punishment by confinement for 14 years only, and still other circumstances justifying them in imposing different degrees of punishment up to death. 1 Starr & C. St. c. 88, par. 190. Evidence of mitigating circumstances is therefore admissible which would have been inadmissible or unavailing at the common law.

**2. CRIMINAL LAW—NEW TRIAL—CUMULATIVE OR IMPEACHING EVIDENCE ALONE NOT GENERALLY GROUND FOR—EXCEPTIONS.**

The general rule is that a new trial will not be granted merely for the purpose of admitting cumulative evidence, or to impeach a witness. But this rule is subject to exceptions,—cumulative evidence of a different kind or character from that adduced on the trial. The new evidence of mitigating circumstances in this case (of indictment and conviction of murder) is held to be such as to be good ground for a new trial, and the record is held to show that the defendant used due diligence, and could not have obtained the evidence in time for the former trial.

MAGRUDER, J., dissenting.

Error to Du Page.

PER CURIAM. Ozias W. Fletcher and Merritt Fletcher, his son, were indicted by the grand jury of Kane county for the murder of Otto J. Hope, in that county, on the first day of June, A. D. 1884. On the application of the defendants the venue was changed to Du Page county, and the defendants were tried in the circuit court of that county at its March term, A. D. 1885. The jury returned a verdict finding Ozias W. Fletcher guilty of manslaughter, and fixing his punishment at confinement in the penitentiary for the term of three years, and finding Merritt Fletcher guilty of murder, and fixing his punishment at death by hanging. Motion for new trial was made by the defendants, and overruled by the court, and judgment was then rendered on the verdict. The homicide occurred on Sunday morning, in a public highway, near the residence of the Fletchers. Hope had in his employ a laborer named Eli Steinbourne, who was born in France, who understood and spoke German, but who did not speak nor understand English. Steinbourne, under Hope's direction, had been pasturing Hope's cattle in the highway. The Fletchers had also been pasturing their cattle in the same highway. On Saturday, the day before the homicide, Ozias W. Fletcher,

Merritt Fletcher, and another son of Ozias, named Frank, had trouble with Steinbourne, resulting in some violence, growing out of the mutual pasturing of Fletcher's and Hope's cattle in the same highway. On Sunday morning, Fletcher's cattle were being pastured in the highway, and Hope's cattle were brought there for that purpose by Hope and Steinbourne. Ozias W. Fletcher, Merritt Fletcher, and Frank Fletcher were in the highway, sitting or standing near the Fletcher cattle. Hope and Steinbourne left Hope's cattle behind them, and advanced to the Fletchers. A personal conflict immediately ensued, during which Merritt Fletcher shot and killed Hope, and shot Steinbourne twice, seriously wounding him. The only witnesses of the transaction were the parties engaged. There was evidence tending to prove antecedent malice on the part of the Fletchers, the preparation of arms, threats, etc., and there was also evidence tending to deny this. We deem it improper to prejudice another trial by commenting on the evidence. The Fletchers claimed, and gave evidence tending to prove, that they were lawfully at the place, not anticipating violence; that they were attacked at first, Ozias W. by Hope, and Merritt by Steinbourne, and afterwards that both Steinbourne and Hope were upon Merritt, having him down and beating him, when he fired the fatal shot in self-defense. Steinbourne testified, in substance, that he and Hope, seeing the Fletchers in the road, left their cattle behind, and advanced to them, having, at the time, sticks in their hands with which they had been driving their cattle; that Hope and Ozias W. Fletcher were soon using loud language, which he could not understand; that Ozias W. Fletcher raised a stick which he had in his hand as if to strike Hope, when the witness ran up and interposed his stick, saying, "Halt, la," to prevent Hope being struck; that as he did so Merritt fired his revolver, striking the witness in the right side; that Hope then sprang for Merritt, and Merritt shot him, and Steinbourne, trying to again interpose in behalf of Hope, was first assaulted by Ozias W. with a knife, though not cut, and he was afterwards again shot by Merritt. He emphatically denied that either he or Hope hit Ozias W. before Merritt shot. He again stated that, about a half a second after Hope jumped behind witness to get hold of Merritt, Hope was shot. It was proved by affidavits on the motion for a new trial that Steinbourne, on the second day of June, A. D. 1884, believing that he was then going to die, made a statement under oath, which was interpreted and reduced to writing, which reads as follows:

"STATEMENT OF ELI STEINBOURNE.

"I worked for Otto J. Hope; drove cattle for him. Last Saturday drove cattle on the cross-road. Fletcher's boy, Frank, came and drove my cows back. Boy went away. Short time after old man Fletcher and his two sons came back to where I was watching the cattle. They tried to drive my cattle back. I told them to let them alone. Then they struck me with clubs; drove me and the cattle back towards home. Sunday morning Hope and I went with the cattle to see the reason why his cattle could not feed on the road. When we got the cattle down on the cross-road, we saw the three Fletchers, each one having a club, driving their cattle up the road towards us. Hope said, 'Will go and see what they want.' We went to them. The

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young boy was in the middle of the road. The old man was next to Ingham's hedge. The young man was on the fence west of the road. The one on the fence threw a knife to the boy in the road. I told Hope. Hope then went to talk to old Fletcher. Could not understand what was said. I was in the middle of the road. Old man Fletcher raised his arm with the club to strike Mr. Hope, and then I run up and struck old Fletcher with the stick I had, to keep him from licking my boss. The boy on the fence jumped off, and shot me once in the right hip. He was about six feet from me. Hope went for him, tried to take the revolver from him. Hope threw him on the ground. Then Fletcher shot him, I think twice. Old man Fletcher came with a knife. I held him back, so that he could not strike Hope. Hope went off. Young Fletcher shot me again in the right side, and I went away. I heard old Fletcher say to his son, who shot me, 'That's all right.' The old man tried to cut me with a knife while I was holding him to keep him from following up Hope. I make this statement under the full impression and belief that I cannot get well; that I am going to die," etc.

Affidavit of Theodore Even: "Interpreted the above correctly."

The affidavits showed that neither the defendants nor their attorneys had any knowledge of the existence of this statement until since the trial, when they accidentally learned of it; that they were guilty of no negligence in not having ascertained its existence: that the statement, when made, was placed in the hands of the state's attorney of Kane county, and kept by him until his term of office expired, when he handed it over to his successor in office, who retained its possession, and did not disclose its existence to the defendants or their attorneys: We think no negligence can in any respect be imputed to the defendants or their attorneys with regard to this statement.

Conceding, for the sake of argument, that the evidence authorized the jury to find that the shooting was with premeditated malice, (but as to the correctness of this we express no opinion,) still our statute provides:

"Whoever is guilty of murder shall suffer punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict." Paragraph 190, Crim. Code, (1 Starr & C. 795.)

The common law recognized no such varying degree of guilt. All murder, by that law, was the same,—the punishment must be death. But a majority of the court are of the opinion that, in the contemplation of this statute, there may be every technical element of murder existing, and yet the circumstances be such that the jury would be justified in imposing punishment by confinement in the penitentiary for 14 years only, and still other circumstances justifying them in imposing different degrees of punishment up to that of death. It necessarily follows that, in order to determine the degree of punishment to be imposed for this offense, evidence must be admissible which would not have been admissible, or, if admitted, could have availed nothing, at common law. And so a majority of the court concludes that if Steinbourne's attention had been called to this statement on the trial, and he had admitted that he had made it, and that it was true, it must have tended to have the effect to put the conduct of Merritt in a less unfavorable light before the jury than it was put by the evidence Steinbourne gave upon the trial. If

Merritt, in the first instance, did not shoot until his father had been struck with a stick by Steinbourne, his conduct, however inexcusable, is certainly, in a moral point of view, in some degree less objectionable than it would have been if he had shot before. And if he did not shoot and kill Hope until after Hope had thrown him on the ground, his act is also, in this respect, in some degree, however slight it may be, less culpable than it would have been if he had shot him before, when he might, without difficulty, have retreated from the conflict. If Steinbourne had denied making this statement, it would have been competent to have contradicted him, and so have discredited his testimony. But the existence of the statement not having been known to the defendants or to their counsel, it has been impossible to avail of it.

The general rule is that a new trial will not be granted merely for the purpose of admitting cumulative evidence, or to impeach a witness. The rule, however, is subject to exemptions. *Cochran v. Ammon*, 16 Ill. 316. In *Fabrilius v. Cock*, 3 Burr. 1771, Lord MANSFIELD granted a new trial because of the discovery, subsequent to the trial, that the judgment was rendered upon the testimony of a witness whose testimony was suborned. In *Peagram v. King*, 2 Hawks, 605, S. C. 11 Amer. Dec. 793, a court of equity decreed a new trial at law because of the discovery, subsequent to the trial, that the judgment was rendered upon perjured evidence. In *Wright v. State*, 44 Tex. 645, where the principal witness for the state, in an affidavit, stated that her evidence given on the trial was incorrect, and her mother, by affidavit, stated that she was unreliable, it was held to be grounds for new trial as subsequently discovered evidence. So in *Great Falls Manuf'g Co. v. Mates*, 5 N. H. 574, it was held sufficient ground for new trial that one of the witnesses on whose evidence the verdict was rendered, was convicted of perjury in his testimony, on his own confession. In *Durant v. Ashmore*, 2 Rich. Law, 184, a new trial was granted on after-discovered written evidence which might have affected the witness' credit with the jury. And to the same effect is *Ecfert v. Des Coudres*, 1 Mill, 70. It cannot be objected to granting a motion for a new trial on the ground of newly-discovered evidence, that such evidence is cumulative if it is of a different kind or character from that adduced on the trial. Whart. Crim. Pl. & Pr. (8th Ed.) § 870; *Long v. State*, 54 Ga. 564; *Guyot v. Butts*, 4 Wend. 579.

A majority of the court are of the opinion that the facts here disclosed, under the peculiar circumstances of the case, exempt this statement from the operation of the general rule referred to, and that a new trial ought to have been granted to Merritt Fletcher. A majority of the court see no cause to disturb the judgment against Ozias W. Fletcher, but they hold there was error in not granting a new trial to Merritt Fletcher. The judgment against Ozias W. Fletcher is affirmed. The judgment against Merritt Fletcher is reversed, and the cause is remanded for a new trial. Affirmed in part, and reversed and remanded in part.

MAGRUDER, J., dissenting.

(117 Ill. 98)

## LAWSON v. LAWSON and another.

*(Supreme Court of Illinois. May 15, 1886.)*

## STATUTE OF FRAUDS—EXPRESS TRUSTS MUST BE EVIDENCED BY WRITING.

The conveyance, alleged by the complainant in this case, to an attorney to perfect title, and recovery, is upon express trust; and such a trust must, under the statute of frauds, be in writing. 1 Starr & C. St. c. 59, § 9. The trust, not having been evidenced by writing in this instance, must fail.<sup>1</sup>

## Appeal from Cook.

MULKEY, C. J. This was a suit in equity, brought in the circuit court of Cook county by John Lawson against his two sons, Lewis and Peter, as heirs of Ann Lawson, their deceased mother, to recover certain real estate alleged to be held in trust by the defendants for the complainant. The court below, on the hearing, entered a decree dismissing the bill for want of equity, and the present appeal is from that decree. The case made by the bill is, in substance, this: The record of the title to the property was destroyed by fire in 1873. After the fire, and during that year, the complainant, being the undisputed owner in fee of the premises, conveyed the same in trust to Henry S. Dietrich, to have the record restored and title perfected by a suit to be brought by him under the burned record act, and upon the further trust to reconvey said premises on request. In May, 1877, Dietrich conveyed the property to one Rose, who in February, 1879, conveyed to Wesley Sisson. All of these conveyances were made without consideration, and in trust to hold for the use of complainant. In the fall of 1879, complainant directed his attorney to prepare and cause to be executed a deed by Wesley Sisson to his wife, Ann Lawson, conveying the property to her upon the condition that if she should survive complainant the title was to become absolute in her, but that if complainant survived her then the title was to revert to him and his heirs, free from the claims of the heirs of his wife. In September, 1879, Sisson, on his own motion, and without the knowledge or consent of complainant, conveyed the property by warranty deed to Ann Lawson, the same being made without any consideration whatever. In January, 1882, Ann Lawson died intestate, leaving four children, two of whom voluntarily conveyed to the complainant their interest in the land, but the appellees declined to do so, whereupon this suit was brought. The appellees, by their answer, set up and rely upon the statute of frauds as a defense.

That the case made by the bill is one which, if true, appeals strongly to a court of equity, cannot admit of a doubt. But, like all others where the facts charged, and out of which the equities arise, are not admitted, the complainant, to succeed, is bound to prove them in the manner prescribed by law. There is no feature about the case in hand taking it out of this general rule. Before complainant can attack the conveyance made by Sisson to his wife he must show that he has an

<sup>1</sup> See note at end of case.



equitable interest in it which a court of equity will recognize and enforce. It is admitted, or rather expressly charged in the bill, that complainant, in 1879, made a conveyance of the property to Dietrich. As that deed is not set out in the record, and no claim is made to the contrary, we must assume it was in form an absolute deed. It is true, he also charges in his bill, as already seen, that the conveyance was made upon certain express trusts, which, if proved, would show that he still has an interest in the land. But the question is, has this charge in the bill been established by legitimate proof? It is not pretended it is evidenced by any writing, as required by the ninth section of the statute of frauds. That section having been interposed and relied on as a defense, it follows that, in the absence of such proof, the appellant does not appear to have any interest in the property sought to be recovered, and hence the court properly dismissed the bill. *Hovey v. Holcomb*, 11 Ill. 660; *Lantry v. Lantry*, 51 Ill. 458; *Rogers v. Simmons*, 55 Ill. 76.

Under the pleadings and proofs we think the decree was right, and it will therefore be affirmed.

## NOTE.

For a full discussion of the question of the creation of express trusts in land by parol agreement, see *Merwitz v. Floring*, (Ill.) 2 N. E. Rep. 529, and note, 534-536; *Green v. Dietrich*, (Ill.) 3 N. E. Rep. 800, and note, 806.

An express trust cannot be raised by a parol promise to reconvey real estate to the grantor. *Hansen v. Berthelson*, (Neb.) 27 N. W. Rep. 423.

An express trust in real estate cannot be proved by parol. *Todd v. Munson*, (Conn.) 4 Atl. Rep. 89.

Parol evidence is not available to establish trust in lands in Pennsylvania. *Longdon v. Clouse*, (Pa.) 1 Atl. Rep. 600.

It seems that parol evidence is inadmissible to show that a conveyance absolute on its face was in fact executed upon an express trust for the benefit of the grantor. *Pavey v. American Ins. Co.*, (Wis.) 13 N. W. Rep. 925.

In the absence of fraud or mistake, parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor. *Rasdall's Adm'r v. Rasdall*, 9 Wis. 379.

Where it is sought, through the establishment of a trust by parol evidence, to defeat the title of one holding a fee of real estate under a deed absolute, the essential facts relied on must be clearly established. *Falsken v. Harkendorf*, (Neb.) 7 N. W. Rep. 749.

Under the statute of frauds in force in Iowa, a conveyance of real property cannot be shown to be made in trust for another except by an instrument in writing executed with all the formalities of a deed. *Allen v. Withrow*, 3 Sup. Ct. Rep. 517.

An oral agreement, by the vendee of land, to reconvey it is within the statute of frauds; and, where it appears in a bill for specific performance that the agreement was oral, the fact can be taken advantage of by demurrer. *Ahrend v. Odiorne*, 118 Mass. 261.

(121 Ill. 25)

## FIRST NAT. BANK OF LAS VEGAS v. OBERNE and others.

(Supreme Court of Illinois. May 15, 1886.)

## PRINCIPAL AND AGENT — REPUDIATION OF AUTHORITY — RESTORATION OF PROCEEDS RECEIVED.

The present suit was upon an indorsement of a guaranty upon commercial paper, made in a firm name by an agent whose authority is denied. The guaranty was made in the course of a transfer to a bank, which thereupon discounted the note, and placed the proceeds to the credit of such firm. A portion of such proceeds were afterwards drawn by such firm by checks to their creditors. The firm is held liable on such guaranty to the extent of proceeds received. It cannot repudiate the agent's authority without restoring

the proceeds. The court decline to extend the liability to the remainder of the funds which were drawn out by the same agent, but not used in the firm business. **MULKEY, C. J.**, dissents.

Appeal from First district.

**SHELDON, J.** This was an action brought by the First National Bank of Las Vegas against George Oberne and Henry N. Hosick upon the following guaranty of a promissory note, viz.:

"\$1,000.

LAS VEGAS, N. MEXICO, October 15, 1882.

"Six months after date I promise to pay to the order of Oberne, Hosick & Co. one thousand dollars, at Las Vegas, New Mexico, at the rate of one per cent. per month from date till paid. Value received.

"EDWIN A. PRENTICE.

"Pay to the First National Bank, Las Vegas, or order.

"For and in consideration of the sum of ten cents, the receipt whereof is hereby acknowledged, we hereby guaranty the payment of the within note, waiving demand and notice of non-payment and protest, and agree to pay all costs and expenses paid or incurred in collecting same.

"OBERNE, HOSICK & Co.

"By THOMAS DAVIS."

The declaration contained also the common counts. The issue formed under the plea of the general issue, verified by affidavit, was tried by the court without a jury, and found for the defendants, and, after overruling a motion for a new trial, judgment was entered accordingly, which was affirmed on appeal to the appellate court for the First district, and the plaintiff appealed to this court.

Oberne, Hosick & Co., the defendants, were a firm in Chicago, dealing in wool, hides, and pelts, etc., who bought them at various places, Las Vegas among others, had them shipped to Chicago, and sold them there. Thomas Davis was their agent at Las Vegas. The course of business was for Davis, when he made a purchase, or anticipated making one, to draw drafts on Oberne, Hosick & Co., the amounts of which were placed to their credit in open account on the books of the bank, and were checked against by Davis, who signed the firm name of Oberne, Hosick & Co. to the checks by Thomas Davis. On October 23, 1882, the account of Oberne, Hosick & Co. was overdrawn \$16.45. On that day Davis applied to the bank for it to purchase the note in question. The cashier wrote on the back of the note the indorsement and guaranty which appear, and Davis signed the name of the firm by himself thereunder. The note was then taken by the bank, and the amount of it placed to the credit of Oberne, Hosick & Co. on the books of the bank. This amount, between October 23d and November 20th following, was all checked out by Davis upon checks signed: "OBERNE, HOSICK & Co. Per THOMAS DAVIS." There were no other credits in the account of Oberne, Hosick & Co. during that period from October 23 to November 20, or until December 1, 1882. Two of the checks thus drawn, one on October 24th, the other on October 26th, for the respective sums of \$500 and \$60.27, were given to Weil and Graaf for hides and pelts bought of them by

Thomas Davis, as agent of Oberne, Hosick & Co. The note of Prentice appears to have been given for a loan of money to him by Davis.

The foregoing facts are undisputed, and upon them we are of opinion there was a right of recovery, at least to the extent of \$560.27, the amount of the proceeds of the note which was paid to Weil & Graaf. Admitting that there was no authority in Davis to bind Oberne, Hosick & Co. by the indorsement and guaranty of the note, yet it appears that in consequence of such indorsement and guaranty there was placed to their credit on the books of the bank the proceeds of the note, \$1,000, and that \$560.27 of such proceeds was actually paid out by the bank to Weil & Graaf upon checks given by the defendants by their agent in payment for hides and pelts bought of Weil & Graaf by the defendants; so that defendants actually got that much of the proceeds for the guarantied note. Now, they cannot be permitted to repudiate a contract made in their name by an assumed agent, on the ground of a want of authority in the agent to make it, without restoring the money received by them under the contract, and as the result of the agent's act. See *Harding v. Parshall*, 56 Ill. 219. It was for the consideration of the supposed guaranty by defendants, of the note, that the bank paid over to them the money, and manifestly the bank should have either one or the other, the consideration or the money; and if defendants deny the consideration to the bank, they should repay to it the money they have received.

It is urged by appellant that as Davis was authorized to give checks upon the bank in the name of Oberne, Hosick & Co., and as the entire proceeds of the note were drawn out on checks thus given, that the whole amount should be taken as received by the defendants, or that the bank had the right to consider it as so received. Though the checks were drawn in the name of Oberne, Hosick & Co. by Thomas Davis, they might have been so drawn wrongfully, and the money not have gone to the use of defendants, in the same manner as the transaction of the note was without authority. And it was only funds in the bank, of Oberne, Hosick & Co., that Davis was authorized to check upon, and the proceeds of the note were not their funds if they repudiated the transfer and guaranty of the note. Otherwise than as to the amount shown to have actually gone to the use of defendants in payment for goods purchased by them, viz., \$560.27, we cannot say the judgment was wrong.

The judgments of the appellate and circuit courts are reversed, and the cause remanded to the circuit court.

MULKEY, C. J. I do not concur in this opinion.

(119 Ill. 567)

**DILLMAN, Surviving Partner, etc., v. NADLEHOFFER.***(Supreme Court of Illinois. May 15, 1886.)***1. EQUITY—RESCISSION—BILL TO RESCIND MUST OFFER RESTORATION.**

A bill to rescind a contract must offer to return the consideration actually received, and restore the defendant to all his rights existing prior to the making of the contract, (in this case to his rights in partnership assets,) and on a failure to offer such return the bill is demurrable.<sup>1</sup>

**2. SAME—FRAUDULENT REPRESENTATIONS—SIMPLEX COMMENDATIO NON OBLIGAT—EXCEPTIONS.**

In respect to the fraudulent representations as ground for vacating a contract, the general rule is that general exaggerated statements as to value of the articles sold, do not constitute ground for rescission. There are exceptions to this rule. The usual grounds for exception are: (1) Unequal knowledge and position of parties; (2) vendor's knowledge of purchaser's ignorance; (3) misrepresentation of value in response to direct question; (4) gross inadequacy or disparity of value. The representations in this case that certain patents were valid, and that defendant had been offered \$25,000 therefor, do not come within the exceptions.<sup>2</sup>

**3. FRAUD—FALSE REPRESENTATIONS AS TO LAW NOT ACTIONABLE.**

It is well settled that, ordinarily, one is not liable for false representations respecting a mere question of law. So false representations as to the validity of a patent are held not actionable.

**Appeal from Second district.**

**MULKEY, C. J.** This is an appeal from a judgment of the appellate court for the Second district, affirming an order and decree of the circuit court of Will county, sustaining a demurrer to and dismissing the complainant's bill for want of equity, in a certain suit therein pending, wherein Andrew Dillman and Edward R. Knowlton were plaintiffs, and John W. Nadlehoffer was defendant. The bill charges, in substance, that in the fall of 1882 the plaintiffs and defendant entered into copartnership under the firm name of John W. Nadlehoffer & Co. for the purpose of carrying on the business of manufacturing and selling barbed fence wire at Joliet, in said county; that defendant contributed, as his share of the capital in said business, the use of three certain improvements in barbed wire, of which he claimed to be the owner and inventor, and which constituted the chief inducement to the formation of the partnership; that defendant had already received a patent for one of said improvements, and had applications pending for the other two; that the partnership business thus established was successfully carried on, with defendant as superintendent of the factory, until the eighteenth of April, 1883, when defendant refused to carry on the business any longer, and was threatening to sell his patents, he having in the mean time obtained another on said improvements; that he represented and assured plaintiffs that he was already offered by others \$25,000 for the two patents, and that he should accept the offer if plaintiffs declined to purchase them; that under these circumstances, on the eighteenth day of April, 1883, defendant, by a written contract, signed and sealed by all the parties, for the consideration of \$23,000, sold and transferred to the plaintiffs all his interest in the partnership, its business and effects, including ma-

<sup>1</sup>See note at end of case, part 1.<sup>2</sup>See note at end of case, part 2.

chinery, tools, fixtures, goods manufactured and not manufactured, stock on hand, and all debts and claims due the firm; that before and at the time of the sale and transfer to plaintiffs by defendant of his interest in the partnership, its business and effects, as just stated, as well as before and at the time of the commencement of the partnership itself, the defendant represented to plaintiffs that said improvements were his own invention, and that the patents issued thereon were genuine and valid; and that they did not conflict with or infringe upon the patents or inventions of any one, and particularly those controlled by the Washburn & Moen Manufacturing Company and I. L. Ellwood, or their licensees. The truth of all these representations and statements is positively denied, and it is expressly charged in the bill they were made with intent to deceive and defraud plaintiffs; and that, confiding in their truth, they were induced to act upon them, to their injury. The object of the bill is to restrain the collection of a balance due defendant on the sale of the patents and his interest in the partnership effects, and to recover back the amount received by him from plaintiffs under said sale and transfer.

While the bill seeks to set aside and rescind the contract of sale of the eighteenth of April, 1883, which operated, not only as a transfer to plaintiffs of the patents, but also as a dissolution of the partnership, and as a conveyance to them of defendant's active interest in the partnership, as already seen, yet it does not offer to reconvey the patents, nor does it seek an accounting or settlement of the partnership business, or in any manner to restore him to his rights as they existed before and at the time of the dissolution of the partnership. Nor is it claimed by the bill that the complainants have ceased to use the patents in conducting their business, or that their right to do so has ever been questioned by any one, although a year and nine months and a half elapsed between the date of the transfer and the filing of the bill. As the complainants do not offer to reconvey the patents, it may be, for aught that appears from the bill, they have sold, in whole or in part, their rights in them to others, and possibly realized therefrom large profits. We do not think, in the light of all the facts disclosed by the bill, the simple averment that the patents were infringements upon other patents and worthless is a sufficient answer to the defects in the bill here pointed out. But, as we do not intend to rest our decision upon the insufficiency of the bill in this respect, it is unnecessary to enter upon a discussion of this phase of the case. We prefer that the conclusion to be reached shall turn upon the main question discussed by counsel in the briefs, namely, whether the representations relied on, in the light of all the circumstances appearing on the face of the bill, are such a fraud as constitutes an actionable injury cognizable in a court of equity. The particular statements imputed to the defendant, and mainly relied on as a ground of relief, are but two, and, as expressed in the bill, are as follows: (1) "That said letters patent were valid, and the invention therein described and claimed was new, useful, and had not been in use before," etc.; (2) that defendant "had then already been offered upwards of twenty-five thousand dollars in cash for said two letters patent."

Much of the argument seems to proceed upon the theory that a false representation, made in a given form, for a fraudulent purpose, must necessarily be followed by the same legal consequences under all circumstances. Acting upon this idea, appellee collates and presses upon the attention of the court a certain line of authorities recognizing the rule that general statements of a vendor, pending negotiation of sale, as to the value or price of the property, or as to what he has been offered for it, though false and made with an intent to deceive, and as an inducement to the sale, will afford no ground of action, for the reason it is the purchaser's own folly to rely on such statements. This general rule is founded mainly on two maxims of the law, namely, *caveat emptor* and *simplex commendatio non obligat*. On the other hand, appellant has collected and presented, in a very able and elaborate argument, another line of authorities, where like representations with respect to value or price, made under different circumstances, have been held to vitiate the sale, and entitle the injured party to relief. The latter class of cases establish and illustrate the exceptions and limitations to the general rule announced in the first.

Ordinarily, statements of an indefinite or general character made by either of the parties pending a negotiation for the sale of property, relating to its cost or value, or offers made for it, and the like, will not, in the absence of special circumstances, afford any ground for avoiding the sale, although false and made with a fraudulent intent. *Cooper v. Lovering*, 106 Mass. 77; *Mooney v. Miller*, 102 Mass. 217; *Hemmer v. Cooper*, 8 Allen, 334; *Holbrook v. Connor*, 60 Me. 578; *Jennings v. Broughton*, 5 De Gex, M. & G. 134; *Drysdale v. Mace*, Id. 103; *Ellis v. Andrews*, 56 N. Y. 83; *Noetling v. Wright*, 72 Ill. 390; *Walker v. Carrington*, 74 Ill. 446; *Allen v. Hart*, 72 Ill. 104; *Clement v. Boone*, 5 Bradw. 109; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Eames v. Morgan*, 37 Ill. 260; *Miller v. Craig*, 36 Ill. 109; *Banta v. Palmer*, 47 Ill. 99; *Kenner v. Harding*, 85 Ill. 264; *Bond v. Ramsey*, 89 Ill. 29; *Tuck v. Downing*, 76 Ill. 71. Yet it is just as well settled that where the contracting parties for any cause are not on equal terms, and such representations are gross exaggerations, resulting in an unconscionable bargain, equity will not hesitate to interpose in favor of the injured party. *Jackson v. Armstrong*, 50 Mich. 65; S. C. 14 N. W. Rep. 702; *Haygarth v. Wearing*, L. R. 12 Eq. 320.

The case last cited well illustrates the subject under discussion. Miss Haygarth inherited from her brother, James Haygarth, an estate worth about £500. The first intimation she had of the fact was from the defendant, Wearing, who was quite familiar with the estate and its value, while the plaintiff knew nothing whatever about it. Wearing called on her at her own house, and, after having informed her of her succession to the estate, he asked what she was going to do with it. She replied "she did not know." He then told her that there was an understanding between him and her brother that he was to make over the land to him, but that he had neglected to do so. She then asked him what the land was worth, to which he replied £100, may be a trifle more or less. Believing what he said to be true, and having no other knowledge or infor-

mation on the subject, she told him she would let him have the property for the £100, and some time afterwards conveyed it to him, or rather to his daughter, at his request, for the £100. On learning the true value of the land, Miss Haygarth filed a bill against Wearing and his daughter to set aside the sale and conveyance, and the court decreed accordingly, holding that the representation was fraudulent, notwithstanding it related to the value of the premises, and this decree was affirmed on appeal. We have no doubt of the correctness of the decision in that case. Several important matters entered into the question involved in it, which are worthy of special notice, as they are frequently to be met with in that class of cases: *First*, the parties were not contracting on equal terms,—that is, the purchaser knew all about the property and the seller knew nothing about it; *second*, the vendor's ignorance on the subject was well known to the purchaser; *third*, the statement as to the value of the land was made by him in response to a direct question asked him by her on that subject, and he was therefore bound to answer truly, if at all; *fourth*, the value as fixed by him was grossly inadequate.

It will be seen at a glance that the features we have specially noticed as having a controlling influence in that case do not appear at all in this, and hence it cannot be regarded as an authority against the view taken by the lower courts in this case. The statement in the present bill that the patents were new, useful, etc., while in form is one of a fact, was necessarily based, to a large extent, upon mere opinion, about which, so far as we can perceive, the appellant was just as able to judge as the appellee. When this representation was renewed at the time of the sale, the appellant had been manufacturing under the patents nearly a year, and it is but reasonable to presume that he had learned pretty much all that could be known about them, so far as their usefulness was concerned; and, with respect to their legality or validity, that necessarily involved a mere legal opinion, about which one non-professional person could judge as well as another. It is well settled that, ordinarily, one is not liable for false representations respecting a mere question of law. *Fish v. Cleland*, 33 Ill. 238. There are some exceptions to this rule, it is true, but this case does not fall within them.

There is another important matter to be specially noted in this connection. In all cases where it is sought to hold one liable for false representations, the question necessarily arises whether, under all the circumstances, the plaintiff had a right to rely upon them. In determining this question, the representations must be viewed in the light of all the facts of which the plaintiff had actual notice, and also of such as he might have availed himself by the exercise of ordinary prudence. If, therefore, in thus considering the representations, it appears there were facts and circumstances present at the time they were made sufficient to put the plaintiff upon his guard, or to cast a suspicion upon their truthfulness, and that he neglected to avail himself of the warning thus given, he would not afterwards be heard to complain, for the reason his own conduct contributed to the injury. The written contract which is here sought to be set aside contains, among others, the following provision:

"The said party of the first part, however, does not warrant the validity of either of said patents, or that they are not infringements of any other patents now existing, and the said party of the first part shall not be required to defend any suits now pending, or hereafter to be instituted, wherein the validity of said patents are called in question."

Here the appellee expressly refused to warrant the validity of the patents, or that they were not infringements upon other patents; showing conclusively, whatever he may have theretofore said to the contrary, that he did not then positively *know* that the patents were valid, or that they were not infringements upon other patents, and that he was not willing to take any risk on either of these questions. Surely this was enough to put appellant upon his guard. It shows conclusively that the contingency of the patents ultimately proving to be invalid in law was in the minds of both the contracting parties, and this was expressly provided for in the agreement. In such case the seller cannot be held liable for a false representation where nothing appears to show, as is the case here, that the seller has been guilty of any artifice or other means to prevent the purchaser from examining and judging for himself.

We are also clearly of opinion that, under the circumstances of this case, the appellant was not warranted in relying on the statement that appellee had already been offered \$25,000 for the patents. Conceding that such a representation, under some circumstances, might be a ground for equitable relief, there are a number of reasons why it cannot be so regarded in this case. In the first place, the statement is too general and vague. There is nothing in it to indicate when, where, or by whom it was made, or whether it was by a responsible or irresponsible person. Moreover, the very fact that appellee consented to accept of appellant \$23,000, when another, according to the representation, as is claimed, was standing by ready to pay him \$25,000, ought to have satisfied any reasonable person that the representation could not be safely relied upon. But the case was still worse than this. The \$23,000 was not given and promised together for the patents alone, but also for appellee's interest in the partnership and the entire partnership effects. Under these circumstances, if the appellant placed any reliance upon the representation in question, as he claims he did, it was the sheerest folly to do so, and he has no right to complain.

We agree with the lower courts that the bill shows no ground for relief, and that it was therefore properly dismissed. Judgment affirmed.

#### NOTE.

1. **RESCISSON OF CONTRACT.** In a bill in equity by a vendee for the rescission of a deed on the ground of the vendor's fraud and misrepresentation, relief in equity cannot be granted except the plaintiff have, within a reasonable time after the discovery of the fraud, elected to disaffirm the contract, and also returned, or offered to return, the personal property received, and reconveyed, or offered to reconvey, the real estate of which he has the title. *Schneider v. Foote*, 27 Fed. Rep. —.

The intention to rescind a contract must be manifested by some positive act. *Davidson v. Keep*, (Iowa,) 16 N. W. Rep. 101.

Where the evidence shows that a party was induced to make a certain purchase by false and fraudulent representations as to the value of the property, he is entitled to a



decree for the cancellation of notes given as part consideration for the property. *Parks v. Burbank*, (Iowa,) 12 N. W. Rep. 729.

It is said in *Seeley v. Reed*, 25 Fed. Rep. 361, that a court of equity will decree a rescission of a contract obtained by fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representations, to his injury or prejudice.

Where a plaintiff comes into a court of equity asking for the rescission, in whole or in part, of a contract, or to be relieved of a portion of a contract, and the taking of an account is necessary for the ascertainment of the sum to be repaid, or the sum to be liquidated by an adjudication based on evidence of facts independent of the terms of the contract itself, an offer to refund such sum as shall be decreed is a sufficient offer to do equity. *Sutter St. R. Co. v. Baum*, (Cal.) 4 Pac. Rep. 916.

2. FALSE AND FRAUDULENT REPRESENTATIONS. A contract secured by false and fraudulent representations cannot be enforced. *Mills v. Collins*, (Iowa,) 25 N. W. Rep. 109.

A court of equity will decree a rescission of a contract obtained by the fraudulent representations or conduct of one of the parties thereto, on the complaint of the other, when it satisfactorily appears that the party seeking the rescission has been misled in regard to a material matter by such representation or conduct, to his injury or prejudice. But when the facts are known to both parties, and each acts on his own judgment, the court will not rescind the contract because it may or does turn out that they, or either of them, were mistaken as to the legal effect of the facts, or the rights or obligations of the parties thereunder, and particularly when such mistake can in no way injuriously affect the right of the party complaining under the contract, or prevent him from obtaining and receiving all the benefit contemplated by it, and to which he is entitled under it. *Seeley v. Reed*, 25 Fed. Rep. 361.

When, by false representations or misrepresentations, a fraud has been committed, and by it the complainant has been injured, the general principles of equity jurisprudence afford a remedy. *Singer Manufg Co. v. Yarger*, 12 Fed. Rep. 487. See *Chandler v. Childs*, (Mich.) 3 N. W. Rep. 297; *Cavender v. Roberson*, (Kan.) 7 Pac. Rep. 152.

When no damage, present or prospective, can result from a fraud practiced, or false representations or misrepresentation made, a court of equity will not entertain a petition for relief. *Dunn v. Remington*, (Neb.) 2 N. W. Rep. 230.

A person is not at liberty to make positive assertions about facts material to a transaction unless he knows them to be true; and if a statement so made is in fact false, the assertor cannot relieve himself from the imputation of fraud by pleading ignorance, but must respond in damages to any one who has sustained loss by acting in reasonable reliance upon such assertion. *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486.

Equity will not relieve against a misrepresentation, unless it be of some material matter constituting some motive to the contract, something in regard to which reliance is placed by one party on the other, and by which he was actually misled, and not merely a matter of opinion, open to the inquiry and examination of both parties. *Buckner v. Street*, 15 Fed. Rep. 365.

False representations may be a ground for relief, though the person making them believes them true, if the person to whom they were made relied upon them, and was induced thereby to enter into the contract. *Seeberger v. Hobert*, (Iowa,) 8 N. W. Rep. 482.

Fraudulent representations or misrepresentations are not ground for relief, where they are immaterial, even though they be relied upon. *Hall v. Johnson*, (Mich.) 2 N. W. Rep. 55. See, to same effect, *Lynch v. Mercantile Trust Co.*, 18 Fed. Rep. 486; *Seeberger v. Hobert*, (Iowa,) 8 N. W. Rep. 482.

In fraudulent representation or misrepresentation the injured parties may obtain relief, even though they did not suppose every statement made to them literally true. *Heineman v. Steiger*, (Mich.) 19 N. W. Rep. 965.

Where the vendor honestly expresses an incorrect opinion as to the amount, quality, and value of the goods he disposes of in a sale of his business and good-will thereof, and the purchaser sees or knows the property, or has an opportunity to know it, no action for false representations will lie. *Collins v. Jackson*, (Mich.) 19 N. W. Rep. 947.

Mere "dealing talk" in the sale of goods, unless accompanied by some artifice to deceive the purchaser or throw him off his guard, or some concealment of intrinsic defects not easily detected by ordinary care and diligence, does not amount to misrepresentation. *Reynolds v. Palmer*, 21 Fed. Rep. 433.

False statements made at the time of the sale by the vendor of chattels, with the fraudulent intent to induce the purchaser to accept an inferior article as a superior one, or to give an exorbitant and unjust price therefor, will render such purchase voidable; but such false statement must be of some matter affecting the character, quantity, quality, value, or title of such chattel. *Bank of Barnesville v. Yocum*, (Neb.) 9 N. W. Rep. 84.

A statement recklessly made, without knowledge of its truth, is a false statement knowingly made, within the settled rule. *Cooper v. Schlesinger*, 4 Sup. Ct. Rep. 360.

Whether or not omission to communicate known facts will amount to fraudulent representation depends upon the circumstances of the particular case, and the relations of the parties. *Britton v. Brewster*, 2 Fed. Rep. 180.

Where a vendor conceals a material fact, which is substantially the consideration of the contract, and which is peculiarly within his knowledge, it is fraudulent misrepresentation. *Dowling v. Lawrence*, (Wis.) 18 N. W. Rep. 552.

Evidence of fraudulent representations must be clear and convincing. *Wickham v. Morehouse*, 18 Fed. Rep. 324.

Where a man sells a business, and the contract of sale contained a clause including all right to business done by certain agents, evidence that the seller was willing to engage in the same business with such agents is not proof of fraud in making the contract. *Taylor v. Saurman*, (Pa.) 1 Atl. Rep. 40.

It was recently held by the supreme court of Indiana, in the case of *Cook v. Churchman*, 3 N. E. Rep. 759, that where money is obtained under a contract, any fraudulent representations employed by a party thereto as a means of inducing the loan to be made, if otherwise proper, are not to be excluded because of the statute of frauds; also that where parol representations are made regarding the credit and ability of a third person, with the intent that such third person shall obtain money or credit thereon, the statute of fraud applies, and no action thereon can be maintained, although the party making the representations may have entered into a conspiracy with such person with the expectation of obtaining some incidental benefit for himself.

The law holds a contracting party liable as for a fraud on his express representations concerning facts material to the treaty, the truth of which he assumes to know, and the truth of which is not known to the other contracting party, where the representations were false, and the other party, relying upon them, has been misled to his injury. *Stimson v. Helps*, (Colo.) 10 Pac. Rep. 292.

False representations, to avoid a contract, must be made for the purpose of inducing the party complaining to enter into the contract, and must have been relied upon by him. *Berringer v. Beecher*, (Mich.) 25 N. W. Rep. 491.

In an action founded upon the fraud and deceit of the defendant in making false representations, it is necessary to prove that they were fraudulently made. An intention to deceive is a necessary element or ingredient. It may be proven by showing either that the party knew that the statements were untrue; or that, not knowing whether they were true or false, he did not honestly believe that they were true; or, not knowing whether they were true or false, he misstated the source or extent of his knowledge. But in each case there would be falsehood uttered and intent to deceive. *Humphrey v. Merriam*, (Minn.) 20 N. W. Rep. 138.

A contract secured by false representations as to matters material thereto, and the party to whom they were made relies on such representations to his damage, cannot be enforced. *Frenzel v. Miller*, 37 Ind. 1.

To sustain a defense of fraudulent representations it is insufficient to show that the representations made were simply false. Fraudulent intent in the party making them must be shown. *Griswold v. Sabin*, 51 N. H. 167.

A naked assertion, by a vendor, of the value of property offered for sale, although false and fraudulent, will not support an action for damages, but the vendee must have been ignorant and destitute of the means of information on the subject, and must have entirely relied on the representation, or must have been prevented from inquiry or acquiring knowledge by the vendor's artifice; and so, where the vendee sees the property, he may not rely on the vendor's representation of value. *Chrysler v. Canaday*, 90 N. Y. 272.

False and fraudulent representations of the market price of an article sold, made by the vendor to induce a sale, and relied on by the vendee, will not avoid the contract where the vendor had no special facilities of ascertaining the market price, and there are no special circumstances making it his duty to communicate his knowledge. *Grafenstein v. Epstein*, 23 Kan. 443.

In the absence of artifice, a sale will not be set aside on the ground that it was procured by false and fraudulent representations, if the vendor believed them true, and the vendee had equal opportunity and means of ascertaining their falsity. *Mamlock v. Fairbanks*, (Wis.) 1 N. W. Rep. 167.

One proposing to buy an interest in a business and a stock of goods, having ample opportunity to examine and investigate, may not rely on the seller's representations as to value of the goods or extent of the business. *Poland v. Brownell*, 131 Mass. 138.

(118 Ill. 56)

## WATSON and another v. WATSON.

(Supreme Court of Illinois. May 15, 1886.)

## EQUITY—CONVEYANCE BY HUSBAND AND WIFE TO HIS MOTHER—VACATION—WIFE'S TESTIMONY ALONE INSUFFICIENT FOR.

In the present case a conveyance was made by the husband and wife to his mother. The wife brings this bill to vacate the deed on the ground that she was induced to execute it by misrepresentations of her husband. Her unsupported testimony is insufficient to establish this, against his testimony, corroborated by the certificate of acknowledgment.

## Appeal from Cook.

CRAIG, J. This was a bill brought by Eda Watson to set aside a deed executed by her and her husband, Artemus D. Watson, on the ninth day of May, 1884, in which they conveyed certain property in Chicago to Catharine Watson, on the ground that she was induced to execute the instrument by the misrepresentations of her husband. The cause was heard upon bill, answer, replication, and proofs, and a decree rendered in favor of complainant, to reverse which the defendants appealed. The property involved was inherited by Artemus D. Watson from his father, it being the homestead of the latter, and was conveyed to the widow of the deceased husband. Artemus D. Watson, as appears from the evidence, was married to complainant on the fourteenth day of February, 1854, and soon after the marriage they took up their residence with the mother of the husband, who occupied the property involved. About one month after the marriage, the wife became *enciente*, and some evidence was introduced by complainant tending to prove that the husband and mother-in-law procured medicine for the wife for the purpose of producing an abortion. This, however, is denied by the defendants. But, whatever may be the fact in regard to this matter, such evidence has no bearing on the question involved. There was also evidence that the complainant and her mother-in-law did not get along altogether harmoniously, and that this led to a "spat," as they term it, occasionally between the complainant and her husband; but this character of evidence has but little to do with the validity or invalidity of the deed.

The deed was in the usual form, and was executed by the complainant, and acknowledged before a notary public in Cook county. The certificate of the officer attached to the deed is in the form required by the statute. In it he certifies, under his official seal, that the complainant appeared before him, and acknowledged that she signed, sealed, and delivered the said instrument, as her free and voluntary act, for the uses and purposes therein set forth. The only direct evidence offered on the hearing to impeach the certificate of the officer before whom the deed was acknowledged, was that of the complainant herself, who in substance testified that she did not read the deed, nor was it read to her; that her husband informed her that it was a paper to be filed in the probate court to settle up his father's estate; that she did not know what the paper was when she executed it; that she relied upon the statement of her husband. This version of the transaction is contradicted by the

husband, who in substance testified that he wrote the deed at his house on the eighth day of May, and asked complainant if she would go down town in the morning to sign a deed conveying the Park street property to his mother. She replied that she would let him know in the morning. The next morning the request was renewed, and the two went down to the office of the notary, and the deed was there signed and acknowledged. He also testified that on the road to the notary's office he informed his wife that a few months after his father's death he had made an agreement with his mother to convey the property to her. The witness also denied the statement, made by his wife, that the instrument executed was a paper to be used in closing up his father's estate. The evidence of the husband is a direct contradiction of that of the complainant as to the execution of the deed.

The record before us presents the question whether a deed can be impeached upon the testimony alone of one of the grantors; the certificate of the officer and the other grantor showing that the deed was executed and acknowledged in due form. As between the immediate parties to a deed, the certificate of acknowledgment of the officer may be impeached for fraud, collusion, or imposition; but the evidence to produce that result, as has often been held by this court, must fully and clearly satisfy the court that the certificate of the officer is false and fraudulent. In *Lickmon v. Harding*, 65 Ill. 505, we held that, in the absence of proof of fraud and collusion on the part of the officer who took the acknowledgment, the officer's certificate, in proper form, must prevail over the unsupported testimony of the party grantor that the same was false and forged. See, also, *Fitzgerald v. Fitzgerald*, 100 Ill. 386, where the same doctrine is announced. Under the rule announced, it is plain that the decree cannot be sustained. There is nothing in the record to impeach the certificate of the officer before whom the deed was acknowledged, except the unsupported testimony of one of the grantors, and that is contradicted by the evidence of the other grantor. We are aware of no well-considered case holding that a deed may be impeached and set aside on such evidence; and we think it would be establishing a dangerous precedent for any court to lay down a rule of that character. As was said in the case first cited, public policy requires such an act should prevail over the unsupported testimony of an interested party, otherwise there would be but slight security in titles to land. Here the complainant was 19 years old, a person of intelligence and culture; and had she used even slight precaution, and read the deed, which it was her duty to have done, she never could have been imposed upon or deceived in the execution of the deed; and if she was imposed upon, it was her own fault, and she must bear the loss, arising, as it does, from her own negligence.

The decree will be reversed, and the cause remanded, with directions to the court to dismiss the bill.

(117 Ill. 632)

## GAGE v. MAYER.

*(Supreme Court of Illinois. May 15, 1896.)***1. TAXATION—TAX DEED—NOTICE FOR REDEMPTION, AND AFFIDAVIT—INACCURACY IN AFFIDAVIT.**

The validity of a tax deed is dependent on the performance of the statutory conditions of giving notice for redemption, and making affidavit as to the same. A failure to make an affidavit complying with the statute, or an inaccuracy in the affidavit, will be fatal to the deed, regardless of what the real facts may be, or of what may be proved.

**2. SAME—MISTAKE IN NAME.**

A notice to I. Mayer is not a notice to J. Mayer; and an affidavit showing that property was assessed to J. Mayer, and that notice was given to I. Mayer, is insufficient.

**3. SAME—REQUIRING REDEEMER TO PAY OTHER TAXES THAN THOSE FOR WHICH SALE WAS MADE, IS ERROR NOT INJURIOUS TO PURCHASER.**

The fact that the party seeking redemption may be required to pay too large an amount, *e. g.*, by including the cost of other taxes than those for which the sale was made, is an error not injurious to the purchaser, and cannot be taken advantage of by him on appeal.

**4. EQUITY—JURISDICTION—LEGAL TITLE NOT DETERMINABLE—CROSS-BILL.**

It is a well-settled principle that a court of equity is not a proper tribunal for the trial of legal titles to real estate, and this applies equally to the assertion of a title by a cross-bill and by original bill.

**Appeal from Cook.**

CRAIG, J. This was a bill brought by Jacob Mayer, in the circuit court of Cook county, against Henry H. Gage, to set aside a tax deed issued to Gage on the twenty-sixth day of March, 1880, purporting to convey certain lots situated in the town of Lake, in Cook county, which had been sold for the non-payment of taxes on the twenty-seventh day of August, 1877. As to the validity of the deed but one question need be considered, as we regard that conclusive.

Section 216, c. 120, Rev. St. 1874, provides that "hereafter no purchaser \* \* \* at any sale of lands \* \* \* for taxes \* \* \* shall be entitled to a deed \* \* \* until the following conditions have been complied with, to-wit: Such purchaser shall serve \* \* \* notice of such purchase on every person in \* \* \* possession \* \* \* of such land, \* \* \* and also the person in whose name the same was taxed, \* \* \* if \* \* \* he can be found in the county. \* \* \*" Section 217, c. 120, Rev. St. 74, provides that the purchaser shall make an affidavit stating particularly the facts relied upon as compliance with section 216, *supra*, before he shall be entitled to a deed. Under section 216 no person is entitled to a deed, and no deed can lawfully be issued unless the notice specified in the section has been given. Section 217 is equally imperative that the purchaser, before he shall be entitled to a deed, shall make an affidavit showing a compliance with the section of the statute. The affidavit is required to be filed with the county clerk, whose duty it is to enter it upon the records of his office. The affidavit relied upon as showing a compliance with the statute was made by the agent of the purchaser at the tax sale, and states that he visited the property, December 6, 1878, to serve the

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occupant with a notice, and there was no person in possession of the same, but the property was vacant and unoccupied; that the property was taxed in the name of W. H. Rice and I. Mayer, and he served a notice, of which the annexed is a true copy, on W. H. Rice and I. Mayer, by handing the same to, and leaving the same with, W. H. Rice personally, at No. 188 Washington street, and J. Mayer, personally, at Howland block, Chicago, in said county, both on March 19, 1879.

From the affidavit it appears that the lots were assessed in the names of two persons, W. H. Rice and I. Mayer, but the notice was served on W. H. Rice and J. Mayer. So far as I. Mayer is concerned, it does not appear from the affidavit that he was served with any notice whatever. Had the affidavit shown that I. Mayer and J. Mayer was one and the same person, or that there was no such person as I. Mayer, and the assessment in his name was a clerical error intended for J. Mayer, who was the real owner of the land when assessed, it might have been a sufficient compliance with the statute to authorize the execution of the tax deed. This, however, does not appear from the affidavit, and we perceive no ground upon which the affidavit can be held sufficient, unless we can say that a service on J. Mayer was a service on I. Mayer; in other words, that J. Mayer and I. Mayer are *idem sonans*. In support of this view it is said in the argument:

"The initials 'I' and 'J' are not to be taken as mere initials, but as abbreviations for the name 'Jacob,' for which they stand. If the word had been fully spelled out, 'Jacob,' it could not have been successfully contended that this was not 'Jacob.' In contemplation of law the two cases are identical."

We are willing to concede that Iacob and Jacob may be regarded as one and the same name. Where the letter "I" is placed before "acob," any person would see without a moment's reflection that it was intended for the letter "J." But upon what theory can it be said that the letter "J" stands for Jacob. It may as well stand for John or James, or any other given name which commences with the letter. So, also, "I" may stand for Isaac, Ion, or any other given name which commences with that letter. The use of either of the letters would not in the least indicate that they were intended as an abbreviation of the word "Jacob." It may be, as claimed in the argument, that "I" was formerly used in words where "J" is now written, but we do not think it is so used at the present time. At all events, we are not satisfied that there is authority for holding that I. Mayer and J. Mayer are to be regarded as one and the same person; and leaving a notice with J. Mayer was not a service on I. Mayer, the person in whose name the property was taxed. *Gage v. Hervey*, 111 Ill. 308, may be regarded as an authority on the question.

We have not remarked upon the evidence introduced in the trial, tending to prove that I. Mayer and J. Mayer was one and the same person, as we did not regard such evidence competent in the case. The execution of the deed rests entirely upon the sufficiency of the affidavit filed with the clerk, upon which it issued. Parol evidence cannot be introduced to supply defects or omissions in the affidavit. The statute only authorizes a deed to be executed upon an affidavit being filed which contains

certain specified facts. If the affidavit does not contain the specified facts, the deed is unauthorized and nugatory, regardless of what the real facts may be or what may be proved.

*Pond v. Ennis*, 69 Ill. 341, has been cited as an authority on the sufficiency of the notice. In the case cited, a defendant, in a proceeding to foreclose a mortgage, was served by a wrong name, and it was held that the party was bound to plead the misnomer, and in failure to do so was bound by the decree rendered in the cause. There is no doubt in regard to the rule laid down in the case cited; but that was a proceeding in court, and it has no bearing on the validity of the steps required to be taken under the revenue law to make a tax title to real estate. The validity of a tax title, as has often been ruled by this court, depends upon a strict compliance with the statute.

It appears from the record that appellant had purchased the lots in question for taxes at sales prior to the one involved in this proceeding, and the master, in computing the amount which complainant should pay, included amounts which appellant had paid on and under these sales; and it is argued that the court erred in requiring appellee to pay appellant for tax titles not in issue under the bill. The fact that appellee may be required to pay too large an amount cannot injure appellant, and, if not injured, there can be no just ground of complaint. The validity of the sales made prior to 1877 were not involved in this bill; and if the appellant should be of opinion that an acceptance of the money decreed to be paid by appellee, which had been paid out by appellant on or under such sales, would have any bearing upon such sales, he can leave that amount in the hands of the person with whom it has been deposited, and take the balance of the money paid under the decree.

The appellant filed a cross-bill in which he alleged that he was the owner of the land in fee-simple, under four distinct sources of title: *First*, under a deed from Herman Leib, county clerk, dated February 10, 1877; *second*, under a deed from some party dated March 28, 1877; *third*, under a deed from E. F. C. Klokke, county clerk, dated March 26, 1880; *fourth*, under a deed from some party dated July 2, 1880. The complainant interposed a demurrer to the cross-bill, which the court overruled for the reason that it failed to show any ground for equitable relief; that the cross-bill set up a legal title in appellant; and that his remedy was at law. It may be regarded as a well-settled principle that a court of equity is not the proper tribunal for the trial of legal titles to real estate. An action of ejectment in a court of law must be resorted to where the parties desire to contest the validity of conflicting titles. An action of ejectment cannot be tried in a court of equity by bill or cross-bill. *Parker v. Skinner*, 114 Ill. 192. From an inspection of the cross-bill it is apparent that the relief therein claimed was not a proper subject to be determined in a court of equity. The complainant's bill was brought to impeach a tax deed issued on the twenty-sixth day of March, 1880, on the ground that it was void, and hence a cloud upon his title. Any matter or thing having a bearing on the validity of the sale or deed was proper for the appellant to present. But the fact that

appellant had held other deeds for the property involved, which may have invested him with the fee, could not properly be set up by an affirmative bill. If he holds the fee to property under such deeds, he has his remedy in an action of ejectment, where his title, and that of the complainant, may be investigated and determined as their rights may appear. On a bill for partition, conflicting titles may be investigated and determined as settled in some of the cases cited by appellant; but this is not a proceeding of that character, and the rules that govern in such a case have no bearing here.

The decree of the circuit court will be affirmed.

(117 Ill. 130)

HORNE v. WALTON.

(*Supreme Court of Illinois.* May 15, 1886.)

DAMAGES—DECEIT—ACTION FOR—MEASURE OF DAMAGES—DISTINCTION BETWEEN SALE AND LOAN.

Where there has been a sale of land, and fraudulent representations were made as to its value or quality or condition, the measure of damages undoubtedly is the difference between the actual value of the land and the value of the land as represented at the time of the sale; but where the transaction is a loan upon real-estate security, induced by fraudulent representations as to the value of the security, the measure of damages is the amount loaned, with interest thereon.

Appeal from First district.

MAGRUDER, J. This is an action on the case, brought by appellee in the circuit court of Cook county, to recover damages of appellant for obtaining \$2,000 of appellee by deceit, and false and fraudulent representations. The case was tried before a jury, who returned a verdict in favor of appellee for \$2,900, being the sum of \$2,000 and interest thereon. The judgment upon this verdict was affirmed by the appellate court, and the case is brought to this court by appeal from the appellate court. The declaration alleges that appellee worked on the farm of one Bowen, and had \$2,000 deposited in the Illinois Trust & Savings Bank of Chicago; that appellant (an attorney) came to Bowen's place in August, 1877, and represented to appellee that the bank was unsafe, and it would be better to invest the money in real estate security; that appellant stated that he had been agent for 14 years for one Carpenter, of Cincinnati, who was worth over \$100,000, and owned some lots in Chicago, worth \$5,000; that Carpenter wanted \$2,000 to pay off the taxes upon these lots, and would pay double the interest paid by the bank; that the title to the lots was good, and appellant knew it to be good; that appellant induced appellee to surrender up the \$2,000, and gave to appellee, as security, Carpenter's note for that amount, due in six months, drawing 8 per cent. interest, and a mortgage, executed by Carpenter on the lots in question; that appellant represented that the investment was safe, and that the money would be used in paying the accumulated taxes upon said lots; that the representations so made were false, and known to be false by appellant, and were made for the purpose of deceiving and defrauding appellee;



that upon the maturity of the note appellee demanded his money of appellant, but was told that Carpenter had died, and nothing could be done until the estate was settled; that the money was promised to be forthcoming in a few weeks from Carpenter's father-in-law, but has never been paid; that appellant declined to furnish an abstract of title; that the title was not good in Carpenter; that the money was not used to pay taxes on the lots; that the taxes had been paid on the lots for five years prior to 1877 by Mary Kenyon; that Mary Kenyon was the owner in fee of the lots, etc.

The appellant complains that the circuit court erroneously refused to give an instruction asked by him, which told the jury that, if they should find the issues for the plaintiff, "the true measure of damages would be the difference in value between the value of the property at the time the transaction was had, and what it would have been worth at said time had it been as the jury believe from the evidence said defendant represented it to said plaintiff, and said plaintiff believed it to be from said representations." This instruction was properly refused, as being inapplicable to the facts of the case. Where there has been a sale of land, and fraudulent representations have been made as to its value or quality or condition, the measure of damages is undoubtedly the difference between the actual value of the land and the value of it as it was represented to be at the time of the sale. In this case there was no sale, but a loan. Appellee is alleged to have parted with his money, as a loan, upon representations that a certain security offered him was good, when, as matter of fact, it was known to be worthless. The evidence tends to show that Carpenter was worth nothing pecuniarily, and had no title to the lots mortgaged, and that appellee never saw Carpenter, and knew nothing about him, or his title to the lots, except what he learned from appellant. He did not buy after an examination of the record title, and in reliance upon such examination. He was not furnished by the borrower with an abstract of title, as is customary in such cases. He relied solely upon the statements of appellant, who was a lawyer, as to the validity of the title. The evidence also tends to show that, before suit brought, the note and mortgage were tendered back by appellee to appellant. The actual loss of appellee was the money he parted with, and interest thereon while he was kept out of the possession of it. We think the correct measure of damages in this case was the amount of such loss, to-wit, the \$2,000 and interest. It is not perceived why the same rule does not apply here as is laid down in cases where there is a breach of the covenant of seizin. "For a total breach of the covenant of seizin or good right to convey, while nothing passes by the conveyance, the measure of damages is the amount of consideration paid, and interest." 2 Suth. Dam. 257. To the same effect is the case of *Frazer v. Supervisors Peoria Co.*, 74 Ill. 282. Under the instructions given the jury estimated the damages in accordance with this rule.

The refusal of appellant's second refused instruction is claimed to have been erroneous. The instruction was defective in form, in requiring the jury to "believe," and in not requiring them to "believe from the evi-

dence." While this formal defect may not have been sufficient of itself to have misled the jury, yet we think that the substance of this instruction was embraced in the third instruction which was given for appellant. The second instruction refused, singling out the conversations testified to by appellee, attempted to lay down certain conditions upon which alone those conversations could be regarded as proved by a preponderance of evidence. The duty of appellee to establish his case by a preponderance of evidence was stated with sufficient fairness to appellant, in the third instruction given for him, which was in the following words:

"(3.) The jury are instructed that the burden of proof in this class of cases is upon the party holding the affirmative; and if the jury find that the evidence bearing upon the plaintiff's case is evenly balanced, or that it preponderates in favor of the defendant, then the plaintiff cannot recover, and the jury should find for the defendant."

This third instruction also embraces substantially all that is material or pertinent to the issue in appellant's fifth refused instruction.

Appellant's ninth refused instruction was properly refused. It required the jury to find that appellee had offered to surrender the "notes" to the said Carpenter, or his legal representatives. There was only one note, and the evidence tends to show that this note, indorsed by appellee, and the mortgage securing it, accompanied by an assignment thereof, duly executed by appellee, were tendered to appellant before suit brought. Appellee, who was a poor gardener, working as a laborer upon a gentleman's country place, was not required, under the circumstances of this case, to go to Cincinnati and look up the legal representatives of Carpenter. Appellant, not Carpenter, gave him the note and mortgage. Appellant swears that he was Carpenter's agent, and had been for 14 years. It was sufficient, therefore, that the offer to surrender the securities was made to appellant.

As to appellant's tenth refused instruction, which required the jury to find for appellant, unless they found from the evidence "that said Carpenter was insolvent \* \* \* at the time of the commencement of this suit," it is sufficient to say that, by the undisputed evidence in the case, Carpenter had been dead some two years before "the commencement of this suit."

It is objected that there was, in some particulars, a variance between the averments in the declaration and the proof, as introduced. No such variance was pointed out in the trial court. If it existed, an objection pointing it out should have been made on the trial, so that the declaration could be amended to conform to the proofs. It is too late to make such an objection here. *City of Elgin v. Kimball*, 90 Ill. 356. Whether or not appellant's representations were false, and whether or not he knew them to be false when he made them, are questions of fact, in reference to which the judgment of the appellate court, affirming that of the circuit court, is final.

The judgment of the appellate court is affirmed.

(117 Ill. 141)

## HORNE v. WALTON.

(Supreme Court of Illinois. May 15, 1886.)

## DAMAGES—DECEIT—ACTION FOR—MEASURE OF DAMAGES.

In an action for deceit, where the *gravamen* of the offense is that the defendant by false representations induced the plaintiff to loan his money, the measure of damages is the amount of money parted with, (and *semble* interest,) and not the difference between the actual value of the property received and what it would be if as represented.

Appeal from First district.

MULKEY, C. J. Sarah Walton recovered a judgment in the circuit court of Cook county against Daniel Horne, at its February term, 1885, in an action on the case for deceit, for the sum of \$1,015, which, on appeal, was affirmed by the appellate court of the First district. The matter to be considered and determined here is whether the record before us discloses any error of law for which the appellate court should have reversed the judgment of the trial court. The evidence tends to show that in the summer of 1877 appellee was residing, with her husband, near Riverdale, this state,—both being in the employ of a Mr. Bowen, the husband as a laborer on his farm, and the wife as his housekeeper; that the defendant was an acquaintance of theirs, and knew that plaintiff had saved out of her earnings a small sum of money; that the defendant called at their house, and inquired of her where she kept her money; that on being informed she “kept it in the savings bank” he told her it was not safe to keep it there; that most of the banks were breaking, and he would advise her, as a friend, to take the money out of the bank at once; that he knew where she could let it out on better terms than she was getting at the bank, secured by mortgage on certain lots, the title to which he assured her was perfectly good, with the exception of some back taxes due on them, and that the money he proposed to get of her was wanted to pay off the taxes in question; that the lots belonged to a Mr. Carpenter and one Gibbons, who were “worth \$100,000, and just as good as the Bank of England.” The evidence also tends to show that the above representations were false, and made with the intent and for the purpose of deceiving and defrauding appellee, and that by means thereof the defendant finally induced the plaintiff to let him have \$700 cash, receiving from him in exchange a note for that amount purporting to be executed by Daniel H. Carpenter, of Cincinnati, secured by a mortgage on the lots referred to by the defendant, which would have been ample security for the money if the title had been good. It is conceded, however, Carpenter had no title whatever to the lots, and the evidence tends to prove that the defendant well knew it at the time of making such representations. As it most generally happens in cases of this character, there is a conflict in the testimony, but with this we are not concerned.

The only alleged error complained of in the argument of appellant, worthy of notice, is the court's refusal to give to the jury the following instruction:

"The court instructs the jury that, if they find the issues for the plaintiff, then the true measure of damages is the difference in value between the value of the property alleged as having been offered and included in the mortgage given as security at the time the transaction was had, and what it would have been worth at that time had it been as the jury believe from the evidence said defendant represented it to said plaintiff, and said plaintiff believed it to be from said representations. The court further instructs the jury that, in the absence of any such testimony as to such valuation, and if the jury should find that no such evidence has been given herein, then you should find for the defendant."

This instruction seems to be based upon a total misapprehension of the true character of the action, and the grounds upon which the plaintiff is entitled, if at all, to recover. The *gravamen* of the complaint, as we understand it, is the alleged fraud and deceit of the defendant, by means of which the plaintiff was induced to part with her money. The actual loss she sustained was the amount of money she was induced to part with by means of the false and fraudulent representations made to her by the defendant. What is here said is equally applicable to appellant's suggestions in respect to the measure of damages.

The present case is, in all its essential features, like the case of *Horne v. Walton*, *ante*, 100, (decided at the present term of this court,) wherein we reached the same conclusion we have in this case.

Perceiving no error in the record, the judgment will be affirmed.

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(117 Ill. 137)

FARSON and others v. GORHAM.

(*Supreme Court of Illinois*. May 15, 1886.)

APPEAL—APPEALABLE ORDER—ORDER REMOVING A RECEIVER IS NOT.

An order removing a receiver is not a final and appealable order, within section 67 of the practice act. 2 Starr & C. St. c. 110, par. 68. A case cannot be taken piecemeal to the supreme court.<sup>1</sup>

Error to First district.

CRAIG, J. This was a bill in equity, brought by John Farson, trustee, against Gilbert A. Colby and others, to foreclose a certain trust deed which was executed on the first day of October, 1881, by Colby to Farson, on certain property in Chicago, to secure \$19,500 due and owing Preston, Kean & Co. The bill alleged that Colby was insolvent, and prayed that a receiver be appointed to take possession of the premises, and collect the rents as provided in the deed of trust. On the fourteenth day of May, 1884, the court appointed William D. Preston receiver, who went into the possession of the property. Charles T. Gorham, the defendant in error, was made a party to the bill, but no service was had as to him when the receiver was appointed. On the third day of June, 1884,

<sup>1</sup>See note at end of case.

his appearance was entered, and on the fourteenth day of June he filed an answer to the bill. In the answer the defendant in error set up that he had previously obtained a judgment against Colby, upon which his equity of redemption in the mortgaged premises had been sold, and that he had received a sheriff's deed on the twentieth of May, 1884. He denied that Colby was insolvent; denied that there was any cause for the appointment of a receiver. He also set up that the mortgaged premises were worth \$30,000, much more than the mortgage debt. After the filing of the answer the defendant in error entered a motion to vacate the order appointing the receiver, and that the possession of the property be turned over to him. The court heard the evidence on the motion, and entered an order that upon Gorham entering into a good and sufficient bond within 20 days, in the sum of \$5,000, the receiver and his lessees immediately surrender the possession of the property and premises to Charles T. Gorham, to which Augustus D. Lamb, John Farson, and Frederick W. Hayes excepted, and prayed an appeal, which was denied. After the appeal was denied, the complainant in the bill sued out a writ of error from the appellate court to reverse the order, but on motion in the appellate court the writ of error was dismissed, and this writ of error was brought to reverse the judgment of the appellate court. Section 68 of the practice act provides, appeals from and writs of error to all circuit courts, the superior court of Cook county, and city courts, and from other courts from which such appeals and writs of error may be allowed by law, may be taken to the appellate courts from all final judgments, orders, and decrees, except as herein stated. The question presented is whether the order entered by the court was a final judgment, within the meaning of the statute.

The original bill to foreclose the deed of trust or mortgage, which must in the end finally settle the rights of the parties as to the property involved, is still pending and undetermined in the superior court. There are various orders made by a circuit court in the progress of a cause which may, for the time, more or less affect the rights of the parties, from which no appeal will lie; nor can a writ of error be prosecuted to reverse such orders, for the reason that such orders are not final within the meaning of the statute, but merely interlocutory. We regard the order in question of that character. When this case is heard on its merits, the order that has been entered may be vacated by the superior court in the final decree, and hence no necessity exists for removing that order until the final decree is rendered in the cause. This court has often decided that a case cannot be heard here by piecemeal. In *Coates v. Cunningham*, 80 Ill. 467, we held that a decree appointing a receiver is interlocutory, and a writ of error will not lie to reverse it. For the same reason a writ of error will not lie to reverse a decree removing a receiver, as was done by the decree here. It is true that the decree or order entered in this case gives the defendant in error the possession of the property, but that cannot in any manner impair the rights of the complainant, as the defendant in error was required to give bond and security, and all moneys which may come into his hands under the order will be

subject to the final decree which the court may ultimately render in the cause. When the original bill is heard on its merits, and a final decree rendered which will definitely settle the rights of all the parties to the cause, it will then be ample time, if the decree is erroneous, for either party to appeal or sue out a writ of error. Then the entire record can be brought before the court for examination, and any error that may have intervened may be corrected.

*Blake v. Blake*, 80 Ill. 524, has been cited as an authority by plea in error. But that case has no bearing here. The decree appealed from there was one for the payment of money against a husband in a bill for divorce. The decree was one upon which an execution might issue. It was in effect an absolute moneyed judgment, and was in no manner connected with, nor did it depend upon, the final decree, which might oft-times be rendered in the cause.

The decision of the appellate court dismissing the writ of error will be affirmed.

## NOTE.

An appeal will lie from an order appointing a receiver. *Leary v. Graeff*, (Minn.) 16 N. W. Rep. 395. See *Simon v. Schloss*, (Minn.) 12 N. W. Rep. 196.

An order appointing a receiver is not appealable. *Stebbins v. Savage*, (Mont.) 5 Pac. Rep. 278.

A decision refusing to remove an assignee appointed under insolvent act is not appealable. *In re Goldsmith*, (Or.) 7 Pac. Rep. 97.

An appeal lies only from a final judgment. *Norton v. Hood*, 12 Fed. Rep. 763.

There is no final judgment, from which an appeal can be taken, until the judgment is actually rendered and entered upon the findings, and the costs taxed and inserted therein. *Board of Sup'rs of Co. of Milwaukee v. Fabet*, (Wis.) 25 N. W. Rep. 11.

An appeal will be dismissed where there does not affirmatively appear a judgment from which an appeal may be taken, and it will be dismissed upon this ground, although the parties failed to present the objection; for, being jurisdictional in its nature, the parties cannot waive it by silence or consent. *Green v. Ronen*, (Iowa,) 12 N. W. Rep. 765.

A judgment by default cannot be reviewed on appeal before a motion to open the default. *Dols v. Baumhager*, (Minn.) 10 N. W. Rep. 420.

A consent order cannot be appealed from. *Chapin v. Perrin*, (Mich.) 8 N. W. Rep. 721.

An order condemning land for the use of a railroad company is a final order, affecting a substantial right, and is appealable. *Wisconsin Cent. R. Co. v. Cornell University*, (Wis.) 5 N. W. Rep. 331.

A decree on a creditors' bill is a final decree, from which an appeal may be taken. *Reed v. Baker*, (Mich.) 3 N. W. Rep. 959.

A judgment on a verdict is a final order, from which an appeal will lie even though the judgment was entered on the motion of the defeated and appealing party. *Warner v. Lockerby*, (Minn.) 8 N. W. Rep. 879.

An order vacating a judgment on the ground of fraud and irregularity is appealable. *Dryden v. Wyllis*, (Iowa,) 1 N. W. Rep. 703.

In proceedings supplementary to execution, an order adjudging a stranger in contempt for failing to appear and answer under an order requiring him so to do, but reserving the matter of punishment for future consideration, is not appealable. *Menage v. Lustfield*, (Minn.) 16 N. W. Rep. 398.

Refusal to entertain a cause sent by one court to another for trial, for want of jurisdiction, is appealable. *Delaney v. Schuette*, (Wis.) 5 N. W. Rep. 796.

No appeal can be taken from an order granting a change of venue. *Graves v. Richmond*, (Iowa,) 12 N. W. Rep. 80. See *Allerton v. Eldridge*, (Iowa,) 10 N. W. Rep. 252.

But when a motion for change of venue, by mutual understanding, is treated as a demurrer involving the merits of the case, in the court below, an appeal will lie. *Lucas Co. v. Wilson*, (Iowa,) 13 N. W. Rep. 325.

An order striking a cause from the calendar of the court, on the ground that it has been removed to another court for trial, (the validity of such attempted removal being disputed,) is appealable. *Lee v. Buckheit*, (Wis.) 4 N. W. Rep. 1077.

An appeal will lie from an order discharging a sheriff from liability for the seizure of

goods upon process, and substituting other parties. *Sunberg v. District Court of Linn Co., (Iowa.)* 16 N. W. Rep. 724. See *Sunberg v. Babcock, (Iowa.)* 16 N. W. Rep. 718.

An appeal lies from a decree making an injunction perpetual. *Crowell v. Horack, (Neb.)* 12 N. W. Rep. 99.

An order modifying an injunction may be appealed from. *Weaver v. Mississippi & Rum River Boom Co., (Minn.)* 16 N. W. Rep. 209.

*Mandamus* is not appealable. *State v. Lancaster Co., (Neb.)* 13 N. W. Rep. 212.

A judgment for the payment of money, or stand imprisoned for contempt, in *mandamus* proceedings, is reviewable on appeal. *Schwab v. Coots, (Mich.)* 7 N. W. Rep. 61.

No appeal lies from an order overruling a special demurrer, with leave to answer. *Turck v. Soule, (Mich.)* 20 N. W. Rep. 822.

An order overruling a demurrer is not final, and no appeal will lie. *Kirchner v. Wood, (Iowa.)* 12 N. W. Rep. 44. See *Harris Manuf'g Co. v. Walsh, (Dak.)* 3 N. W. Rep. 307.

An appeal will lie from a judgment dismissing an action, with costs. *Rodgers v. Russell, (Neb.)* 9 N. W. Rep. 547.

A decree settling the rights and interests of parties in partition is appealable. *Williams v. Wells, (Iowa.)* 16 N. W. Rep. 513.

An order striking out an answer is appealable. *Harlan v. St. Paul, M. & M. Ry. Co., (Minn.)* 18 N. W. Rep. 147.

An appeal lies from an order striking from the pleadings all allegations having reference to one of the material issues raised. *Stanley v. City of Davenport, (Iowa.)* 2 N. W. Rep. 1064. See *Vermilye v. Vermilye, (Minn.)* 18 N. W. Rep. 832.

An order striking out redundant matter from an answer is not appealable. *Carpenter v. Reynolds, (Wis.)* 17 N. W. Rep. 300.

An order refusing to strike out portions of a pleading is not appealable. *Vermilye v. Vermilye, (Minn.)* 18 N. W. Rep. 832.

Refusal to dismiss an appeal from an inferior court, and retaining same for trial on the merits, is not appealable. *Minnesota Cent. R. Co. v. Peterson, (Minn.)* 16 N. W. Rep. 456.

A decree enjoining the sale of real estate is appealable. *Richards v. Coon, (Neb.)* 14 N. W. Rep. 162.

An order dissolving a temporary injunction is not appealable. *School-district v. Brown, (Neb.)* 6 N. W. Rep. 770.

An order directing a sheriff to pay over certain moneys collected by him on execution is appealable. *Coykendall v. Way, (Minn.)* 12 N. W. Rep. 452.

An order amounting practically to a final decree is appealable. *Morey v. Grant, (Mich.)* 12 N. W. Rep. 202.

An order fixing time of dissolution of partnership is appealable. *Candler v. Stange, (Mich.)* 19 N. W. Rep. 154.

An order dismissing an appeal from the probate of a will is appealable. *Ellair v. Wayne Circuit Judge, (Mich.)* 9 N. W. Rep. 533.

An order vacating a previous order of dismissal of a petition in insolvency, and fixing a day for hearing, is not appealable. *Smith v. New York Life Ins. Co., (Minn.)* 16 N. W. Rep. 452.

An intermediate order for costs, not appealable. *Riddle v. Yates, (Neb.)* 7 N. W. Rep. 289; *Felber v. Southern M. Ry. Co., (Minn.)* 9 N. W. Rep. 635.

An order to answer interrogatory and pay costs is appealable. *Cleveland v. Burnham, (Wis.)* 17 N. W. Rep. 126; but see *Cleveland v. Burnham, (Wis.)* 18 N. W. Rep. 190.

An order ratifying a clerk's refusal to tax costs is appealable. *State v. Reesa, (Wis.)* 15 N. W. Rep. 383.

A decision allowing a retaxation of costs is not appealable. *Herrick v. Butler, (Minn.)* 14 N. W. Rep. 794; *Herrick v. Root, (Minn.)* 14 N. W. Rep. 793.

Decision on a motion to modify conclusions of law is not appealable. *Shepard v. Pettit, (Minn.)* 16 N. W. Rep. 271.

An order vacating a judgment made by the court at the term is not appealable. *Brown v. Edgerton, (Neb.)* 16 N. W. 474.

An order of the circuit court staying proceedings in a partition suit until the county court should determine the interest of the respective parties in the state to which the realty belonged, and should make distribution of the estate, is not appealable. *Peeper v. Peeper, (Wis.)* 10 N. W. Rep. 604.

An order denying a motion for want of prosecution is not appealable. *German-town Farmers' Mut. Ins. Co. v. Dhein, (Wis.)* 15 N. W. Rep. 840.

An order dismissing an appeal is appealable. *Ross v. Evans, (Minn.)* 14 N. W. Rep. 897.

An order overruling a motion to discharge an attachment is not appealable. *Wilson v. Shepherd, (Neb.)* 16 N. W. Rep. 826.

An order dissolving an attachment is appealable. *Turpin v. Coates, (Neb.)* 11 N. W. Rep. 300. See *Wilson v. Shepherd, (Neb.)* 16 N. W. Rep. 826.

An order requiring an attorney to pay money collected for his client into court, and, on failure to do so, allowing execution therefor, is appealable. *Baldwin v. Foss*, (Neb.) 16 N. W. Rep. 480.

An order striking a bill in equity from file is appealable. *McMann v. Westcott*, (Mich.) 10 N. W. Rep. 190.

An order of continuance is not appealable. *Jaffray v. Thompson*, (Iowa.) 21 N. W. Rep. 659.

A finding that the allegations of a petition are confessed to be true by a defendant who is in default for want of an answer is not a final order or judgment, and no appeal will lie. *Daniels v. Tibbetts*, (Neb.) 21 N. W. Rep. 454. See *Riddle v. Yates*, (Neb.) 7 N. W. Rep. 289.

Where an order has been made granting a perpetual injunction, and referring the case to a master to take an account of the profits, etc., the report of the amount to the court is a final decree, and appealable. *Smith v. Walker*, (Mich.) 22 N. W. Rep. 287.

An order allowing a continuance is not appealable. *Sowards v. Stevens*, (Wis.) 24 N. W. Rep. 409.

No appeal will lie from an order granting change of venue. *Horak v. Horak*, (Iowa.) 25 N. W. Rep. 924.

Where demurrer to answer is overruled, and case dismissed, with costs, an appeal will lie. *Arnold v. Kreutzer*, (Iowa.) 25 N. W. Rep. 138.

An order setting aside a previous order vacating a judgment rendered at the same term is not appealable. *Owen v. Going*, (Colo.) 1 Pac. Rep. 229.

An order denying motion for removal of cause to federal court, not appealable. *Rough v. Booth*, (Cal.) 3 Pac. Rep. 91.

An order in criminal case declaring bail forfeited, and refusing to hear motion to discharge the forfeiture, is not appealable. *People v. Tremayne*, (Utah.) 3 Pac. Rep. 85.

An order striking out the defendant's answer is not appealable. *Beach v. Hodgdon*, (Cal.) 5 Pac. Rep. 77.

An appeal will not lie from an order refusing to allow the amendment of a complaint, or striking from the files. *Owen v. McCormick*, (Mont.) 5 Pac. Rep. 280.

An order refusing to set aside the service of the summons is not appealable. *Kansas Rolling-mill Co. v. Bovard*, (Kan.) 7 Pac. Rep. 622.

An order refusing to open a judgment is appealable. *Gillespie v. Campbell*, (Pa.) 1 Atl. Rep. 665.

An order so far final as to conclude the rights at issue, or to deny redress to the party seeking it, is appealable. *Waverly, M. & P. L., etc., Ass'n of Baltimore Co. v. Buck*, (Md.) 1 Atl. Rep. 561.

An order denying an application for a rehearing in equity is not appealable. *Zimmer v. Miller*, (Md.) 1 Atl. Rep. 858.

No appeal lies from a decision of a court of common pleas approving a charter. In re *Grand Lodge A. O. U. W. of Pa.*, (Pa.) 1 Atl. Rep. 582.

An order granting or refusing alimony *pendente lite* is not appealable. *Aspinwall v. Aspinwall*, (Neb.) 25 N. W. Rep. 623.

An order dismissing an action on the ground that the complaint stated no cause of action is not appealable. *Thorp v. Lorenz*, (Minn.) 25 N. W. Rep. 712. See *Craver v. Christian*, (Minn.) 26 N. W. Rep. 8.

An order of nonsuit is not appealable. *Kimple v. Conway*, (Cal.) 10 Pac. Rep. 189.

(117 Ill. 21)

### BROWN v. CITY OF CHICAGO and another.

(*Supreme Court of Illinois. May 15, 1886.*)

#### 1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—NOTICE—TIME OF—EXCLUSION OF FIRST DAY AND INCLUSION OF LAST.

In computing the statutory period of notice (in this case 10 days) required for application to confirm an assessment, the proper rule is to exclude the first day of publication and include the last. 1 *Starr & C. St. c. 24*, par. 143, art. 9, § 27.

#### 2. SAME—SPECIAL ASSESSMENT—VOTE OF COUNCIL TO STAY PROCEEDINGS FOR TWO YEARS—NOTICE FOR CONFIRMATION WITHIN TWO YEARS.

Where the city council votes a stay of proceedings for two years in an assessment proceeding, and afterwards proceedings are resumed, and within the two years the person assessed receives a notice to make objections in the county court, he cannot rely on such vote of the council, and absent himself from the proceedings.



Error to superior court, Cook county.

MAGRUDER, J. This is a bill in chancery, filed by plaintiffs in error in the superior court of Cook county, against the city of Chicago and the collector of Cook county, the defendants in error herein, to restrain said collector from selling certain lots in Chicago for the non-payment of a special assessment for the improvement of Main street, in that city. Defendants below demurred to the bill, which, after argument upon the demurrer, was dismissed for want of equity.

It was alleged in the bill, and is here urged, that the county court had no jurisdiction to confirm the assessment, because sufficient notice of the application for such confirmation was not given, in accordance with the requirements in article 9 of the general act for the incorporation of cities and villages. Rev. St. c. 24, §§ 143, 145. Section 27 of article 9 requires that the commissioners "shall cause at least ten days' notice to be given by posting notices," etc., "and, when a daily newspaper is published in such city or village, by publishing the same at least five successive days in such daily newspaper," etc. Section 29 provides that "if ten days shall not have elapsed between the first publication, or the putting up of such notices, and the first day of the next term of such court, the hearing shall be continued until the next term of court." In this case the notices were posted, and the first publication was made, on January 30, 1885, and the first day of the next term was February 9, 1885. It is claimed that "ten days' notice" was not given. But, under the repeated decisions of this court, there was sufficient notice. Excluding January 30th, and including February 9th, there were 10 days. The proper rule for the computation of time in such cases is to exclude the day on which the notice was first inserted or posted, and include the day on which the term commenced. *Ewing v. Bailey*, 4 Scam. 420; *Vairin v. Edmonson*, 5 Gilman, 270; *Bowman v. Wood*, 41 Ill. 208; *Forsyth v. Warren*, 62 Ill. 68; Rev. St. c. 100, entitled "Notices," § 6. The language of the statute, which was construed in *Vairin v. Edmonson*, *supra*, and to which the rule here indicated was applied by the court, was as follows: "If sixty days shall not intervene between the first insertion of such notice and the first term of the court, then the cause shall be continued," etc.

The bill also charges that after January 3, 1884, on which day the petition required by sections 22 and 23 of article 9 was filed in the county court, and a short time prior to February 4, 1884, plaintiffs in error petitioned the city council to defer action on the improvement in question; that the committee to whom the petition was referred, agreed that no further action should be taken for two years; that in accordance with such agreement the city council, on February 4, 1884, entered an order directing the law department to stay such proceedings for two years; that no further action was taken by the council in the matter; and that the further prosecution of the proceeding was without their authority. The language of the order passed by the council was as follows: "Ordered, that the law department be, and is hereby directed, to stay proceedings

for the improvement of Main street, from the South Branch of Chicago river to Thirty-first street, for a period of two years." The bill further alleges that on January 29, 1885, the assessment roll, compiled by the commissioners appointed to make the assessment, was filed in the county court; that on February 6, 1885, the affidavit of posting notices and the certificate of publication were filed, from which it appeared that the notices were posted, and the first publication was made, as above stated, on January 30, 1885; that on February 9, 1885, the first day of the term, the corporation counsel obtained an order requiring all parties objecting to the assessment to file their objections on or before February 11, 1885, and that on that day, no objections having been filed, the court confirmed the assessment roll.

It will be observed that the prosecution of the proceedings by the filing of the assessment roll and the giving of notice, etc., was not resumed for a year after the order of February 4, 1884, was entered. The bill is defective in not averring that plaintiffs in error had no notice of the steps taken in January and February, 1885, for the further prosecution of the proceedings. Section 27, above referred to, not only required the posting and publication of notice, but also that notice of the assessment, and of the term of court to which the roll will be returned, shall be sent by mail to the property owners. The law will presume, in the absence of proof to the contrary, that the commissioners did their duty, and sent such notice by mail. The bill does not aver that plaintiffs in error did not receive the mailed notices, nor does it allege that they did not see the posted and published notices, nor that they had no notice of the rule entered on February 9, 1885, in reference to the filing of objections. Section 30 of article 9 provides that "any person interested in any real estate to be affected by such assessment may appear and file objections," etc. If plaintiffs in error did receive notice of the steps taken in January and February, 1885, for the prosecution of the proceedings which had been suspended in February, 1884, they should have filed their objections to the action so taken, on or before February 11, 1885. If the order passed by the council on February 4, 1884, was a defense to any prosecution of the proceedings until the two years specified in the order had elapsed, such defense should have been set up in the county court at the February term, 1885, before the confirmation of the assessment.

Without considering the other points presented by the counsel in their arguments, we think that, for the reasons here stated, the demurrer to the bill was properly sustained. The decree of the superior court dismissing the bill is therefore affirmed.

(117 Ill. 648)

## CIHAK v. KLEKE.

*(Supreme Court of Illinois. May 15, 1886.)*

## 1. EASEMENTS—SEVERAL TENEMENTS IN ONE ESTATE ARRANGED WITH OPEN AND VISIBLE DEPENDENCIES AND BENEFITS—SALE OF ONE CONFERS EASEMENT.

When the owner of two tenements, or of an entire estate, has arranged and adapted these so that one tenement derives a benefit and advantage from the other of a permanent, open, and visible character, and he sells the same, a purchaser takes the tenement or portion sold with all the benefits and burdens which so appear at the time of the sale to belong to it. It is not necessary, in such a case, that the easement claimed by the grantee must be really necessary for the enjoyment of the estate granted.<sup>1</sup>

## 2. SAME—ESTOPPEL TO DENY EASEMENT.

When the owner of property has made sales by reference to a private plat showing an alley or other easement, and assured the purchaser that such plat will be recorded, and the purchaser invests his money on the faith of such representations, the grantor will be estopped to deny the existence of such easement.

## 3. SAME—EVIDENCE—INTENTIONS OF GRANTOR—HER HUSBAND CANNOT TESTIFY AS TO.

It is inadmissible for the grantor's husband to testify as to her intentions in making a certain plat exhibiting a private alley. Only her acts and declarations are admissible, from which her intentions can be inferred.

SCOTT, J., dissents.

## Error to First district.

SHELDON, J. We are of opinion that, upon the facts of this case, Cihak, the plaintiff in error, has an easement in the alley in question, which cannot be destroyed without his concurrence. We would have no doubt in the matter had Mrs. Hubbard, the grantor of Cihak, been the actor in the sale to him, and in the previous management of the entire property, instead of Gunzenhauser. The proof establishes to our satisfaction that in 1859 Gunzenhauser, as agent, took charge of the three lots 19, 20, and 21, fronting on De Koven street, to care for, lease them, and collect the rents; that for the more advantageous leasing of the lots, and deriving the most rental, he subdivided them, making of lots 20 and 21 four lots fronting on Jefferson street, and dividing lot 19 into two lots fronting on De Koven street. He made the four lots on Jefferson street 90 feet in depth, and an alley 10 feet wide,—the alley running from north to south along the entire east line of lot 19, and taking off the west 10 feet of the east two lots, thus forming an alley between the east half of lot 19 on the west, and the four lots on the east; that he drove the stakes for the alley; that he made written leases of the lots, according to this subdivision, leasing the four lots as only 90 feet deep; that in 1859 he leased the east half of lot 19, and the tenant in that year put up a fence on the west line of the alley, and, as the four lots east of the alley were leased, the tenant would put a fence on the west end of his lot adjoining the alley, so that by about 1864 all the four lots east of the alley were leased and occupied, and there was either a fence or

<sup>1</sup> Respecting the sale of lands with reference to an alley-way as shown by a plat, see *Dexter v. Tree*, (Ill.) 6 N. E. Rep. 506; *Clarke v. Gaffney*, (Ill.) 6 N. E. Rep. 689.

shed and barn along the entire east line of the alley; and from that time until 1882, with the alley thus open and defined, all the lots were under lease in the manner stated. This establishment of the alley was not only for the use and benefit of the lots from which it was taken on the east of it, but it was as well for the use and benefit of the east half of lot 19, which adjoined it its whole length on the west. This alley was a manifest advantage to the east half of lot 19, and must have enhanced its rental value. There was a building on the east half of lot 19 fronting on De Koven street, with its side on the line of the alley, with a window in it, and a door leading into the alley. The alley was actually being used for the delivery of coal and wood for the house, and was the only means of access to the house used for such purpose. If all this had been with the knowledge and procurement of the owner, and she had personally sold the east half of lot 19, the case would seem to be brought within the principle that when the owner of two tenements, or of an entire estate, has arranged and adapted these so that one tenement, or one portion of the estate, derives a benefit and advantage from the other, of a permanent, open, and visible character, and he sells the same, a purchaser takes the tenement or portion sold with all the benefits and burdens which so appear, at the time of the sale, to belong to it. *Morrison v. King*, 62 Ill. 34; *Ingals v. Plamondon*, 75 Ill. 118; *Janes v. Jenkins*, 34 Md. 1; *Huttemeier v. Albro*, 18 N. Y. 50; *Lampman v. Milks*, 21 N. Y. 507; *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *Kieffer v. Imhoff*, 26 Pa. St. 438; *Cannon v. Boyd*, 73 Pa. St. 179.

We do not concur in the view of counsel for defendants in error, that the easement to be claimed by the grantee in such a case must be really necessary for the enjoyment of the estate granted. Mr. Bennett, in his edition of *Goddard on Easements*, (page 122,) in speaking on this subject of grants of *quasi* easements upon the conveyance of one of two lots, says:

"The third class of cases is where the *quasi* easement claimed by the grantee is not really 'necessary' for the enjoyment of the estate granted, but is highly convenient and beneficial therefor; and here the modern rule in America is that, if such easement is continuous and apparent at the time of the grant, it passes to the purchaser with his estate, otherwise not."

And in *Washb. Easem.* (3d Ed.) 95, in the discussing of this question, the author says:

"It [the easement] must be reasonably necessary to the enjoyment of the part which claims it; and, where that is not the case, it requires descriptive words of grant or reservation in the deed to create an easement in favor of one part of a heritage over another."

There can be no doubt here that the alley was highly convenient and beneficial for the enjoyment of the estate granted to Cihak. Gunzenhauser would appear to have made the subdivision he did of his own motion. Wilder was the owner at the time, and lived in Chicago. All that goes to connect him with the subdivision is Gunzenhauser's statement that Wilder was on the ground several times; helped him to get off

the squatters; "made no objections to my letting out the land in that way, and was perfectly satisfied." While Henry G. Hubbard owned the property, he lived in Connecticut, and is not shown to have had any personal knowledge of the subdivision; and the same with Mrs. E. K. Hubbard. We understand she, too, resided in Connecticut. E. K. Hubbard, her husband, testifies that he resided in Chicago from 1835 to 1885; that he had authority from his wife to act on her behalf; says he thinks his wife had seen the lots; that he saw them, after his wife became owner, perhaps once a month; that he did not recollect consulting with any one regarding the subdivision platted and recorded, except perhaps Gunzenhauser. And here the inquiry is suggested, why this plat of the subdivision which was made and recorded at the instance of E. K. Hubbard, and, as Mrs. Hubbard acknowledges, by her direction, comes to correspond precisely with the subdivision which Gunzenhauser made in 1859, and has the same alley of just 10 feet wide, exactly as Gunzenhauser staked it out in 1859? It implies knowledge by Mrs. Hubbard of the subdivision, and is evidence tending to show her adoption and confirmation of that subdivision, and of what was done under it.

But without further pursuing this branch of the case, or expressing an opinion whether the circumstances of the arrangement and use of the alley for the accommodation of this lot of Cihak, and selling the lot with the apparent appurtenance of the alley attached to it, were alone sufficient to give to the grantee of the lot the use of the alley, we come to the conclusion that they were sufficient when taken in connection with the subsequent sales being made subject to the alley. Defendants in error never bought or paid for the alley, or so supposed. In the deeds for lots 1 and 2 the use of the west 10 feet of the lots for a private alley was expressly reserved. And at the time the deed for lots 3 and 4 was made there was upon record the plat of the subdivision showing the alley upon it. True, it is named "Private Alley," and it is insisted by counsel for defendants in error that this means private to the lots from which the alley was taken,—those on the east side of it,—and that it was for their use only. Under other circumstances, of Mrs. Hubbard not being the owner of the ground on the west side of the alley, this might be so. But was it so under the circumstances here? The alley had originally been laid out many years before for the accommodation of Cihak's lot, as well as the other lots, and had ever afterwards been used equally for the accommodation of Cihak's and the other lots. At the time Mrs. Hubbard put the designation "Private Alley" on the plat the alley was being so used, and she was the owner of the ground on both sides of the alley, with a building standing on the west line of the alley constructed with special adaptation for the use of the alley. The alley was important for the beneficial enjoyment of her lot on the west side of the alley, and must have enhanced its value. There was no apparent purpose why the alley should not be as much for the use of the owner's ground on one side of the alley as on the other side. Under such circumstances, we think the meaning of "private" was that the alley was private to the owner's own ground; that the alley was for the

use of the owner's lots only, but of her lots abutting on both sides of the alley, and not for the use solely of her lots on one side of the alley.

We give no consideration to the manifestly incompetent testimony of E. K. Hubbard, that his wife's intention was to reserve the alley as a private alley for the use of lots 1, 2, 3, and 4. It was not competent for him to swear to his wife's or any one else's intention. All that he might do in such regard would be to testify to acts and declarations as showing intention. The question here is, what others had reason to believe was the intention from the circumstances and the acts done.

The alley was an important consideration with Cihak when he purchased. An inspection of the abstract of title did not show the alley of record. This defect was brought to the attention of Gunzenhauser, and, to assure Cihak that he would get with his lot the use of the alley, the plat of the subdivision, with the alley appearing upon it acknowledged by Mrs. Hubbard, was shown by Gunzenhauser to Cihak; the former stating that the plat was going to be put upon record. This satisfied Cihak that he would get the benefit of the alley. Gunzenhauser, who made the sale, Kaspar, who acted for Cihak, and Cihak, no doubt, all believed that the recording of the plat of the subdivision would secure for Cihak the use of the alley. It did not occur to either of them that the word "private" had any significance as excluding such use. To so construe that word would be to make it but a snare to entrap the one purchasing the lot on the west side of the alley. It would be to give to defendants in error ground which they never purchased, and to rob plaintiff in error of an alley, the use of which he had good reason to believe he purchased as an appurtenance to his lot. We find enough in the facts of this case to have put the defendants on inquiry, so as to have affected them with notice of the circumstances upon which we rest the right of the complainant to the use of this alley.

The judgment of the appellate court and the decree of the circuit court will be reversed, and the cause remanded to the circuit court for further proceedings in conformity with this opinion.

SCOTT, J. I do not concur in this opinion.

(117 Ill. 171.)

#### SANDERSON v. TOWN OF LA SALLE.

(*Supreme Court of Illinois*. May 15, 1886.)

#### TAXATION—SUIT IN PERSONAM TO RECOVER TAX ON FORFEITED PROPERTY—IRREGULARITIES IN FORFEITURE IMMATERIAL.

In a suit *in personam*, against the owner of property forfeited for non-payment of taxes, to recover the amount of such taxes, (2 Starr & C. St. c. 120, § 280, par. 232,) irregularities in the proceeding for forfeiture are immaterial. It is sufficient to charge the owner, in any case of this character, where there has been a forfeiture in fact of delinquent land, at a regular tax sale, for the taxes legally due thereon.

Error to La Salle county court.

MULKEY, C. J. The town of La Salle recovered a personal judgment, in the county court of La Salle county, against Lyman Sanderson, the appellant, for \$95.96, on account of taxes alleged to be due the town on a certain lot assessed in his name, and which appears on the tax-books to have been forfeited to the state for the non-payment of said taxes. The present appeal is from that judgment. The recovery was had in an action of debt founded upon section 230 of the revenue act, which is as follows:

"The county board may, at any time, institute suit in an action of debt, in the name of the people of the state of Illinois, in any court of competent jurisdiction, for the whole amount due on forfeited property; or any town, county, city, school-district, or other municipal corporation to which any tax may be due, may, at any time, institute suit in an action of debt in its own name, before any court of competent jurisdiction, for the amount of such tax due any such corporation on forfeited property, and prosecute the same to final judgment."

A reversal is asked, first, because the record does not affirmatively show that the attorneys conducting the suit for the town were authorized by a vote of the town to do so. Without stopping to inquire whether a formal vote of the town is necessary to employ counsel in a case like this, about which we express no opinion, it is very clear that mere absence of proof that counsel for plaintiff were thus employed affords no ground for a reversal of the judgment. A question of this kind cannot be successfully raised for the first time in an appellate tribunal, as is now sought to be done.

It is next objected that the record of the proceedings in county court fails to show that the collector published a list of the delinquent lands and lots, and gave notice of his intended application for judgments against the lot in question, as required by section 182 of the revenue act. We do not regard it important to inquire whether this claim is well founded or not. It must be borne in mind, the present suit was not instituted for the purpose of ascertaining whether the proceedings in the county court, culminating in the judgment against the lot charged with the taxes now sought to be recovered, strictly conforms to all the requirements of a statute, as in a case where the validity of a tax title is involved. On the contrary, this is simply a common-law action of debt to recover the town taxes due on the lot in question for the years 1875, 1877, 1878, and 1879. In all cases where there has been a forfeiture of land for the taxes justly due upon it, this action will be against the owner, notwithstanding omissions or irregularities have occurred in the tax proceeding which would be fatal to a tax title founded thereon. We have no doubt that one of the chief objects the legislature had in view in adopting the act was to afford a safe and simple remedy for the collection of taxes where, by reason of defects in the proceeding against the land itself, purchasers would be deterred from buying at tax sales. We hold, therefore, that it is sufficient to charge the owner, in any case of this character, where there has been a forfeiture in fact of delinquent land, at a regular tax sale, for the taxes legally due thereon. All the evidence con-

sidered, we think this case is clearly brought within the rule here laid down, and are also of the opinion that none of the objections urged as a ground of reversal are well founded. It is not deemed necessary, nor, indeed, proper, to enter into a discussion of the details of the evidence for the purpose of demonstrating the correctness of the conclusion reached. Ordinarily, such discussions are of but little interest or utility to those who have occasion to consult our reports; hence, as a general rule, they should be avoided. We perceive nothing in this case to require a departure from the rule suggested. It is the facts as found, and the conclusions of law arising thereon, that the profession are interested in.

The conclusion reached in this case is supported with more or less directness in the following cases: *Biggins v. People*, 106 Ill. 270; *Douthett v. Kettle*, 104 Ill. 356.

The judgment will be affirmed.

(118 Ill. 112)

PEOPLE *ex rel.* BLISS and others *v.* CHICAGO W. D. RY. CO.

(*Supreme Court of Illinois.* May 15, 1886.)

STREET RAILWAYS—MUNICIPAL ORDINANCE—MANDAMUS TO COMPEL CONSTRUCTION.

Defendant was authorized by an ordinance (the provisions of which the defendant accepted) to construct and operate a street-railway track upon a certain street, upon condition, among other things, that the track be extended to a certain point as soon as such road could be constructed, operated, and kept in repair without actual loss. Upon *mandamus* to compel the construction of such extension, the company answered that it could not be constructed, kept in repair, and operated without loss. The petitioner demurred, on the ground that the record showed that the ordinance depended for validity on the consent of property holders, and that such consent had been made, with the request that the ordinance require such extension to be constructed immediately. The court hold that such request did not operate as a condition; that the ordinance was valid; and that the company could not be compelled to build the extension except in accordance with the terms of the ordinance.

Appeal from First district.

CRAIG, J. The Chicago West Division Railway Company, under the terms of its charter, was authorized to construct, maintain, and operate a single or double track railway along such streets in the west division of the city of Chicago as the common council shall from time to time authorize, upon such terms and conditions, and with such rights and privileges, as the council has or may by contract prescribe. On the second day of August, 1880, a petition was signed by a majority of owners of lands, representing more than one-half of the frontage on Ogden avenue, between Western avenue and the city limits, and presented to the common council, in which the common council was requested to grant the Chicago West Division Railway Company permission to lay its tracks upon Ogden avenue from Western avenue to Crawford avenue. No conditions were prescribed in this petition, but it contained the request that the common council would also pass such ordinance, or issue such order as may be legally authorized, to compel the railway company



to lay its tracks and run its cars upon the extended line without necessary delay after permission is given to occupy the streets. On the seventh day of August, 1881, the common council passed an ordinance, section 1 of which authorized the railroad company to extend its line of road from its present terminus, at or near Western avenue, to the western limits of Chicago. Section 2 is as follows:

"Said permission and consent to extend shall be conditional upon the acceptance by said Chicago West Division Railway Company of this ordinance within ten days after its passage and approval by the mayor, and their agreement to comply with all its conditions; and upon the further conditions that said tracks shall be laid and in actual operation from Western avenue to the western line of Douglas park, on or before the first day of June, 1881, and from the western line of Douglas park to Lawndale as soon as the same can be constructed, operated, and kept in repair without actual loss."

On the twenty-third day of February following, the railroad company filed in the office of the city clerk its written acceptance of the ordinance. The road has been constructed and is in operation from Western avenue to Douglas park, and the question presented by this record is whether the railway company can be compelled by *mandamus* to construct and operate a line of road from Douglas park to Lawndale. In the answer to the petition the railway company, among other things, denied that the extension of its line from Douglas park to Lawndale ever could have been or could then be constructed, operated, and kept in repair without actual loss. To the answer the petitioner demurred; the court overruled the demurrer; and, as the petitioner abided by the demurrer, the writ was dismissed. Whether a railway company can be compelled to construct and operate a line of railroad by *mandamus* may well be doubted; but we do not find it necessary to decide that question, as the decision of the case may properly be placed upon other grounds.

It is not claimed that the charter under which the railway company derived its corporate powers of itself imposed the obligation to construct this particular line of road; but the obligation, if any exists, arises from the ordinance adopted by the city of Chicago, and the acceptance of its provisions by the railway company. This being the case, an examination of the terms and conditions of the ordinance, and its acceptance, seems to be necessary to determine the rights, the duties, and obligations of the parties. As said before, the first section of the ordinance authorized the railway company to construct and operate a line of road on Ogden avenue from Western avenue to the western limits of the city. The second section imposed the conditions. The *first* requires the acceptance of the ordinance by the railway company within a specified time; *second*, that the tracks shall be laid, and the road in operation, from Western avenue to the western line of Douglas park on or before the first day of June, 1881; and, *third*, from the western line of Douglas park to Lawndale as soon as the road can be constructed, operated, and kept in repair without actual loss. These alone were the conditions imposed by the city of Chicago upon the railway company when it accepted the ordinance and agreed to be bound by its terms and condi-

tions, and it is plain that other and additional conditions could not be imposed without its consent. Under the ordinance which was accepted by the railway company it was not bound to construct and operate a line of road from Douglas park to Lawndale until it could be built, operated, and kept in repair without actual loss. In the answer, which is admitted to be true by the demurrer, it is clearly alleged that the road cannot be constructed and kept in repair without loss. With this conceded fact in the record, it seems too plain for argument that no obligation rests on the railway to construct and operate this part of the road.

But it is set up in the petition that on the fourth day of August, 1884, the city of Chicago framed an ordinance requiring the railway company, within 60 days after being notified of the action of the city, to extend its line of road to Lawndale. This ordinance can have no bearing on the question involved. In the original ordinance no right to alter or change the terms upon which the railway company accepted the terms of the ordinance was reserved; and, in the absence of such reservation, we are aware of no principle upon which the city, without the consent of the railway company, can impose upon it other and additional obligations. When the common council gave the railway company permission to occupy the streets of the city, it then had the right to impose such conditions, in regard to the time within which the line of road should be completed, as in its judgment the public interest of the city required; but after it had acted, and its terms had been accepted, it would be manifestly unjust and unwise to allow the common council arbitrarily to impose other and different terms. Doubtless the common council, notwithstanding the grant to the railway company of the right to use the streets, retained full power and authority over the streets to improve them, and use them for all purposes for which they were dedicated to public use. But that reserved power conferred no right in the common council to compel by ordinance the construction and operation of a street railway.

The petitioner, however, concedes in the argument that he is bound by the ordinance which was accepted by the railway company, in so far as it conforms to the consent of a majority of the land-owners, but he insists that section 2 of the ordinance, which provides for the building of the road to Lawndale as soon as the same can be constructed and operated without loss, is void. This position is founded in a misconception of what we conceive to be a fair and reasonable construction to be placed upon the written consent submitted by the land-owners to the common council, upon which that body acted when it framed the ordinance. The petition is addressed to the mayor and common council, and, after reciting that petitioners are a majority by frontage of those owning property on the proposed line, proceeds:

"Being desirous of having the West Division City Railway Company extend its line from its present terminus to or beyond Douglas park, \* \* \* petition \* \* \* your body to grant permission to said company to lay their tracks upon Ogden avenue from Western avenue to Crawford avenue. And

your petitioners would further \* \* \* request your \* \* \* body to pass such ordinance or issue such order as you may be legally authorized to do, to compel said company to lay its tracks and run its cars upon said extended line without necessary delay after you have authorized it so to do."

This is the document which led to the passage of the ordinance, section 2 of which it is said is void as not being authorized by it. It is true that the property owners might have inserted such conditions in their assent as they thought proper, and the common council might have been powerless to grant the railway company permission to occupy the streets except upon the conditions specified by the property owners in their consent; but the paper does not seem to contain conditions. The grant of the right was not requested upon any condition. The latter part of the paper expresses a request that the railway company might be required to lay its tracks and run its cars without unnecessary delay; but consent is not given on this condition, or even any other condition. Under the consent as expressed in the writing, the common council passed the power to act as, in their judgment, the best interest of the public required. This they did by the passage of the ordinance; and it is not for the courts to say that the ordinance, as framed and accepted by the railway company, was wise or unwise. It is enough that the common council was authorized to pass the ordinance; their discretionary power as to its terms and conditions is not a subject of review.

Other matters, not, however, of controlling importance, have been discussed, but it will not be necessary to follow the argument in detail. We perceive no ground upon which the petition can be sustained.

The judgment of the appellate court will be affirmed.

(117 Ill. 597)

JONES and others v. LLOYD and others.

(*Supreme Court of Illinois*. May 15, 1886.)

1. STATUTE OF FRAUDS — MEMORANDUM — PLEADING IN FORMER SUIT DULY SIGNED.

An agreement to convey land, evidenced by a pleading in a former suit, setting forth the agreement, and signed with the names of the parties to be charged, is binding, within the statute of frauds, where the defense of the statute was not interposed in such former suit at the same time with such pleading.

2. TRUSTS — RELEASE BY CESTUIS QUE TRUSTENT — TRUSTEE MUST MAKE FULL DISCLOSURE.

A release by *cestuis que trustent* will not be binding unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee. The facts surrounding the release in this case are held to show gross fraud on the part of the trustee.

3. SAME — LACHES — DELAY CAUSED BY IGNORANCE AND DECEPTION.

A delay of six years to bring suit would ordinarily amount to such laches as to defeat the suit; but in this case the delay of the *cestuis* for six years to file a bill against their trustee is found to have been caused by ignorance of the facts, produced in turn by the deception and bad faith of the trustee, and constitutes no bar.

SCOTT and SHELTON, JJ., dissent.

Error to De Kalb.

MAGRUDER, J. On January 1, 1862, John H. P. Jones, father of plaintiffs in error, and also father of the defendant in error, Rebecca Lloyd, was indebted to Hannah Miller in the sum of \$2,330.30, and was the owner of the N.  $\frac{1}{4}$  of section 27, township 41, range 3 E. of third P. M., in De Kalb county, which 320 acres was then worth about \$20 per acre. The defendant in error John Lloyd, at the same time, had a claim upon the 320 acres, growing out of some previous sale, or attempted sale thereof, to him, by his father-in-law. On that day Jones and Lloyd both executed deeds to Hannah Miller, and the legal title to the property was thereby placed in her. By an agreement between the three, Lloyd was to take possession of the land as his own, and have the rents and profits, and, out of the same, pay the taxes, and also pay to Hannah Miller the \$2,330.30, with interest at the rate of 10 per cent. per annum, payable annually, as soon as he was able, and on or before January 2, 1872. Hannah Miller agreed that she would convey the premises to Lloyd upon the payment of her debt and interest within the 10 years, on or before January 2, 1872. John H. P. Jones agreed that he would contribute towards the payment of the debt to Miller out of such moneys as he might earn by his practice as a physician, and that his two minor sons, Oliver, then about 15 years old, and Randolph, then about 12 years old, the plaintiffs in error herein, should live with Lloyd, and work for him, "until said premises were paid for, or they became of age." As a part of the same arrangement Lloyd also then and there agreed that he would furnish a home to the minor children of John H. P. Jones during their minority, and to Jones himself during his life-time, and would also support the said Jones when unable to support himself as long as he lived, and, upon obtaining the deed of the 320 acres from Hannah Miller, would convey the W.  $\frac{1}{4}$  thereof, being the N. W.  $\frac{1}{4}$  of the section, containing 160 acres, to the two minor sons of John H. P. Jones, who are the plaintiffs in error in this case. A more detailed statement of this transaction, and substantially the same as that here recited, may be found in *Jones v. Miller*, 44 Ill. 181.

This is a bill filed in the circuit court of De Kalb county by the plaintiffs in error, to compel a conveyance to them, or to Randolph Jones, of the S.  $\frac{1}{4}$  of the said N. W.  $\frac{1}{4}$ ; the N.  $\frac{1}{4}$  thereof having been already conveyed to Oliver Jones, as hereinafter set forth. Upon final hearing the circuit court dismissed the bill for want of equity, and the case is brought to this court by writ of error, issued herefrom, for the purpose of reviewing such decree of dismissal.

It is insisted that the agreement to convey the 160 acres to plaintiffs in error cannot be enforced, because it was not in writing, and is therefore void under the statute of frauds. This objection is without force, under the circumstances of this case. At the November term, 1864, of the De Kalb county circuit court, and in the case of *Jones v. Miller*, above referred to, which was before this court at the April term, 1867, the defendants in error herein, who were co-defendants with Miller in that case, filed an answer in which they admitted and set up at length the agreement between Hannah Miller, John H. P. Jones, and John

Lloyd, as the same is above detailed. That answer in the old suit was introduced in evidence upon the trial of this present suit, in the court below. It purports to have been signed by "John Lloyd and Catherine Rebecca Lloyd, Defendants;" and, if not signed by them in person, was signed by their attorneys for them. We think that the statement of the agreement therein meets the requirement of the statute. *McLaurie v. Partlow*, 53 Ill. 340; *Kingsbury v. Burnside*, 58 Ill. 310; *McConnell v. Brillhart*, 17 Ill. 354. The agreement was there set up by the defendants, "without at the same time interposing the statute of frauds as a defense." Pom. Spec. Perf. § 140. Moreover, in *Jones v. Miller*, *supra*, which was a suit between defendants in error on the one side, and the ancestor of plaintiffs in error on the other, the agreement, as here recited, with some slight variations in the details, was actually found by this court to have been executed between the parties here mentioned. We there say: "If Lloyd refuses to perform his part of this contract, Jones can pursue his legal remedies under the new agreement." If such a course was open to Jones, it is not perceived why the same course is not now open to the two sons of Jones, who are beneficiaries in the trust created by "the new agreement."

The evidence shows that the defendant in error John Lloyd has failed to keep his contract. He did not furnish his father-in-law, John H. P. Jones, with a home or with support, as he agreed to. Jones did not live with Lloyd after the fall of 1866. About that time, when he was between 60 and 70 years old, he was ordered by Lloyd to pack up and go. From some time in 1866 to March, 1877, when he died, he had no home with Lloyd, and received no support from him. During this period, while he was old and feeble and lame, he lived in a number of places with a number of persons. Numerous appeals were made, on his own behalf, to Lloyd for help, but none of them were listened to. The proof is clear that during the last 10 years of his life the old man was in the poorest possible circumstances financially. Lloyd does not claim that he aided him in any way, after his leaving, except in the matter of clothing. He also admits that the support of Jones would have cost from \$150 to \$200 per year. By discarding him, therefore, from 1867 to 1877, he saved some \$1,500, or thereabouts. Lloyd did not keep his contract by furnishing a home to the minor children of Jones during their minority. The daughter, Sarah, stayed only a few weeks, and then went off to work for her living. In 1866, Ambrosine, the youngest daughter, who was then only 12 years old, was compelled to leave Lloyd's house, and work first in one family and then in another. She continued so to work and earn her own support during the remaining six years of her minority. Whenever she returned to Lloyd's house, she was reminded that she should seek a situation elsewhere. The cost of her support could not have been less than \$100 per year, so that her brother-in-law saved at least \$600 by her leaving.

Lloyd has failed utterly to keep his contract, so far as plaintiffs in error are concerned, and his conduct towards them has been marked by the grossest fraud and deception. He was not obliged to wait 10 years

before paying Mrs. Miller. Her debt was payable *on or before* January 2, 1872. He was to appropriate the rents and profits of the farm towards the payment of her debt, and to discharge it "*as soon as he was able out of the rents,*" etc. He should not have used the rents and profits for any other purpose than to pay off the \$2,330.30. The plaintiffs in error were to live with him and work for him "until said premises were paid for, or they became of age." He claims that, in the fall of 1872, he still owed Mrs. Miller \$1,100. If this was so, it was because he used the income of the farm for other purposes, and with the apparent intention of keeping the plaintiffs in error at work for him as long as possible. When he took possession of the 320 acres in 1862, he had but little property of his own. At that time, Jones had considerable personal property upon the 320 acres, nearly all of which was used and absorbed by Lloyd and his family. The work of plaintiffs in error relieved Lloyd of the necessity of employing other labor except during harvest. The rental value of the farm per year was from \$3 to \$3.50 an acre. Lloyd had no other source of income from 1862 to 1873 than that which he derived from the 320 acres. During this period, and beginning as early as 1867, he bought 80 acres at Malta, and improved it. He bought five acres of timber land. He built a house that cost \$1,000. He put up new barns, and moved old ones. He built a horse stable, a cow stable, a hay barn. He also built fences, and partly with material owned by Jones. He had a large stock of horses and cattle raised on the place. He raised two or three car-loads of hogs each year, starting with the hogs left there by his father-in-law. It is clear that he could have paid Mrs. Miller, out of the rents and profits of the 320 acres, long before 1872 if he had chosen to do so. As soon as he paid her and received a deed from her, it was his duty to convey the N. W.  $\frac{1}{4}$  of the tract to plaintiffs in error. He induced plaintiffs in error to believe that he could not get a deed until after the expiration of 10 years, and that they were bound to work for him for 10 years, before they would be entitled to receive their 160 acres. Oliver worked for him full 10 years, beginning in 1862, when he was 15 years old, and ending in 1873, when he was 26 years old. He was absent in the army one year, and upon his return was required to work an extra year to make up for the lost time. While away, he sent home \$500 bounty money, of which Lloyd and his wife took possession, and of which he received back only \$280. Randolph also worked for Lloyd 10 years, with the exception of about six months.

During the long period of their service the plaintiffs in error received no compensation whatever. They were not encouraged to attend school, and seem to have been purposely kept in ignorance. Oliver can neither read nor write. Randolph can write his name, but cannot read writing. According to the testimony in the record, in reference to the wages usually paid to farm laborers, the average yearly value of the services of plaintiffs in error was, at the lowest estimate, \$150 for Oliver, and \$100 for Randolph. Accordingly, the work done by them both during the 10 years saved Lloyd a total expenditure of at least \$2,500 for labor.

Plaintiffs in error, though evidently not informed as to the details of the arrangement between their father and Lloyd, were aware that they were to receive 80 acres apiece, and they worked and waited for their reward, and expected it at the end of 10 years. In 1867, having been told by one Tallmadge that Lloyd would play them false, and not give them the 160 acres, they applied to Lloyd to know if this was true, and stated to him that, if it was true, they would quit working for him, and go elsewhere. They both swear—and their statements bear all the marks of being true—that Lloyd then told them to continue their work, and he would give them 80 acres apiece, as he had agreed to do. He thereby renewed the original agreement made on their behalf by their father in 1862. They continued in the active performance of the agreement, as thus renewed, for more than five years after 1867, and, during all this period, maintained a joint possession with Lloyd of the premises for which they were laboring. On April 3, 1874, he held the legal title to the N. W.  $\frac{1}{4}$  of the section, in trust for plaintiffs in error. He stood to them in the relation of a trustee to his *cestuis que trustent*. His obligations and duties were such as grow out of such a relation of trust. On that day he and his wife and Oliver and Randolph rode to the county-seat together in a carriage, went to the office of a lawyer who had been one of the attorneys of Lloyd in the old litigation with his father-in-law, and whose bias and interest were all on Lloyd's side. This attorney was familiar with the terms of the agreement between Lloyd and Jones, and seemed to have prepared himself in advance for the interview, because he says that he had before him the files in the old suit, and, among them, the answer above referred to, in which the agreement was set forth. Plaintiffs in error expected their deed for the 160 acres. Instead of this, Lloyd and his attorney told them that all the interest and claim of their father, under the contract, had been "wiped out;" that they were really entitled to receive nothing, but that Lloyd, in consideration of their having been "good boys," would give them one 80-acre tract. Lloyd and his attorney then proposed to plaintiffs in error that Lloyd should convey the N.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of the section to Oliver, and that Oliver should execute a mortgage thereon to secure the payment of his note to Randolph for \$1,000, payable in four installments, in January, 1875, 1876, 1877, and 1878. In other words, the proposition was to give Oliver the title to 80 acres, and give Randolph a mortgage on Oliver's 80 acres, to be paid by Oliver himself. The bare statement of the proposition indicates its unfairness and injustice.

Plaintiffs in error both swear that the arrangement in question was never proposed to them, and they had never heard of it, until the meeting took place at the attorney's office on April 3, 1874. Lloyd states, with indefiniteness and hesitancy, that he made the proposition to his brothers-in-law in the fall of 1872, and they agreed to it at that time. They positively deny this, and we think their testimony is entitled to the greater weight. He also seeks to make it appear that the settlement, upon the basis of one 80-acre tract and a mortgage, was talked over among them on that day while they were riding to town. But Mrs. Lloyd her-

self says that nothing was said on the subject during the ride. The admitted conduct of plaintiffs in error, when the proposed settlement was first broached to them, confirms their evidence upon this subject. Randolph Jones was so overcome with astonishment and indignation at the sorry outcome of so many years of working and waiting that he rose from his seat with impatience and left the room. It took the combined influence of his sister and brothers-in-law and their attorney to bring him to terms. As he went out saying that he would not take anything, the attorney told him "that will not do." His sister sneeringly remarked to him, "You are showing yourself nicely with your brother." His brother-in-law followed him out, and coaxed him, and told him that there was "no use in getting huffy," and urged upon him that the claims of his father and of himself and his brother upon the land had all been "wiped out," and that what had been offered was offered "*free gratis*." While they were out the attorney talked to Oliver, who had insisted, as soon as the arrangement was proposed, that it had always been understood that they were to have 80 acres apiece. Oliver finally concluded, and so said to his brother, upon the latter's return to the office with Lloyd, that if, according to the statements made to them, they were legally entitled to nothing, they might as well take what they could get. Accordingly a deed was then and there made by Lloyd and his wife to Oliver Jones, conveying the N.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ ; and notes for \$1,000, and a mortgage on the N.  $\frac{1}{4}$  securing the same, were executed by Oliver to Randolph. At the same time plaintiffs in error were persuaded to execute to Lloyd a release of any demands which they might have against him. Plaintiffs in error swear that the answer hereinbefore mentioned, which was referred to in the release, and the agreement set up in the answer, were not read to them at all, and that they knew nothing about their contents. They also swear that they were unable to read the release, and were told that it was merely an agreement to pay one-third of the costs of any suit which their father might bring for the recovery of their land and Lloyd's land.

It is urged by defendants in error that this release is a defense to the relief prayed for in this case. It cannot, however, be allowed to have the effect claimed for it, in view of the circumstances under which it was executed. It was made by the beneficiaries in a trust at the instance of their trustee. In the matter of its procurement, Lloyd, the trustee, was bound, under the law, to act with the utmost fairness towards his ignorant and inexperienced brothers-in-law, the *cestuis que trustent*. He should have put them in possession of all the facts surrounding the transaction of which he himself had knowledge. He should have refrained from bringing to bear upon them any undue or improper influence.

"A release by the *cestuis que trust* will not be binding unless the parties are made fully acquainted with their own rights, and the nature and full extent of the liabilities of the trustee. Any concealment, misrepresentation, or other fraudulent conduct will vitiate such a release." Perry, Trusts, § 923. Therefore a full statement of all the accounts and other



transactions of the trustee should unquestionably be furnished to the *cestuis que trust*, together with all the information requisite for explaining and understanding them. "And the burden is on the trustee to vindicate the bargain or gift from any shadow of suspicion, and to show that it was perfectly fair and reasonable in every respect, and courts will scrutinize the transaction with great severity." Perry, Trusts, § 428; Hill, Trustees, \*581.

An application of these principles to the facts as disclosed in the record will show that Lloyd failed to do his duty as the holder of an important trust. He kept for himself 80 acres of land that belonged to the beneficiaries whom he represented. He induced them to consent to his retention of their property, by stating to them that all their own claim to it, and all their legal rights in it, had been "wiped out." This statement was false. The grounds which he urged in support of it, and which he pressed with such eagerness as to make them believe it, were — *First*, the alleged failure of their father to aid him in paying the Miller debt; *second*, the large expense he had been put to by the litigation brought against him by their father; *third*, a yet unpaid balance upon the Miller debt, which it was difficult for him to discharge.

The contract, as set out in the old answers, and as stated by this court in *Jones v. Miller*, *supra*, did not require John H. P. Jones to contribute any specified amount towards the payment of Mrs. Miller's debt. He was only to do what he could to help Lloyd in paying it off. He was unable to do anything because Lloyd refused to give him a home and furnish him a support, in accordance with the original agreement. "The earnings, which might have gone to pay the Miller mortgage, he was obliged to use in procuring for himself the home and support which his son-in-law denied to him. His failure to aid in paying their common debt was the fault of Lloyd himself. Whatever loss Lloyd may have met with on account of such failure was more than offset by the amount which he was enabled to save by neglecting his father-in-law's support during the last 10 years of the latter's life. All this should have been explained to the beneficiaries in this trust, when they were told that their father had paid nothing on the Miller debt, and that for this reason they should release Lloyd from his obligations. No such explanation was given.

As to the expense which Lloyd claims to have been put to by reason of litigation instituted against him by his father-in-law, he is unable, in his testimony, to figure up that such expense amounted to more than \$285. This was more than offset by the amount which his refusal to furnish a home, as he agreed to do, to Ambrosine Jones, his young sister-in-law, during the last six years of her minority, enabled him to save. He grossly exaggerated the amount of this expense to his brothers-in-law when he was pleading with them to take one "80" instead of two "80's." He failed to explain to them the damages for which he would have been justly liable if he had been called to account for his violated agreement in reference to their minor sister.

Again, he says he told them that he could not give them more than

80 acres, because "the old man had put me to a good deal of expense, and this \$1,000 was back." If, at that time, the sum of \$1,000 was still unpaid upon the claim of Mrs. Miller,—which does not appear from all the evidence to have been at all probable, or ever possible,—he should have told plaintiffs in error, in connection with the subject of such unpaid balance, that the Miller debt might have been paid years before that time if he had applied the rents and profits of the farm to such payment, as he had agreed to do, instead of using them to make outside investments for himself. To claim the sympathies of his brothers-in-law on account of an unpaid indebtedness which would not have existed but for his misuse of funds, accumulated mainly by their own labors, was the sheepest hypocrisy.

Moreover, the manner in which Lloyd obtained this release subjects his conduct to the gravest suspicions. In procuring it he purposely sought the assistance of his wife and his lawyer. The plaintiffs in error had lived with their elder sister, Mrs. Lloyd, for many years. They lost their mother in 1854; and, as we understand it, before they left Wales their native country. They say, and Mrs. Lloyd says, that they looked up to her as a mother. Oliver says that he had such implicit faith in his sister and her husband that he believed what they told him about his rights under the agreement. When the statements of persons whose relations to them were so close, and in whom they had so much confidence, were backed by the concurrence of a shrewd and well-informed lawyer, it is easy to see what impression was made upon the minds of these ignorant and simple-hearted youths.

The settlement was made in April, 1874, and this suit was brought in January, 1880. It is said the delay in bringing the suit amounts to such laches as ought to defeat the prayer for relief. Under ordinary circumstances, a delay of six years would constitute laches in such a case as this. But the proof shows that plaintiffs in error did not discover the real facts, nor learn of the fraud that had been practiced upon them, until the fall of 1879. No laches can arise from delay in taking steps to undo a fraud until after knowledge of the fraud has been acquired.

The decree of the circuit court dismissing the bill is reversed, with directions to that court to enter a decree requiring defendants in error to convey the S.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$ , above described, to plaintiff in error Randolph Jones, subject, however, to a lien thereon in favor of plaintiff in error Oliver Jones for the amount paid by him to said Randolph upon the mortgage for \$1,000 executed upon the N.  $\frac{1}{4}$  of the quarter section, and requiring defendant in error John Lloyd to account for the rents and profits of said S.  $\frac{1}{4}$  since April 3, 1874, and if the said S.  $\frac{1}{4}$  has been sold, then requiring said Lloyd to account for the value thereof on April 3, 1874, and interest at 6 per cent. per annum on the amount of such value.

SCOTT and SHELDON, JJ., dissent from this opinion.

(118 Ill. 35)

## GAGE and others v. REID and others

(Supreme Court of Illinois. May 15, 1886.)

## 1. TAXATION—TAX DEED—NOTICE TO REDEEM—PERSONAL SERVICE OF, NECESSARY.

Under section 216 of the revenue act, (2 Starr & C. St. c. 120, par. 218,) and section 5 of article 9 of the constitution of 1870, (1 Starr & C. St. 148,) a purchaser at a tax sale must make personal service of the notice to redeem on the persons in possession of the property. A leaving of a copy with a business partner of such a person is not sufficient.

## 2. SAME—DEED TO BE TAKEN AND RECORDED WITHIN YEAR, OR SALE VOID.

Under section 225 of the revenue act (2 Starr & C. St. c. 120, par. 227) a tax deed must be taken out and recorded by the purchaser within one year after the expiration of the time for redemption, or the sale will be void. The excuse for not complying herewith in this case, viz., the mistake of the clerk in issuing a deed to the wrong party, which deed was assigned to the purchaser, thereby showing that he had notice in ample time, is held not sufficient.

Appeal from Cook.

A. N. Gage, for appellants.

James R. Mann and Josiah H. Bissell, for appellees.

SCHOLFIELD, J. This case was before this court in *Gage v. Reid*, 104 Ill. 509, where a full statement of the case, as then presented, will be found. After the case was remanded, pursuant to the judgment of this court as then rendered, the bill was amended in the respects then held defective, and the circuit court, on the hearing, thereafter decreed that the three tax deeds in the amended bill described,—namely, one to Portia Gage, dated February 27, A. D. 1872; one to Asahel Gage, dated August 30, A. D. 1872; and one to Asahel Gage, dated January 16, A. D. 1884,—be canceled and set aside as colorable and voidable, upon the complainants paying to the holders of such deeds certain amounts which the decree finds and recites to be due to them on account of taxes, penalties, interest, and costs, etc. And the decree afterwards contains this clause also:

“And in case the said complainants, or either parties to this suit, shall not comply with the order herein in this regard, then, in that case, the said sums of money so found to be due to the said defendant, as aforesaid, shall be, and it is hereby declared and decreed to be, an equitable lien upon the whole of said premises for the amounts thereof, respectively, with interest thereon at the rate of six per cent. per annum from the date of this decree.”

The respects wherein it is argued that the circuit court erred are: (1) In holding the titles of appellants colorable and voidable; (2) in holding that appellees have a sufficient interest to warrant a decree in their favor; (3) in adding the clause to the decree as just recited.

It will be convenient to consider these points in the order stated.

1. It is provided in section 5 of article 9 of our constitution that, in case of sales for taxes, occupants shall in all cases be served with personal notice before the time of redemption expires. And section 216 of the revenue act, in force July 1, 1874, provides:

“Hereafter no purchaser, or assignee of such purchaser, of any land, town, or city lot, at any sale of lands or lots for taxes or special assessments due,

either to the state, or any county or incorporated town or city within the same, or at any sale for taxes or levies authorized by the laws of this state, shall be entitled to a deed for the lands or lots so purchased until the following conditions have been complied with, to-wit: Such purchaser or assignee shall serve, or cause to be served, a written or printed, or partly written and printed, notice of such purchase on every person in actual possession or occupancy of such land or lot, and also the person in whose name the same was taxed or specially assessed, if upon diligent inquiry he can be found in the county. \* \* \*

The tax deed to Portia Gage is under a sale made in A. D. 1869, for the taxes due for the year A. D. 1868. The property was then owned by and assessed in the name of Reid & Sherwin, a firm composed of John Reid and Joseph Sherwin. Cecilia Reid testified that her father, James Sherwin, and her mother, Mary Sherwin, resided on this property continuously for a period of 25 years, up to and next preceding the death of her father, which occurred in August, 1879. They were in possession in 1868, and never left there. No one contested this testimony. The only evidence of the service of notice prior to the making of this deed is in the affidavit of U. George Taylor, who testifies that he served a notice on Reid & Sherwin on the first day of April, A. D. 1871, by handing the same to Joseph Sherwin, one of the firm, etc. This was not even good service as to Reid. And there can be no pretense that it was any service as to James Sherwin and Mary Sherwin. The deed to Portia Gage, therefore, was clearly made in violation of the constitution and the statute, and was colorable only and therefore voidable. The tax deed to Asahel Gage, dated August 30, A. D. 1878, is under a sale made in A. D. 1875, for the taxes due in A. D. 1874. The record shows that John Reid died intestate on the ninth day of May, A. D. 1873, seized in fee of the undivided half of the property, leaving surviving him Cecilia Reid, his widow, and Joseph J. Reid and Annie M. Reid, his children and only heirs at law; and that Cecilia Reid, Joseph J. Reid, and Annie M. Reid resided together in a house upon this property, and were in the actual occupancy of the property from the time the sale was made until the deed was made. The only evidence of the service of notice prior to the making of this deed is in affidavits showing service of such notice upon Mary Sherwin, James Sherwin, D. O. Hara, Joseph Sherwin, and Asahel Gage. There is no evidence of service of notice upon Cecilia Reid, Annie M. Reid, or Joseph J. Reid, nor upon John J. Harley, one of the persons in whose name the property was assessed. This deed, therefore, was also made in violation of the constitution and of the statute, and was colorable and voidable. The tax deed to Asahel Gage, dated January 16, A. D. 1884, is under a sale made on the eleventh of October, A. D. 1878, a little more than five years and three months intervening. It was then, and still is, provided by section 225 of the revenue act, in force July 1, 1874, (Rev. St. 1874, p. 895:)

"Unless the holder of the certificate for real estate purchased at any tax sale under this act takes out the deed as entitled by law, and files the same for record within one year from and after the time for redemption expires, the said certificate or deed, and the sale on which it is based, shall, from and after

the expiration of such one year, be absolutely null. If the holder of such certificate shall be prevented from obtaining such deed by injunction or order of any court, or by the refusal of the clerk to execute the same, the time he is so prevented shall be excluded from the computation of such time. \* \* \*

The excuse for non-compliance with this section is that the clerk, by mistake, made a deed, in apt time, to one Henry H. Gage, and that this deed was made to correct that mistake. The evidence shows that the certificate upon which the deed to Henry H. Gage was made, was formally assigned in blank by Asahel Gage; that the deed was made upon the application of Henry H. Gage; and the evidence fails to show that the clerk made any mistake in making the deed to Henry H. Gage. But if there was a mistake made by the clerk, Gage had notice of it upon receipt of the deed, and in ample time to have the mistake corrected within the year. There is no pretense that Gage was prevented from obtaining his deed within the year by the refusal of the clerk, either actually or constructively, and we are not authorized to extend the exceptions to others than those enumerated in the section. It follows that we entirely concur with the ruling of the circuit court in regard to the tax deeds. Other objections than those we have considered were urged to these deeds; but, as to them, we express no opinion, deeming it unnecessary to do so.

2. It is claimed, under this point, that the evidence shows that the title of the complainants has passed to Gage, by virtue of a sheriff's sale and deed, since the suit has been pending. Nothing of this kind is disclosed by the pleadings, and the evidence is pertinent to no issue under the pleadings. If it was desired to avail of this defense, it should have been brought forward by plea.

3. It is enough to say that the clause in the decree objected to, does appellant no harm. It gives him an additional security for the payment of the amount due him. If the other side do not object to this,—and they have urged no objection here,—he cannot do so. No rule is better established than that a party cannot assign for error that which does him no injury.

The decree is affirmed.

(117 Ill. 26)

ANDERSON v. CHICAGO, B. & Q. R. Co.

(*Supreme Court of Illinois*. May 15, 1886.)

**TAXATION—RAILWAY BRIDGE TAXABLE AS TRACK.**

The railway bridge of the appellee across the Mississippi, from Henderson county to Burlington, built by it, and used solely as a part of its track, is, so far as it is within the jurisdiction of Illinois, assessable as "railroad track" by the state board of equalization, and is not assessable by the township or county assessors. 2 Starr & C. St. c. 120, pars. 42, 110. This is not changed by the act of 1873, (Id. par. 299 *et seq.*), on bridges on border of state, providing that they be assessed as real estate. That act applies to bridges owned by bridge companies.

Appeal from Henderson.

SHELDON, J. The bill in equity in this case was filed by the Chicago, Burlington & Quincy Railroad Company against the collector of taxes of  
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Henderson county, Illinois, to enjoin him from proceeding to collect, through judgment and sale, taxes assessed for the years from 1870 to 1884, both inclusive, upon the east half of a bridge over the Mississippi river opposite Burlington, Iowa. The circuit court decreed the relief prayed, and the defendant appealed.

The single question is, had the assessor of Henderson county, Illinois, in which the east end of the bridge is located, the right to assess the one-half of the bridge, or was it assessable only by the state board of equalization as part of the main track of the railroad of complainant?

It appears that in 1867-68 the Chicago, Burlington & Quincy Railroad Company erected, with its own money, the structure in question, known as the "Burlington Bridge," across the Mississippi river from a point in Henderson county, Illinois, to a point in Burlington, Iowa, and was then, and has been ever since, the sole owner thereof, and that the bridge is used exclusively as a railroad track,—the total length of the bridge being 2,237 feet; that the railroad company had in each year from the erection of the bridge reported 1,119 feet (or the part thereof within the boundary of Illinois) as part of its main track, and the same had been duly assessed and taxes paid thereon as main track, and that the county of Henderson had annually received its due proportion thereof.

In relation to taxation of the realty of railroads, the general revenue law of 1872 (Rev. St. 1874, c. 120, § 42) provides:

"Such right of way, including the superstructures of main, side, or second track or turn-outs, and the station and improvements of the railroad company on such right of way, shall be held to be real estate for the purposes of taxation, and denominated 'railroad track,' and shall be so listed and valued."

By section 43 the value of the "railroad track" shall be listed and taxed in the several counties, towns, villages, districts, and cities in the proportion that the length of the main track in such county, town, village, district, or city bears to the whole length of the road in this state, except the value of the side or second track, and all turn-outs, and all station houses, depots, machine shops, or other buildings belonging to the road, which shall be taxed in the county, town, village, district, or city in which the same are located. The provision of section 109 is that the state board of equalization shall assess the railroad property denominated in the act as railroad track.

The bridge in question was constructed and used by the railroad company as a part of its continuous line of railroad, and we can have no doubt that, under the general revenue law, it comes within the denomination of railroad track, and is to be assessed by the state board of equalization. But, though this might have been the case until 1873, it is contended that since the passage of the act approved May 1, 1873, (Laws 1873, p. 37,) the right to assess has been in the local assessor. That act provides "that all bridge structures across any navigable streams forming the boundary line between the state of Illinois and any other state shall be assessed by the township or other assessor in the county or

township where the same is located, as real estate." Stress is laid upon the word "all,"—"all bridge structures;" that this must include the bridge in question; that it is not allowable to interpret what has no need of interpretation. It must be admitted that this bridge comes within the letter of the statute, but it is not within its meaning. A thing which is within the letter of the statute is not within the statute unless it be within the intention of the makers. 4 Bac. Abr. "Statutes," 468, (45.) In determining the meaning of a statute we are not confined to its words, but may regard its purpose,—consider it in connection with other statutes *in pari materia*, and in view of the condition existing. It appears in the case that there were in 1873 eight bridges spanning the Mississippi river, all of which, except the one in question and that at Rock Island, were erected by bridge companies, and have ever since been, respectively, the property of such bridge companies, and not the property of any railroad company. Such bridges of bridge companies had been regarded as personal property, and as not liable to be sold for delinquent taxes so as to convey a good title thereto; and to meet a necessity in that respect the statute was passed, and for no other purpose. The act was before this court for consideration in *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 620, where we placed this construction upon it. We then said of it:

"The act applies solely to bridge structures; and capital stock is not mentioned in it. The sole object, as appears from its various clauses, especially the emergency clause, was to declare such structures real estate; they having before that time been regarded as personal property. \* \* \* The emergency clause in the act of 1873 conclusively determines the purpose for which the act was passed: 'Whereas, by existing laws, such bridge structures cannot be sold for delinquent taxes, so as to convey a good title thereto, therefore an emergency,' etc."

It was not the purpose of the act to change the method of taxing railroad property, or the mode of assessing it; it was of the system of taxation of railroad property, to distribute the tax upon the main track of railroad, among all the counties in the state through which the road runs, by a certain rule of proportion. The assessment or taxation of railroad property as such, was not in the mind of the legislature; and, there being no intention to make any change in the system of the taxation of railroad property, we must hold that no change therein as to the mode of assessment and taxation of the main track of railroad was effected by the act; that, broad as are its terms,—“all bridge structures,”—it did not include the bridge in question, it being railroad track. As such, it was alone assessable by the state board of equalization, and the assessment of it by the local assessor was without warrant of law.

Attempt was made to show that the company had exercised powers not granted to it in building the bridge, in fixing the terminus of its road on the Mississippi river, and in changing the location of the road after having once exercised the power to locate,—all which was without pertinence in this collateral proceeding. The bridge had been built, and was in fact a part of the main track of the railroad; it was assessed and

taxed as railroad property; and that there may have been the exceeding of chartered powers in the building is immaterial upon this inquiry of which was the proper authority to assess the bridge.

The decree must be affirmed.

(117 Ill. 79)

**McMILLAN and others v. McCORMICK, Jr.**

(*Supreme Court of Illinois. May 15, 1886.*)

**STATUTE OF LIMITATIONS — MORTGAGE — FORECLOSURE — STATUTE PROSPECTIVE ONLY.**

Section 11 of the statute of limitations (3 Starr & C. St. c. 88, par. 11) is prospective only in its operation. It does not apply to mortgages previously executed and delivered.

Appeal from First district.

SCHOLFIELD, J. Henry H. Walker executed a mortgage, with a power of sale, on the eighteenth day of November, A. D. 1868, to Gerhard Foreman, to secure the payment of a promissory note for \$2,000, with interest at the rate of 7 per cent. per annum, payable two years after that date. Appellant Thomson purchased a part of the land included in the mortgage at a sheriff's sale, under a judgment rendered on the fourteenth day of September, A. D. 1874, and appellant McMillan purchased another part of the land included in the mortgage at a sheriff's sale under a judgment rendered in July, A. D. 1875. On the third day of October, A. D. 1884, the trustee advertised that the land would be sold on the eighth day of November, A. D. 1884, pursuant to the power in the mortgage, for the payment of the indebtedness thereby secured. This bill was filed on the last-named day to enjoin that sale.

The principal ground relied on is that the time when the sale is advertised to be made is more than 10 years after the right to make the sale accrued; and that the sale is therefore barred by the eleventh section of the act in regard to limitations in force July 1, A. D. 1872. That section is: "No person shall commence an action or make a sale to foreclose any mortgage, or deed of trust in the nature of a mortgage, unless within ten years after the right of action or right to make such sale accrued." Section 24 of the same act, however, after repealing the several acts in regard to limitations previously in force, concludes thus: "But this section shall not be construed so as to affect any rights or liabilities, or any cause of action, that may have accrued before this act shall take effect." 2 Gross, St. 1873, pp. 258, 259. In the Revision of 1874 this section is omitted, and in chapter 131, § 5, the former statutes of limitations are repealed, with this saving clause: "When any limitation law has been revised by this or the twenty-seventh general assembly, and the former limitation law repealed, such repeal shall not be construed so as to stop the running of any statute; but the time shall be construed as if such repeal had not been made."

In *Dickson v. Chicago, B. & Q. R. Co.*, 77 Ill. 331, we held that the above words, "this section," should be construed to mean "this act," so



that the section would read: "But this act shall not be construed so as to affect any rights or liabilities," etc. In *Means v. Harrison*, 114 Ill. 248, S. C. 2 N. E. Rep. 64, we held that a promissory note executed on January 25, A. D. 1872, payable two years after date, was not, on the fifteenth day of October, A. D. 1884, when suit was brought, barred by the sixteenth section of this act, which requires that actions on promissory notes shall be commenced within 10 years next after the cause of action accrued; but that the case was governed by the act of the fifth of November, A. D. 1849, which was in force when the note was executed. It was, among other things, then said, after construing the saving clause to the effect that it extended to notes that had been executed, but which were not yet due when the act took effect:

"This construction is in accord with the general rule that a statute is to operate *in futuro* only, and it is not to be construed to affect past transactions; and that, if it is left doubtful what was the real design as to its having a prospective or retroactive effect, the statute must be so construed as to have a prospective effect only. *Thompson v. Alexander*, 11 Ill. 55; *Dobbins v. National Bank*, 112 Ill. 553."

It is conceded that that case would be conclusive of the question of limitation here had mortgages been specifically named in any preceding limitation act; but it is contended they are not so named, and therefore the case is governed by *Hyman v. Bayne*, 83 Ill. 256, and *Gridley v. Barnes*, 103 Ill. 216, where it was held that the construction given in *Dickson v. Chicago, B. & Q. R. Co.*, *supra*, to the saving clause of section 24, was applicable only to cases included in previous limitation acts; but that it did not apply to cases not included in such acts, and therefore, as to such cases, the periods of limitation specified in the act in force July 1, 1872, must be applied.

It is true, the words "mortgages and deeds of trust" do not occur in any act of limitation previous to that in force July 1, 1872; but this court has held that such instruments were barred by limitation laws previously to the act on that subject, adopted in 1849, and by that act, since its adoption, both in proceedings in equity and in actions at law. Where there is a covenant in the mortgage or deed of trust for the payment of the debt, which is, perhaps, rarely the case, it can need no argument to show that the instrument would in nowise, so far as affects this question, be different from any other specialty for the payment of money, and therefore the statute of limitations, applicable to instruments of that character in general, would be applicable to it. But as to mortgages or deeds of trust which are not given as being themselves obligations for the payment of debts, but simply as pledging property for the payment of debts evidenced in some other way, a different question is presented.

In *Harris v. Mills*, 28 Ill. 44, it was held, in a proceeding to foreclose a mortgage, that, where the note for the security of which the mortgage was given is barred by the statute of limitations, so that there could be no recovery thereon in an action at law, the right to foreclose is also barred; and this was said to be because it is held that the debt is the

principal thing, and the mortgage is but the incident; the consideration which supports the note supports the mortgage; an assignment of the note operates, *ipso facto*, to transfer the mortgage; and a payment, release, or other discharge of a note satisfies and releases the mortgage.

In *Pollock v. Maison*, 41 Ill. 516, ejectment was brought by a grantee of the mortgagee against the heirs at law of the mortgagor, and it was there held that, the debt secured by the mortgage being barred, there could be no recovery. The court, among other things, said:

"The notes were barred by the statute at the expiration of sixteen years after their maturity; and, the bar to the debt having become complete, plaintiff in error had a right to interpose that bar to prevent a recovery in ejectment."

Of course, the ejectment was not a suit for foreclosure, but it was a legal mode of enforcing rights of the mortgagee under the mortgage; and, if the mortgage was not barred at law, the mortgagee was entitled to recover. The case shows that the statute of limitations of 16 years was held a good defense, in an action at law, on a mortgage given to secure the payment of a promissory note.

In *Medley v. Elliott*, 62 Ill. 533, the above cases were cited with approval; and, in discussing what period of limitation applied in that case, it was said, after quoting from Chancellor KENT's opinion in *Jackson v. Willard*, 4 Johns. 40, that "until foreclosure, or at least until possession taken, the mortgage remains in the light of a *chose in action*. It is but an incident attached to the debt, and, in reason and propriety, it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned, the assignee must hold the interest at the will and disposal of the creditor who holds the bond." It was added: "It naturally follows that the statute of limitations which bars the debt, the principal, can alone bar the mortgage, the incident."

*Emory v. Keighan*, 88 Ill. 482, and the same case again in 94 Ill. 482, was ejectment, and follows *Pollock v. Maison*, *supra*.

Other cases of like character might be referred to, but it is unnecessary. This is sufficient to show that, before the enactment of the section under consideration, it was the settled law of this state that mortgages were within the statute of limitations and barred thereby. The ruling assumed that it is not necessary that the word "mortgage" or "deed of trust" shall be expressed in the statute; that when the principal thing is named, that which is incident to it is necessarily implied; and that, inasmuch as the mortgage or deed of trust is but an incident to the debt, and can have no existence as an obligation or conveyance independently of the debt, or, in other words, that as it is merely an aid or instrumentality in the collection of the debt, any proceeding through or by means of it is just as much intended by the statute as actions of debt, covenant, or *assumpsit*. And hence, when it was enacted the debt was barred in 16 years, it was meant and intended the mortgage or deed of trust securing it was also, by the same words, barred in 16 years. In

naming the principal thing, its incident is included. We feel constrained, therefore, to hold that the case is not analogous to *Hyman v. Bayne* and *Gridley v. Barnes*, *supra*, and that in principle it is not distinguishable from *Means v. Harrison*, *supra*.

There is an allegation in the bill "that a large and valuable portion of the lands conveyed by said trust deed, other than the lands of the complainants, has been released by said trustee." When this was done, is not alleged. If it was done before the rights of complainants attached, it is plain that it does not concern them. If it was done since their rights attached, but without actual notice of them, they are not entitled to complain. *Iglehart v. Crane*, 42 Ill. 261. It was incumbent on the complainants to affirmatively allege a state of case entitling them to relief.

We perceive no cause to disturb the judgment of the appellate court. It is affirmed.

(117 Ill. 152)

WINSLOW v. PEOPLE, for Use, etc.

(*Supreme Court of Illinois*. May 15, 1886.)

1. GUARDIAN AND WARD—BOND—SEVERAL WARDS—ONE BOND—BOND NOT AFFECTED BY DEATH OF ONE.

Where one person has been appointed guardian for several persons, he may give one bond for the discharge of his duties as guardian of them all; and any person entitled to recover may maintain suit in the name of the people on such bond. 1 Starr & C. St. c. 64, pars. 10, 11. The death of one of the several wards in such a case will not affect the bond.

2. SAME—SUIT ON—ESTABLISHMENT OF DEVASTAVIT NOT A CONDITION PRECEDENT.

It is not necessary to the maintenance of a suit on a guardian's bond that a *devastavit* be first established. 1 Starr & C. St. c. 103, par. 13.

3. SAME—CHANGE OF LAW—NO VESTED RIGHT IN LAW EXISTING AT DATE OF BOND.

A guardian and his bondsmen have no vested right in the state of law existing at the date of the bond. A new rule of law affecting the remedy on such bonds will apply to bonds existing at the date of its passage.

4. SAME—GUARDIAN VIOLATING DUTY AS TO WARD'S ESTATE CHARGEABLE WITH INTEREST.

A guardian who refuses to render an account when ordered so to do by the court, and who invests his ward's estate without leave of court, is chargeable with interest.

5. DAMAGES—JUDGMENT IN EXCESS OF AD DAMNUM—REMITTITUR CURES ERROR.

Where a judgment is inadvertently rendered in excess of the *ad damnum*, the error will be cured by a *remittitur* of the excess.

Appeal from First district.

MAGRUDER, J. This is an action of debt brought by the people of the state of Illinois, for the use of Ida G. Walrath, against Chauncey T. Bowen, George S. Bowen, and Almerin H. Winslow, upon a guardian's bond dated December 10, 1867, and executed by Chauncey T. Bowen as guardian of Ida G. Walrath, May N. Walrath, and Daniel E. Walrath, and by George S. Bowen and Almerin H. Winslow as sureties thereon. The bond was approved by the county court of Cook county on the day of its date. George S. Bowen filed a plea of discharge in

bankruptcy, the issue upon which was found in his favor. Winslow pleaded *non est factum* and *nil debet*. Trial was had without a jury before one of the judges of the superior court of Cook county. The issues were found for the plaintiff below, and the debt assessed at \$20,000, the penalty of the bond and the damages at \$3,794.39, upon which finding judgment was entered. The case was taken to the appellate court of the First district by writ of error, issued therefrom, and the judgment of the superior court was there affirmed. The case is brought to this court by appeal from said appellate court.

The first point made by appellant is that Chauncey T. Bowen was appointed guardian of three minors, and gave bond for the performance of his duties as *such* guardian; that one of his wards, May N. Walrath, died on November 17, 1871, and thereby his appointment as guardian of the three ceased; that, although he continued thereafter to act as guardian of Ida and Daniel, the two survivors, separately, the condition of the bond did not cover his conduct in the latter capacity. This position is wholly untenable. The obligee in the bond is "the people of the state of Illinois, for the use of Ida Gazelle Walrath, May N. Walrath, and Daniel Eddy Walrath, minors." The condition of the bond is as follows:

"If the above-bounden Chauncey T. Bowen, who has been appointed guardian of Ida Gazelle Walrath, May N. Walrath, and Daniel Eddy Walrath, shall faithfully discharge the office and trust of such guardian according to law, and shall render a fair and just account of his said guardianship to the county court of Cook county from time to time, as he shall be thereto required by said court, and to comply with all the orders of said county court lawfully made, relative to the goods, chattels, and moneys of such minors, and render and pay to such minors all moneys, goods, and chattels, titles, papers, and effects, which may come to the hands or possession of said guardian belonging to such minors, when such minors shall be thereto entitled, or to any subsequent guardian, should such court so direct, then this obligation shall be void," etc.

To hold that suit could only be brought upon such a bond in the name of the people for the use of the three minors, and not for the use of either or any one of them who may have been wronged, would be to hold that a guardian could squander the estate of one ward without imposing any liability upon his sureties, provided he kept the estates of the others intact. Chapter 47 of Revised Statutes of 1845, entitled "Guardian and Ward," provided (section 15) that, "in all cases of any person being appointed guardian for more than one ward at one time, the judge of probate shall include all in one bond;" and also provided (section 5) that such "bond shall be taken to the people," etc., "for the use of the minor, but may be put in suit from time to time in the name and to the use and benefit of any person entitled by a breach thereof, until the whole penalty shall be recovered thereon." The law of 1845 was in force when the bond sued on in this case was executed. The act of 1872 upon the same subject, in force when this suit was brought, provides that "when any person shall at the same time be appointed guardian for several minors, the court may, if the estate shall be so situated as to make it

more convenient or advantageous to the interest of the ward, include all in one bond," (section 10;) and also that "bonds may be put in suit in the name of the people," etc., "to the use of any person entitled to recover on a breach thereof," (section 11.)

The language of these statutes clearly authorizes a suit for the use of one ward who may be entitled to recover, although the bond may be that of the guardian of several wards. He is not merely the joint guardian of all, but the separate guardian of each. The death of one ward does not relieve him of responsibility as the guardian of each of the survivors.

It is next objected that, before suit could be brought on this bond, a *devastavit* should have been established. We do not think that this was required. The first breach assigned in the declaration is that on April 17, 1877, the county court ordered the guardian to render a full account of his guardianship, and that he did not do so. The second breach is that the said Ida was entitled to receive a certain sum from her guardian on July 16, 1877, when she became of age, and that he converted such sum to his own use, and failed to pay it over to her. If these breaches were established by the evidence, upon which question the judgment of the appellate court is final, a recovery against the surety was authorized. We have held that it is no defense to such a declaration to say that "no adjustment was ever had of the accounts of the guardian by the probate court." It is not necessary that the liability of the principal be first established, by obtaining judgment against him alone, before the surety can be held liable. Section 13 of chapter 103 of the Revised Statutes of 1874 upon the subject of "Official Bonds" provides that in suits upon the bonds of guardians "it shall not be necessary to a recovery that a *devastavit* should have previously been established against the principal." *Bonham v. People*, 102 Ill. 434; *McIntyre v. People*, 103 Ill. 142. In both of these cases the bonds sued upon were executed before the passage of the act of 1874 here referred to. It is said that, inasmuch as Bowen's bond, as guardian, was made in 1867, this suit upon it cannot be governed by the provisions of the act of 1874, which went into effect long after the execution of the bond. But the requirement that a *devastavit* need not be previously established in cases of this kind is one which had reference only to the rule of procedure and the mode of proof. Appellee had no vested right to have this case tried under the laws affecting practice and evidence which were in force in 1867. Where an act merely changes the remedy of the law of procedure, "all rights of action will be enforceable under the new procedure, without regard to whether they occurred before or after such change in the law." *Dobbins v. First Nat. Bank*, 112 Ill. 553. Therefore the provision of the act of 1874 contained in section 13, and above quoted, was applicable in the case at bar.

The next point made by appellant is that the guardian should not have been charged with interest. The evidence tends to show that Bowen made a report to the county court, in which he admitted that he had in his hands on January 1, 1877, \$2,584.05 belonging to Ida G. Walrath, which he had never paid; that on April 17, 1877, he was ordered by the

county court to present a full account of his loans, investments, receipts, and expenditures in 10 days, which he never did; that he invested his ward's money in real-estate securities without the approval of the county court. For these violations of duty he was clearly chargeable with interest. *Hughes v. People, etc.*, 111 Ill. 457. It was not necessary to show that demand was made upon him for the money. *Byrne v. Aetna Ins. Co.*, 56 Ill. 326.

It is again objected that an investment by the guardian of \$3,000 in a note, secured by a mortgage upon property in Evanston, has been approved by Ida G. Walrath since she became of age, and that she is therefore estopped from refusing a credit for that amount to her guardian. On July 1, 1873, Bowen loaned \$3,000 of money belonging to the two wards then surviving, Ida and Daniel, to Hamilton M. Walrath, their father, and took from him his note for that amount, payable in one year, and a mortgage, securing the same, upon his homestead lot in Evanston. The whereabouts of this note are unknown. It has never been paid, nor presented for payment. Ida Walrath has never received any of the money represented by it. The investment in it was never approved by the county court. "A loan upon real-estate security without such approval is made at the peril of the guardian, and \* \* \* in such case, if a loss occurs, the guardian cannot exonerate himself by showing he acted in good faith, or that the security was good when taken." *Hughes v. People, supra*. The only ground for claiming that Ida Walrath approved of this loan is the fact that, after she reached her majority, she lived with her father in his home upon this property. Such fact does not amount to the ratification contended for. Neither the loan to Hamilton Walrath, nor any of the facts connected with it, constituted a defense to this action.

The bond of the guardian, and all the papers connected with his appointment, and with his accountings in the county court, were destroyed in the great fire of October 9, 1871. After the fire, however, the files were restored, and copies of the original papers and proceedings were refiled and approved by the court. The restored copy of the bond was acknowledged, under oath, to be correct by both the sureties thereon. The fact that besides the bond a few more of the restored papers in the guardianship proceedings than were necessary or material may have been received in evidence by the court trying the case without a jury, affords no ground for reversal. *Lake Erie & W. Ry. Co. v. Zoffinger*, 107 Ill. 199.

The judgment in the trial court was for \$3,794.89, while the *ad damnum* in the declaration was only \$3,000. This was, however, cured by the *remittitur* which appellee filed in the appellate court, remitting all of the judgment in excess of \$3,000. *Pixley v. Boynton*, 79 Ill. 351. The evidence tends to show that at least \$3,000 was due from the guardian, for principal and interest, after giving him all the credits to which he was rightfully entitled.

We find no error in the record. The judgment of the appellate court is affirmed.

(44 Ohio St. 257)

CINCINNATI, S. & C. R. Co. and another v. INDIANA, B. & W. RY. Co.

(*Supreme Court of Ohio. June 1. 1886.*)

1. CONTRACT—CONSTRUCTION—WRITTEN AGREEMENT.

In construing a written agreement in which the parties claim the words and expressions contain their true intent and meaning, and there is no claim of fraud or mistake, there should be given to each word and expression that plain and obvious meaning which the context and the whole instrument require to make each part consistent with the whole, and which will secure and carry into effect the object of the parties.

2. SAME—SEVERAL WRITINGS.

When a written agreement consists of more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction.

Reserved in the district court of Clarke county.

The Cincinnati, Sandusky & Cleveland Railroad Company and the Columbus, Springfield & Cincinnati Railway Company brought suit against the Indiana, Bloomington & Western Railway Company, in the court of common pleas of Clarke county, to recover \$33,928.36 and interest, as the balance due plaintiffs from the defendant on account of rent accruing during the first two quarters of a lease made by the plaintiffs to the defendant, March 8, 1881. All these companies are distinct and separate corporations, and each owned a distinct line of railway.

In November, 1870, the Cincinnati, Sandusky & Cleveland Railroad Company entered into the following lease:

"Whereas, the Cincinnati, Sandusky & Cleveland Railroad Company, a lawful corporation under the laws of the state of Ohio, and whose railroad extends from Dayton to Sandusky, in said state, and the Cincinnati & Springfield Railway Company, also a lawful corporation in the state of Ohio, whose proposed railroad extends from Cincinnati to Dayton, have lines of railroad continuous and connected at Dayton, in said state, have entered into an arrangement for their common benefit and consistent with and calculated to promote and better carry out the objects for which they were created.

"Now, therefore, this indenture, made this twenty-eighth (28th) day of November, A. D. 1870, between the said Cincinnati, Sandusky & Cleveland Railroad Company, party of the first part, and the said Cincinnati & Springfield Railway Company, party of the second part, witnesseth:

"That the said party of the first part, for and in consideration of the payments, covenants, and agreements hereinafter mentioned and contained, by said party of the second part, its successors and assigns, to be paid and performed, by these presents grants, demises, and lets unto the said party of the second part, its successors and assigns, who agree to lease the same, so much of its railroad extending from its terminus, in the city of Dayton, in the county of Montgomery, and in the state of Ohio, to its passenger station, in the city of Springfield, in the county of Clarke, and in the state of Ohio, together with the right to the joint use with the party of the first part of its passenger station in the city of Springfield, and so much of its side tracks, freight-houses, turn-tables, water stations, depot grounds, and grounds for the erection of shops and fixtures, and grounds for additional side tracks and approaches to

the same, as is consistent with the use and subject to the same by the party of the first part for the transaction of its business in the city of Springfield; also all the depot grounds, side-tracks, water tanks, station-houses, warehouses, machine-shops, engine-shops, turn-tables, and all fixtures, rights, and privileges of the party of the first part, in the city of Dayton, together with the right of way to all lands upon and over which the bed of said railroad is located and constructed; also all things appertaining to said right of way and road-bed, together with all side tracks, wood and water stations, passenger and freight houses, gravel pits, and the appurtenances, of said portion of said railroad between the city of Dayton and the city of Springfield aforesaid.

"And the said party of the second part, its successors and assigns, shall pay all taxes and assessments whatsoever, excepting on premises in the city of Springfield in the joint occupation of the parties to this agreement, which at any time during the continuance of the said term may be assessed or levied on said railroad, or other premises hereby leased, or any part thereof, or on the said first party, its successors or assigns, on account thereof.

"The taxes, assessments, repairs, and renewals on said premises in the joint occupation of said parties shall be shared and paid by said parties, one-half by each respectively, and the taxes and assessments upon all other property rights and interest at Springfield, in the exclusive occupation of either of said parties, shall be paid by the party using the same; and the said party of the first part hereby covenants and agrees that until said second party, its successors and assigns, shall take the actual possession of said railroad, and the other premises hereinbefore mentioned, it will keep and maintain the same in repair and running order, the same in all respects as it and they now are:

"To have and to hold the above-mentioned and described railroad and premises, with the appurtenances, unto the said party, its successors and assigns, from such day as it shall run its own train from the city of Dayton, over its own road, to the city of Cincinnati, upon giving sixty (60) days' previous notice in writing to the party of the first part, and in any event not later than the first (1st) day of April, A. D. 1872, for and during and until the full end and term of ninety-nine (99) years thence next ensuing, and until the end and term of all renewals and extensions of this lease and of said term as hereafter provided.

"And in consideration of the premises it is hereby agreed that during the said term of ninety-nine (99) years, and said renewals and extensions thereof, the entire gross earnings and receipts accruing by the operating and the use of the said railroad, and the premises hereby granted and demised, to be divided between the parties to this agreement in the following proportions: To the said party of the first part thirty-five (35) per centum, and to said party of the second part sixty-five (65) per centum, thereof; that is to say, the said party of the first part is to receive from said party of the second part, at the time and in the manner hereinafter mentioned, for the use of said railroad and other premises, thirty-five (35) per centum of said gross earnings and receipts, without deductions for expenses, taxes, assessments, terminal charges, losses, damages, or abatement for any other reason, or in any other manner whatever, whereby the sum thus to be received might be reduced; said gross earnings to be determined from the entire gross receipts and earnings from all sources whatsoever or however derived of the said railroad and property hereby leased, or any portion thereof; and the business shall be so transacted, and the books shall be so kept by said second party, as to clearly exhibit the entire gross earnings, without deductions as aforesaid, of the said railroad and premises hereby leased. Said sum shall be paid over to said party of the first part at its office in the city of Sandusky, in quarterly payments, within thirty (30) days after the last days of December, March,



June, and September, in each and every year, for the quarter preceding, and said second party shall furnish and deliver to said first party semi-annual accounts of said gross earnings, and allow said first party such access to its books, documents, and papers as may be required to ascertain the correctness of said accounts.

"Provided always, and these presents are upon this express condition, that if the said party of the second part, its successors and assigns, shall fail to pay said party of the first part, its successors or assigns, said proportional part of said gross earnings, or any part thereof, for a period of thirty (30) days after the same ought to have been paid as aforesaid, or in case the said second party, its successors and assigns, shall not from time to time, and at all times during the continuance of this demise, well and truly observe, perform, and keep all and singular the covenants, conditions, and agreements which are or ought to be kept and performed by said second party according to the true intent and meaning of these presents, then, in any and every such case, the said party of the first part, its successors and assigns, without notice or demand of forfeiture, said default still continuing, shall have the right to re-enter upon said railroad and the premises herein demised, and to have again, repossess, and enjoy the same as of its or their former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

"And the said party of the second part, its successors and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns, that said second party, its successors and assigns, will, during the term hereby granted, well and truly pay unto said party of the first part, its successors and assigns, the said sum above reserved, at the time and in the manner limited and prescribed as aforesaid for the payment thereof, according to the true intent and meaning of these presents; that it will use said railroad in connection with a railroad to be built by said second party between the city of Dayton and the city of Cincinnati so as to form a trunk road from the city of Cincinnati, by the way of the city of Springfield, to Cleveland, Sandusky, and Columbus.

"And said party of the second part further agrees that it will receive and transport over its road, with promptness and dispatch, all freight and passengers, and transact all the business destined for Cincinnati and other points either on its own or any other railroad, and for points beyond Cincinnati, that comes over the railroad under the management and control of the said party of the first part; the said party of the first part fixing the rate therefor to all points; and, in like manner, the party of the second part is to fix the rate of transportation on all freights and business originating at Cincinnati or beyond, or on the line of its road, passing over the road of the party of the first part, to all points; and the rates thus fixed on all such through business, or business between said points, by the parties respectively, shall be divided between them *pro rata* according to distance hauled by each party.

"All unconsigned passenger and freight traffic for points south of Springfield, and controlled by the party of the first part, shall be delivered to and forwarded by the party of the second part from Springfield over the road owned and operated by said second party.

"All business controlled by the party of the second part destined to all points west of the railroad between Springfield and Cleveland via Delaware, and west and south and north-west thereof via lake and rail, or all rail, and to all points on the Columbus road of said party of the first part, and points east and south thereof via Columbus, shall be forwarded by the railway of the party of the first part from Springfield; and that, on all such business destined to or from the territory agreed upon herein as belonging to and sent over the roads of the said first party, said second party will not prorate on

such business, except in connection with the said first party's road, and that to any other railroad said second party shall charge and collect on all such business its full local rates for the distance it shall transport the same; and the second party shall make no lower rates of transportation on either passengers or freight between Cleveland and any point south of Springfield, on local business, than shall be made on same class of business between Sandusky and same points; and also that said party of the second part, its successors and assigns, shall, during the said term, maintain and keep in repair said railroad and other premises hereby granted, and renew and replace the same whenever and as often as the same shall be worn out or deteriorated by use or otherwise; and from time to time, as the nature and extent of the business requires, it will construct new and additional side tracks, stations, warehouses, and other structures and fixtures for its accommodation; that it will run and operate said railroad in such manner that the corporate rights and privileges of said first party shall not be impaired or endangered, and furnish to the public all reasonable accommodations; that it will indemnify and save harmless said party of the first part, its successors and assigns, from all liability and claims for damages and losses incurred and arising in renewing said railroad; and, in general, that it will maintain said railroad in such condition, and that it will operate the same and furnish such machinery, cars, equipments, stations, and other appurtenances, as are suited and required by a railroad of the best description, and that it will use all reasonable and necessary efforts to facilitate and increase the business of said road hereby leased, in preference to any other line or road.

"In making up the schedule time for all through passenger trains, precedence and priority shall be given to the trains to and from Cleveland, and to and from Cincinnati via Springfield and Delaware; but the party of the first part shall have the right to run its trains to and from Columbus, and to and from Sandusky, and to and from Springfield, to connect with the aforesaid through trains to and from Cleveland, and to and from Cincinnati, and shall have the time given, and right, to attach one or more express, baggage, passenger, and sleeping cars, and have them made part of such through trains, as shall from time to time be necessary for the prompt and efficient transaction and management of its business:

"Provided, however, that if the business of the first party is not thereby accommodated satisfactorily to said first party by the schedule of time to be fixed as aforesaid, then the said first party shall have the right, in addition thereto, to fix the time of one train daily each way between Cincinnati and Springfield to connect with its trains to and from Columbus and Sandusky, which trains shall be so run by said second party; and the said party of the first part, its successors and assigns, further covenant and agree that on or before the expiration of the term of ninety-nine years herein contained, at the request and expense of said second party, its successors or assigns, said first party, its successors or assigns, shall grant and execute to said second party, its successors or assigns, a new lease of the railroad and premises hereby demised for the further term of ninety-nine years, to commence at the expiration of the term hereby granted, at the same time, rent payable in a like manner, and subject to the like covenants and agreements, as are contained in these presents; and, on or before the expiration of each and every term of ninety-nine years thereafter, to grant and execute new leases to the party aforesaid of like tenor and effect, thenceforth forever. And the said party of the first part further covenants and agrees that upon the request of said second party, its successors or assigns, it will proceed and appropriate, under the laws of the state of Ohio, such real estate, rights, and interests as may be necessary or required for the maintenance and operation of said railroad; said second party, its successors or assigns, paying all costs or dam-

ages therefor, and for which said first party may thereby become liable. And, further, that upon like request, and at the cost and charge of said second party, its successors or assigns, the said first party, its successors or assigns, will make and execute such further and other lawful deeds, assurances, and confirmations of the railroad and other premises hereby granted, or intended so to be, unto said second party, its successors or assigns, as it or they shall reasonably require.

"And, further, whereas, the said first party heretofore has issued three series of bonds, the payment of which is secured by deeds in trust of their entire property, including the railroad and premises hereby demised, and has issued preferred stock,—the aggregate amount of said bonds and stocks does not exceed the sum of three millions of dollars, (\$3,000,000),—the said first party hereby covenants and agrees that it will pay said bonds, both principal and interest, and the dividends on said stock, as they shall respectively become payable, so as to protect said second party, its successors and assigns, in the use and peaceable possession of said railroad, and the premises hereby demised; but said party of the first part, its successors and assigns, shall have the right, and this indenture is made upon the express condition, that, at any time hereafter, by agreement with the holders of said bonds, it may extend the time of payment of the same, or said first party may substitute for bonds now outstanding new bonds, and secure the payment of such new bonds by another deed in trust of its entire property, including the railroad, and other premises hereby demised, and in such case the deed in trust last mentioned, and said preferred stock, shall be a lien in all respects on any right, title, or interest acquired by said second party, its successors or assigns, under and by virtue of this indenture, as the former deed in trust, and with the same priority of lien: provided, however, that the total amount of bonds so extended or substituted, and the amount of such preferred stock, shall not at any time, without the consent of said second party, exceed the aggregate amount of three million dollars, (\$3,000,000:) and further provided, that in case that the party of the first part, its successors and assigns, shall fail to pay the principal or interest of said bonds, or the dividends of said preferred stock, for a period of thirty days after the same become due and payable, said party of the second part, its successors and assigns, may proceed to pay the same out of the rental created under this lease, so far as the same may extend for the payment thereof, and the said party of the first part shall account to the said party of the second part for the amount thus paid in accordance with the terms of this lease.

"It is mutually agreed that this agreement shall be considered and held perfected and binding on the parties hereto when assented to by the stockholders of each party in the mode and manner pointed out and prescribed by statute.

"In witness whereof, the said party of the first part, and the said party of the second part, by order of their respective boards of directors, have caused their names and corporate seals to be affixed hereto, as well as to the counterpart thereof, by their respective presidents, on the year and day first above mentioned."

This agreement was duly assented to by the stockholders of each party, and on or about May 18, 1871, the Cincinnati & Springfield Railway Company took possession of that portion of the railroad extending from Springfield to Dayton, and, through the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, has ever since operated the same under the lease.

On May 8, 1881, the plaintiffs and the defendant, each of them being

duly authorized by a vote of their respective stockholders, made the following lease:

"Whereas, the Cincinnati, Sandusky & Cleveland Railroad Company and the Columbus, Springfield & Cincinnati Railroad Company, corporations existing by virtue and authority of the laws of the state of Ohio, and the Indiana, Bloomington & Western Railway Company, a corporation existing by virtue and authority of the laws of the states of Ohio, Indiana, and Illinois, the two former of which companies have lines of railroad constructed and in operation from Sandusky to Dayton, in said state of Ohio, and from Columbus to Springfield, in said state of Ohio, connecting at said Springfield; and whereas, the said Indiana, Bloomington & Western Railway Company now owns and operates a line of railroad from Pekin, in the state of Illinois, to Indianapolis, in the state of Indiana, and is now extending its said line of railroad from said Indianapolis to said Springfield, Ohio, by the construction of a new line of railroad so as to connect at said Springfield with the lines of railroad of said Cincinnati, Sandusky & Cleveland and Columbus, Springfield & Cincinnati Railroad Companies, so as to form a continuous line for the passage of cars, and thereby to increase its facilities for doing an east and west bound business, and to render more profitable the large amount of freight and passenger business it expects to bring to said Springfield, and to further facilitate this purpose desires to obtain a lease in perpetuity, or for as long a time as it lawfully can, of the lines of railroad of said Cincinnati, Sandusky & Cleveland and Columbus, Springfield & Cincinnati Railroad Companies; and whereas, the said lines of railroad are continuous and not competing, and the boards of directors of the Cincinnati, Sandusky & Cleveland and Columbus, Springfield & Cincinnati Railroad Companies, afore named, having entered into an agreement to make such a lease or leases, and submit the same for the consideration and ratification of the stockholders of their respective corporations: now, therefore, this indenture, made this eighth (8th) day of March, in the year of our Lord eighteen hundred and eighty-one, (1881,) by and between the said Cincinnati, Sandusky & Cleveland Railroad Company and the Columbus, Springfield & Cincinnati Railroad Company, parties of the first part, and the said Indiana, Bloomington & Western Railway Company, party of the second part, witnesseth:

"That the parties of the first part, for and in consideration of the payments, covenants, and agreements hereinafter mentioned, by, for, and in behalf of the party of the second part, its successors and assigns, to be paid and performed, and upon the conditions and restrictions hereinafter stated, the said parties of the first part do hereby grant, lease, and demise unto the said party of the second part, its successors and assigns, the entire railroads of the said parties of the first part lying in and extending from the city of Sandusky, in Erie county, to the city of Dayton, in Montgomery county, and from the town of Carey, in Wyandot county, to the town of Findlay, in Hancock county, and from the city of Columbus, in Franklin county, to the city of Springfield, in Clarke county,—all in the state of Ohio,—now constructed, or which shall hereafter be constructed, as provided in this agreement; that is to say, their real estate and rights of way, their side tracks, machine-shops, engine-houses, warehouses, road-beds, gravel-pits, bridges, superstructures, tracks, and appurtenances connected with the same, their depot stations, water-houses, rolling stock, and equipment, and all property rights and interests of every description acquired and now held, or which hereafter shall be acquired, by said party of the first part, for the construction, maintenance, and operation of said railroads that may be appurtenant thereto and necessary for their operation, or intended for such use.

"To have and to hold said railroads, and all and singular the premises, with

their appurtenances, hereinbefore demised and expressed, or intended so to be, unto the said Indiana, Bloomington & Western Railroad Company, its successors and assigns, from the first (1st) day of May, A. D. 1881, for and during and until the end of the full term of ninety-nine (99) years thence next ensuing, and renewable from time to time for like periods forever: provided, however, that whereas, the parties of the first part have heretofore issued four series of bonds now outstanding, and have also issued preferred stock not exceeding in the aggregate four millions of dollars, the payment of which is secured by deeds of trust of the entire property of the said parties of the first part, the said parties of the first part, their successors and assigns, shall have the right, and this indenture is made upon the express condition that, at any time hereafter, by agreement with the holders of said bonds and preferred stock, they may extend the time of payment of same, or said parties of the first part, their successors and assigns, may substitute new bonds and preferred stock therefor, and secure the payment of such new bonds and preferred stock by other deed or deeds in trust of their entire property, including the railroads and other property hereby demised; and in such case the said deed or deeds in trust last mentioned, and the preferred stock, shall be a prior lien in all respects on any right, title, or interest acquired by said party of the second part, its successors and assigns, under and by virtue of this indenture, as the former deeds in trust, and with the same priority of lien.

"The total amount of bonds and preferred stock so extended or substituted, however, shall *not* at any time exceed in the aggregate the sum of four millions of dollars without the consent of the said party of the second part; and the said parties of the first part, their successors and assigns, hereby covenant and agree with the party of the second part, its successors and assigns, that, during said term of ninety-nine (99) years (or any other term of years) hereby granted and demised, they will at all times keep and maintain their corporate existence and organization; that they will not knowingly do or omit to do any act or thing whereby their corporate powers, rights, or privileges, or the term hereby created, may be forfeited or endangered, and the possession and use of said railroads and premises hereby granted to said second party, its successors and assigns, restricted; and said parties of the first part, their successors and assigns, hereby covenant and agree with the party of the second part, its successors and assigns, that during the said term of ninety-nine (99) years, or any other term herein provided, it shall, at all times, peaceably and quietly have, hold, and enjoy the said demised and granted railroad premises and appurtenances, without let, hinderance, or interference from said parties of the first part, their successors or assigns, or any other person or persons whomsoever claiming from or under it or them, or either of them. And the said parties of the first part, their successors and assigns, further covenant and agree that on or before the expiration of ninety-nine (99) years, or any other term herein provided, they, or either of them, will at the request and expense of the said party of the second part, its successors or assigns, grant and execute to the said party of the second part, its successors and assigns, a new lease of the railroads and premises hereby demised for the further term of ninety-nine (99) years, to commence at the expiration of the term hereby granted, and at or before the expiration of every renewal thereof, at the same rental, payable in like manner, and subject to the like covenants, agreements, conditions, and restrictions as are contained in these presents.

"And said parties of the first part further covenant and agree that upon the request of said party of the second part, its successors and assigns, it or they, or either of them, will proceed under the laws of the state of Ohio, and appropriate such real estate and rights and interests as may be required for the maintenance or operation of their or either of their lines of railroad; said party of the second part, its successors and assigns, paying

all costs and damages therefor, or for which said parties of the first part, or either of them, may thereby become liable; and, further; that upon like request, and at the cost and charge of said party of the second part, its successors and assigns, the said parties of the first part, their successors and assigns, will make and execute such further and other lawful deeds, assurances, and confirmations of the railroads and premises hereby granted, or intended so to be, unto the said party of the second part, its successors and assigns, as it or they shall reasonably or of right require; and the said party of the second part, its successors and assigns, hereby covenants and agrees with the parties of the first part, their successors and assigns, that it will pay, as rental for the aforementioned granted and demised railroads and appurtenances, thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised railroads and property, which said thirty-three and one-third per centum of said gross earnings and receipts it is hereby guaranteed by said party of the second part, its successors and assigns, shall not be less than three hundred thousand dollars (\$300,000) in any one year during the continuance of this lease; and if, from any cause, said thirty-three and one-third per centum of the said gross earnings and receipts should in any year fall short of three hundred thousand dollars, (\$300,000,) the said party of the second part, its successors or assigns, will make up and pay each and every such deficit out of its or their own money; and, whenever the said thirty-three and one-third per centum of the said gross earnings and receipts shall exceed in any one year the sum of five hundred and fifty thousand dollars, (\$550,000,) all such excess shall inure to and be retained by the party of the second part. Said gross earnings and receipts are to be determined from the entire gross earnings and receipts, from all sources whatsoever, or however derived, of the railroads and property hereby leased, or any portion thereof, and the business of the roads shall be so transacted, and the books and accounts thereof so kept, by said party of the second part, its successors and assigns, as to clearly exhibit the said entire gross earnings and receipts without any deductions whatever. Said amount of three hundred thousand dollars (\$300,000) per annum guaranteed rental shall be paid to the parties of the first part in equal monthly payments of twenty-five thousand dollars each, at the end of each and every month from the date of this lease, and the balance of the thirty-three and one-third per centum of the said gross earnings and receipts shall be paid quarter yearly, on the first days of October, January, April, and July of each and every year from and after the date of this lease; eight one-thirtieths of said guaranteed rental to be so paid to the said Columbus, Springfield & Cincinnati Railroad Company, and twenty-two one-thirtieths to said Cincinnati, Sandusky & Cleveland Railroad Company; and one-fifth of the balance of the said thirty-three and one-third per centum of the said gross earnings and receipts shall be paid to the said Columbus, Springfield & Cincinnati Railroad Company, and four-fifths to the said Cincinnati, Sandusky & Cleveland Railroad Company. Said party of the second part, its successors and assigns, further agrees that it or they will render to the said parties of the first part, their successors and assigns, properly detailed accounts of said gross earnings and receipts quarter yearly, and will allow said parties of the first part, their successors and assigns, by their proper officers or employees duly authorized, such free access to its or their books, papers, and accounts as may be required to ascertain the correctness of the accounts so rendered:

"Provided, always, and these presents are upon the express condition, that if the said party of the second part, its successors and assigns, shall neglect or fail to pay to the said parties of the first part, their successors or assigns, the amount of rental hereinafter provided to be paid, or any part thereof, for

a period of thirty days after the same ought to have been paid, as aforesaid, or in case the said party of the second part, its successors and assigns, shall not from time to time, and at all times during the continuance of this lease, well and truly observe, perform, fulfill, and keep all and singular the covenants, conditions, and agreements hereinbefore or hereinafter contained which are or ought to be kept and performed by said party of the second part, its successors and assigns, according to the true intent and meaning of these presents, then in any and every such case the said parties of the first part, their successors and assigns, shall have the right to re-enter upon said railroads and other premises hereby demised, and to repossess and enjoy the same as of their former estate, anything hereinbefore contained to the contrary thereof in anywise notwithstanding; and the said party of the second part shall be liable to the parties of the first part and each of them for all damages which they or either of them may sustain by any default of the party of the second part, but no such forfeiture shall be declared unless the said party of the first part shall have first notified the said party of the second part of the default complained of, and request the performance of this contract in that behalf by the said party of the second part, its successors and assigns; and the said party of the second part, its successors and assigns, further agree that it or they will diligently prosecute the building of the line of railroad from Indianapolis to Springfield, hereinbefore named, and complete the same, and have it duly connected and in operation with the line of railroad of said party of the second part at said Indianapolis, and with the line of railroad of said party of the first part at said Springfield, on or before January 1, 1882, and will run and operate the said line of railroad in connection with the lines of the parties of the first part, and will not become interested in the earnings of any competing railroads to the roads of the parties of the first part, or either of them; and said party of the second part further agrees that all business arising from its lines of railroad to said Springfield, and destined for points north and north-east thereof, shall be sent over the Cincinnati, Sandusky & Cleveland Railroad as far towards Sandusky as may be necessary to secure the greatest amount of earnings therefrom to the parties of the first part, and all business destined for points east and south-east thereof shall be sent via Columbus over the Columbus, Springfield & Cincinnati Railroad; and the said party of the second part, its successors and assigns, hereby covenants and agrees with the said parties of the first part, their successors and assigns, that it and they will, during the term hereby granted, well and truly pay the rental hereinbefore provided promptly at the times and in the manner limited and prescribed herein for the payment thereof, according to the true intent and meaning of these presents, and that in computing the amount of the total receipts and earnings on the lines of the railroads of the parties of the first part it will allow on all through business between Peoria and Sandusky, and between Peoria and Columbus, full *pro rata* to each road, according to the number of miles hauled on each; and said party of the second part, its successors and assigns, further agree that it and they will, during the continuance of this lease, maintain and keep in good order and condition by renewals and repairs the railroads and other property hereby demised, and to add such new cars, engines, and rolling stock as may be necessary to replace such as may become worn out or destroyed, so as to keep said equipment up to its present standard of value and efficiency, and to mark distinctly, in the usual manner, all such new cars, engines, and rolling stock, to denote that they belong and appertain to the Cincinnati, Sandusky & Cleveland Railroad Company, and so deliver them upon the railroad of said company, free from all liens, as its property, subject only as their other property to the terms of this lease; and all such cars, engines, or other rolling stock shall be so distinctly marked as aforesaid before leaving the shops or other places of manufacture. The party

of the second part, its successors and assigns, will also make all renewals of track upon the railroads of the parties of the first part with steel rails of not less than fifty-six pounds to the linear yard, and will, as rapidly as good management may require, provide the entire tracks of the railroads of the parties of the first part with such steel rails, and will at all times keep and maintain the tracks of the said railroads, and each of them, in first-class condition of repair; that it and they will also run and operate said railroads of the parties of the first part in such manner that the corporate rights and privileges of said parties of the first part shall not be impaired or endangered; that it will furnish the public all reasonable accommodation in the running of its trains and otherwise over said roads of the parties of the first part; that it will indemnify and save harmless the said parties of the first part from all liabilities and claims for damages and losses incurred and arising in any manner in the running of said railroads; and, in general, that it will operate said railroads of the parties of the first part, and furnish such equipments, stations, and other appurtenances therefor, as are suited for and required by a railroad of the best class, and that it will use all necessary and possible efforts to facilitate and increase the business of the railroads hereby leased.

"The said party of the second part further agrees that it will pay all taxes and assessments whatsoever that may be levied by either the state of Ohio, or the United States of America, or under the authority of either thereof, on the roads and property hereby demised, or on their earnings and receipts, and on all dividends and interest which may be paid by the parties of the first part, but not including any taxes or assessments which may be made against the individual holders of the stock or bonds of the parties of the first part; that it will procure and keep policies of insurance in full force upon all bridges, docks, buildings, engines, cars, and other equipments and machinery, and other property hereby demised, to the extent at least of two-thirds of the full value thereof; and to have such policies written for the benefit of whom it may concern, and fully protecting and referring to the respective interests of the parties hereto, and in case of loss all sums received from underwriters of existing or future policies of insurance shall inure to the party of the second part, and to be expended in repairing or replacing, as the case may be, the property damaged or destroyed. The party of the second part shall, whenever requested by the parties of the first part, or either of them, furnish a special car, and transport therein the board or boards of directors of the parties of the first part, or a committee thereof, free of cost, over the roads of the parties of the first part, as often as four times each year, if required; giving them suitable time and opportunity to examine the condition of the roads and other property hereby demised. The party of the second part, its successors and assigns, also further agree that it or they will not transport any wood or ties cut in any of the counties of the state through which the lines of the railroads of the parties of the first part pass at less than the regular local rates for timber, lumber, and wood. It is also mutually agreed between the parties hereto that in case the parties of the first part, their successors and assigns, shall fail to pay the interest or principal of the bonds or preferred stock hereinbefore named, for a period of thirty (30) days after the same shall have become due and payable, the said party of the second part, its successors and assigns, may proceed and pay the same to the parties entitled thereto out of the rental created and provided for under this lease; and the amount so paid shall be charged to the parties of the first part and deducted from the money then due, or to become due, to the parties of the first part, under this lease. In case the parties of the first part should fail to extend the time of payment of any of said bonds, or negotiate new securities in lieu of them as hereinbefore provided, then the said party of the second part may renew the same at a rate of interest not in excess of that now payable in said bonds,



respectively, or may pay and discharge said bonds, and have a lien upon the premises hereby demised for the payment of the same, and a credit on the rental herein reserved of the amount of the interest on the bonds so paid. It is also further mutually agreed and understood between the parties hereto that the Cincinnati, Sandusky & Cleveland Railroad Company sells to the party of the second part all the fuel, lumber, timber, new ties, oil waste, all new and old rails not in the track at the time this lease goes into effect, and all such stationery and other supplies furnished for use upon the lines of railroad hereby leased as may be available for use, and desired by the said party of the second part. An inventory and cost appraisal of the aforementioned supplies and rails shall be made before this lease goes into effect, by three persons, one of whom shall be appointed by the parties of the first part, one by the party of the second part, and the other by the two persons so appointed; the decision of either two of which shall be final both as to the quantities of said supplies and rails thus sold, and their cost value as hereinbefore named; the total amount of which said cost value the party of the second part hereby agrees to pay in cash to the Cincinnati, Sandusky & Cleveland Railroad Company in or within thirty (30) days after this lease goes into effect.

"It is also mutually agreed that all the tracks, bridges, buildings, locomotives, cars, and other property of the parties of the first part hereby leased shall, as soon as practicable, and within sixty (60) days after the date of this lease, be duly inventoried and appraised in manner and form as hereinbefore provided for the inventory and appraisal of the supplies and rails; and said inventory and appraisal, when completed, shall be copied in triplicate, one copy thereof to be placed for filing and record with the Indiana, Bloomington & Western Railroad Company, and one copy, for like purpose, to each the Cincinnati, Sandusky & Cleveland Railroad Company and the Columbus, Springfield & Cincinnati Railroad Company, and also for the purpose of enabling the respective parties hereto the better to determine from time to time if any waste or depreciation of the property has taken place; said appraisal to be made on a basis of value of gold coin of the United States of America; and at the termination of this lease a like inventory and appraisal shall be made, in like manner, of the same or substitute property, to determine whether all such property is then in good, better, or worse condition of efficiency; and the parties making such inventory and appraisal shall appraise the difference in value, if any, and any such difference shall be equalized by payment from one party to the other as the case may require; and to have such waste, depreciation, or betterment and improvement, if any, as the case may be, restored and made good. It is also agreed by the parties of the first part that the party of the second part, its successors and assigns, shall have the right to use the name of the parties of the first part so far as it may be necessary for it to do so in bringing any actions, and in making any defenses.

"It is also further agreed by the party of the second part, its successors and assigns, that the Cincinnati, Sandusky & Cleveland Railroad Company shall retain to itself for its own uses and purposes all real estate it may possess, not appurtenant to its line of railroad, or necessary for its use and operation; more particularly the properties recovered from Rush R. Sloan, its former president. And whereas, the said Cincinnati, Sandusky & Cleveland Railroad Company has heretofore leased the portion of its road between Springfield, in Clarke county, and Dayton, in Montgomery county, the said party of the second part assumes such lease and all existing contracts and agreements, of said parties of the first part. And it is also hereby mutually agreed that if from any cause either of the parties hereto shall neglect or fail to appoint the person herein provided to act as appraiser for the inventorying and appraisal of the supplies and rails, and of the track, locomotives, etc., hereinbefore named, it shall be competent for the appraiser ap-

pointed by the other party to appoint both of such other appraisers. And it is further agreed that the party of the second part will furnish, free of charge, to the parties of the first part suitable rooms and accommodations in the general office buildings at Sandusky, Springfield, and Columbus, Ohio, for the offices of the president, secretaries, and treasurers of the parties of the first part; and that until the completion of the road of the party of the second part said party of the second part will not change the managing agents and employes of the parties of the first part except with the consent of the president of said parties of the first part.

"In witness whereof, the said parties hereunto have caused this lease to be signed by their respective presidents, and attested by their respective secretaries, and have caused their corporate seals to be hereto attached the day and year above written, in triplicate."

The lease was duly executed and delivered, and on May 1, 1881, the defendant took possession of the roads and property leased so far as it could, and holds the same. And since then, May 1, 1881, the defendant has received the rent and has enjoyed the benefits secured to the lessor by the prior lease of November 28, 1870, which was so obtained by the defendant. At the end of the first quarter, after July 31, 1881, a dispute arose as to what rent the defendant should pay plaintiffs for the part of the road between Springfield and Dayton; whether it should be 33½ per cent. of the gross earnings and receipts of that part of the road, or only 33½ per cent. of what was paid over to the defendant, either sum making more than the minimum amount to be paid. After the end of the second quarter, on February 18, 1882, plaintiffs brought suit for the rent claimed and not paid; and they set forth the two leases in full, with averments of gross earnings and receipts and failure to pay amounts due, and plaintiffs claimed judgment for the unpaid amount of 33½ per cent. of the gross earnings and receipts, with interest. The defendant admitted corporate existence, and denied every other allegation or statement.

On the trial the court of common pleas gave judgment for the defendant. A bill of exceptions was taken; and on proceedings in error the district court found as matter of fact—

"That the defendant has operated since May 1, 1881, the plaintiffs' railroads between Sandusky and Springfield and Springfield and Columbus, under the lease to it in said petition exhibited, and has received from the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company the thirty-five per cent. of its gross earnings and receipts on that part of said railroad between Springfield and Dayton, under the lease in said petition first exhibited, from May 1, 1881, to the bringing of this suit; and that if the true construction of the lease from the plaintiffs to the defendant, exhibited in the plaintiffs' petition, be that the defendant is obliged to account for and pay to the plaintiffs thirty-three and one-third per cent. of the gross earnings and receipts realized by the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company by the operation of that portion of the plaintiffs' road between Springfield and Dayton, under the lease in said petition first exhibited, that then there is due and payable to the plaintiffs from the defendant the several amounts claimed in the plaintiff's petition; but that if the true construction of the said lease from the plaintiffs to the defendant be that the defendant is required to account for and pay thirty-three and one-third per cent. of the rental only, due from and paid by the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company for the use of that portion of the said railroad

between Springfield and Dayton, under the lease in said petition first exhibited, that then and in that case there is nothing due from the defendant to the plaintiffs, on the cause of action set forth in the plaintiffs' petition. And it further appearing to the court, all the judges concurring therein, that the decision of the question as to which of said constructions of said lease under the facts and circumstances set forth in the bill of exceptions in this case is the true construction of the lease from the plaintiffs to the defendant involves difficult and important questions of law, and all the judges of this court being of opinion that this cause ought to be reserved, it is by the court, on motion of the plaintiffs, ordered that this cause be, and the same is hereby, reserved for decision in the supreme court."

*Bowman & Bowman* and *R. P. Ranney*, for plaintiffs in error.

*C. W. Fairbanks* and *Wm. H. West*, for defendant in error.

FOLLETT, J. The parties desire "the true construction of the lease from the plaintiffs to the defendant," as to one matter only: What rent shall *now* be paid to plaintiffs for the part of the railroad from Springfield to Dayton? The corporate existence of the parties is admitted, and their competency to make the lease is not questioned. There is no claim, by either party, that there was any mistake or fraud on the part of any one; and neither party asks for any reformation or change of any part of the lease. There does not seem to be any substantial dispute between the parties as to the legal principles that govern the construction of the lease; and all agree that the per cent. to be paid is 33½ per cent.

But they dispute as to the *basis* on which to compute the *amount* of rent to be paid. Is such basis the entire gross earning and receipts of all the property and railroads owned and leased by the plaintiffs, including the part from Springfield to Dayton? This is the *claim* of plaintiffs; and the defendant admits that such basis would be correct if the defendant controlled and operated the entire line of railroad, and that such a basis will be correct when the prior lease is ended, and the defendant comes into possession of the part from Springfield to Dayton. The defendant claims that the correct basis *now* should *not* include the gross earnings and receipts of the part of the railroad from Springfield to Dayton, but only the 35 per cent. rents *received* by the defendant from the company operating that part.

The dispute is shown as follows: During a certain time the gross earnings and receipts of that part of the road are \$300,000, of which 35 per cent., \$105,000, *as rent*, is paid to the defendant. Plaintiffs claim that the 33½ per cent. of the \$300,000, which is \$100,000, should be paid to them; but defendant claims it should pay only 33½ per cent. of the \$105,000 rent received by it, which is \$35,000; making a difference to each party of \$65,000 for each \$300,000 of such gross earnings and receipts.

An examination of this lease of March 8, 1881, shows that the defendant agreed to "pay, as rental for the aforementioned granted and demised railroads and appurtenances, thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised rail-

roads and property." And the lease provides that "said gross earnings and receipts are to be determined from the entire gross earnings and receipts from all sources whatsoever, or however derived, of the railroads and property hereby leased, or any portion thereof."

The railroads and property thus leased are generally described by the lease as "the entire railroads of the said parties of the first part lying in and extending from the city of Sandusky, in Erie county, to the city of Dayton, in Montgomery county, and from the town of Cary, in Wyandot county, to the town of Findlay, in Hancock county, and from the city of Columbus, in Franklin county, to the city of Springfield, in Clarke county,—all in the state of Ohio,—now constructed, or which shall hereafter be constructed, as provided in this agreement." There follows the above a more minute description of the property leased. The part of the railroad from Springfield to Dayton is expressly *included* in the part extending from Sandusky to Dayton. And it is not claimed that this part is included by mistake, or that the lease anywhere excludes such part.

This language is plain and specific, and includes the entire line of railroads, and provides that the "gross earnings and receipts" of the entire line shall be the *basis* for computing the rent. We need not add to the principles of construction as gathered and stated in *Lawler v. Burt*, 7 Ohio St. 340, 349.

It is claimed that certain facts as to the property, and certain words and covenants of the leases, require this language to express a meaning other than the words seem to import; and that the words "gross earnings" apply to the part of the property not included in the prior lease, and the word "receipts" to the part in the prior lease. To have such effect the other meaning must clearly appear to be intended.

It is stated that the plaintiffs did not put the defendant into immediate possession and control of every part of the railroad. It may be answered at once that the defendant agreed with plaintiffs that it should not have such possession and control, and yet the parties used this language as to the *basis* of rent. When this lease was made, all the parties knew that the prior lease of November 28, 1870, was in successful operation; and that the lessee had assigned that lease to the Cleveland, Columbus, Cincinnati & Indianapolis Railway Company, an efficient and responsible company; and that the lease was of great value to the lessor. These parties also inserted the following provision in their lease:

"And whereas, the said Cincinnati, Sandusky & Cleveland Railroad Company has heretofore leased the portion of its road between Springfield, in Clarke county, and Dayton, in Montgomery county, the said party of the second part assumes such lease, and all existing contracts and agreements, of said parties of the first part."

The context shows the intended meaning of the word "assumes." The parties use it in its original meaning, not its acquired meaning.

The defendant *assumed* such lease. It thus took to itself—accepted—the *obligations*, the contracts, and agreements, and the *benefits* of the *lessor* in that prior lease. These parties agreed that their lease was made hav-

ing regard to the provisions of the prior lease. The obligations or the benefits of the prior *lessee* are not *assumed*. Such obligations remain upon the party that agreed to fulfill them, and such party must now perform them for the benefit of the defendant.

The situation of the defendant is very similar to what it would be had the plaintiffs and defendant made their lease *first*, and after that the defendant had made the assumed lease with the company now operating that part of the road. Had this been done, no question could arise as to the basis for computing the rent due plaintiffs on their lease with the defendant; the plain language of the lease states a basis.

The defendant, when it obtained these leases from plaintiffs, was seeking to extend its line of railroad from Pekin, in the state of Illinois, through Indiana, and to Springfield, Ohio; and it leased plaintiffs' property "so as to form a continuous line for the passage of cars, and thereby to increase its facilities for doing an east and west bound business, and to render more profitable the large amount of freight and passenger business it expects to bring to said Springfield." The defendant took immediate possession of plaintiffs' roads east and north of Springfield, and made them parts of its extended system of railroads, east and west and north. By the provisions of the lease assumed, the part of the road from Springfield to Dayton had become a part of a *trunk* road from the city of Cincinnati, by way of Dayton and Springfield, to Cleveland, Sandusky, and Columbus. The defendant thus acquired the benefits of a connection with and interest in a system of railroads extending south; and the *value* of such benefits need not be discussed. Thus it is conclusive that, by the provision "the said party of the second part *assumes such lease*, and all existing contracts and agreements, of said parties of the first part," the defendant did not simply take the *obligations* of the lease assumed, but it did obtain the great *benefits* secured to the *lessor* therein.

The defendant obtained these valuable benefits which it sought to secure, and all the control and possession it purchased and agreed for, with power to take full and entire possession and control of the remaining part whenever there is a failure to fulfill the covenants of the prior lease. And we see no reason why the true construction of this lease does not depend upon the *words* the parties have used in the lease. The defendant agreed to pay "thirty-three and one-third per centum of the total gross earnings and receipts of said granted and demised railroads and property." And the lease describes the entire railroads and property. What are *gross earnings* and *receipts*? Surely they are not *net* earnings and receipts. It has been earnestly contended that the word "receipts" expresses something separate from earnings, and was intended to include only the 35 per cent. paid under the prior lease. But the parties have not so expressed it in the lease; and, on final argument, the defendant admitted that, as the parties had used the words "gross earnings and receipts," these words may be taken together as expressing the same thing, unless other parts of the agreement require a different construction. We think this is the correct rule, especially to bind the defendant in its promises. No other words of this *lease* can require such

a separation and limitation of meaning. There are no provisions that the rent shall be gross earnings and receipts only of the parts operated by the defendant, and different for the parts not so operated. No one could claim such a result would follow should the defendant sublease the parts it now operates.

It is claimed "that in *several* places where the words 'demise and grant' are used, they are evidently used in a restricted sense, and apply to the parts of the roads not before leased;" and so "gross earnings" apply to all income except the rent from the part from Springfield to Dayton, and this rent was called "receipts." But it is not claimed the words "demise and grant" were *only* so used in a restricted sense. And if the words, "demise and grant," did not convey the entire line of railroads, including the part from Springfield to Dayton, what becomes of the defendant's *admitted right* to the possession and control of that part of the road when the prior lease shall be ended? The lease provides that the "gross earnings and receipts" are from the property and railroads "*demised and granted*" in the lease; and the language applies these words to the entire line.

We are asked to compare the provisions of the two leases, to find that the meaning of the word "receipts" is limited to the 35 per centum rent paid to the defendant. It must be conceded that the words "gross earnings and receipts," in the prior lease, where no rents are received, are used together, and used to express one thing only. In that lease there are no receipts aside from the gross earnings; yet the parties there use the words "gross earnings and receipts" as the *basis* for computing rent. And these parties must admit they are so rightly used.

We are asked to look at the covenants, "as to keeping the accounts of the gross earnings and receipts, and the time of the payment of the rental," to aid in separating the word "receipts" from "gross earnings and receipts." In one case the original *lessee* or assigns must keep the accounts, and render a semi-annual statement. In this lease the *defendant* must keep the accounts, and every quarter the defendant must render an accurate *detailed* account. The original lessee need not render an account only each six months, but the account must show the quarterly business, as payments are required quarterly. So far as appears, such accounts show the monthly business; and, whether they do so or not, the defendant has agreed to render quarterly statements, and no one asserts it is not able to do so. So far there is no complaint before us that each party has not known the amount of gross earnings and receipts of each quarter. The exact amount of the first quarter and the amount of the second quarter seem to be well known.

As to *times* of payment in this lease, it is \$25,000 each month, and the quarterly remainder must be paid on the first days of January, April, July, and October, and 30 days' grace is allowed. In the prior lease the time is within 30 days after the last days of December, March, June, and September. The quarters end substantially at the same time.

Again, it is claimed the defendant's covenant to renew the tracks of the roads leased "with steel rails of not less than fifty-six pounds to the

linear yard," could apply only to the roads in the possession and control of the defendant, as the defendant could not repair the road, and as no such provision is in the prior lease. But this claim overlooks a more important provision of each lease. In the prior lease the lessee covenants "in general that it will maintain said railroad in such condition, and that it will operate the same and furnish such machinery, cars, equipments, stations, and other appurtenances, as are suited and required by a railroad of the best description." In this lease the lessee covenants that it will "furnish such equipments, stations, and other appurtenances therefor, as are suited for and required by a railroad of the best class." All agree that steel rails are now "suited and required by a railroad of the best description," and so the prior lease provides for such rails; and, in the future, rails of a quality much better than steel may be "suited for and required by a railroad of the best class." And, when required, they must be furnished under the prior lease, or the defendant, by virtue of the prior lease, may take possession of that part of the railroad, and hold it under his lease with plaintiffs. Thus the defendant has the power to fulfill every one of its covenants in this lease as and when applied to the entire line of railroad, either by its own acts or by compelling another to act.

Whether or not either of these agreements is profitable, is not before us. It does not appear that any one is not profitable.

We find nothing in either lease that requires the word "receipts" to be applied only to the 35 per centum rent paid under the prior lease to the defendant, or that should separate it from the expression "gross earnings and receipts," as used and applied throughout both leases. The parties here made but one lease. The defendant entered into its plain and specific covenants, knowing and accepting the provisions of the prior lease, with plaintiffs' consent. The agreement to pay, as rent, 33 $\frac{1}{3}$  per centum of the total gross earnings and receipts of the granted and demised railroads and property is definite and distinct, and its meaning is not changed or limited by any words or covenant of either lease, or by any fact shown.

The plaintiffs were entitled to judgment as prayed for. The court below erred, and the judgment is reversed, and judgment is rendered for the plaintiffs.

(44 Ohio St. 339)

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BRAIDEN v. MERCER.

(Supreme Court of Ohio. June 1, 1886.)

GUARDIAN AND WARD—ACTION—BOND—SETTLEMENT.

In an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness, or to demand a rehearing of the accounts.

Error to district court, Belmont county.

OWEN, C. J. In October, 1873, Milton W. Junkins was appointed guardian of the estates of two of his minor children. He gave bond, with

Samuel Braiden, plaintiff in error, as surety, conditioned that his principal should "faithfully discharge all his duties as such guardian, as is required by law." He entered upon the discharge of his trust. A considerable sum of money belonging to his wards came into his hands as guardian, which he neglected to account for. He thereafter died, and in February, 1880, D. W. Cooper was appointed his administrator, and in February, 1881, as such administrator, and as required by section 6291, Rev. St., filed in the probate court of Belmont county an account of the doings of his intestate as such guardian. In June, 1881, the court passed upon this account, and found that in his life-time the guardian, as such, had received of his wards' money \$953.48, which, with the interest thereon, amounted to the sum of \$1,384.06, which was adjudged against the estate of the late guardian, and ordered to be paid by the administrator to the then and present guardian, the defendant in error. There being no assets in the hands of the administrator, the action below was brought in the court of common pleas, by the present guardian of these wards, against Braiden and the administrator of his principal, upon the bond of the latter, for the recovery of the amount found due from the estate of the guardian, and interest. To the petition Braiden made answer as follows:

"That the said Milton W. Junkins, as guardian, did not file any account of his trust as guardian; that the account filed by his administrator was filed without the knowledge of this defendant, and this defendant was no party thereto. The defendant further says that, for many years prior to the death of the said Junkins, he, the said Junkins, was a man of intemperate habits; that he was for a very long time unable to work; that he had no real or personal estate, and no income except what he derived from his practice as a physician, when able to practice, and from an estate by curtesy he had in certain real estate; that at the time he was appointed guardian his wards were infants of tender years, requiring great care and attention; that they had, in addition to the moneys claimed to have been received by their guardian, the remainder in fee-simple of a piece of real estate in the city of Bell-air, Ohio, of the value of at least forty-five hundred (\$4,500) dollars; that while they were possessed of an estate as aforesaid, and their father and guardian unable to provide for himself, he, the guardian, did, at great cost to himself, support, clothe, and educate said children, and on them and in their behalf did expend large sums of money, exceeding in the aggregate the amount this defendant is sought to be charged with, and that the said real estate of said wards is still held and possessed by them free of incumbrance. The defendant, Samuel Braiden, further says that for a long time previous to the death of the said Junkins, he, the said Junkins, was not in condition to transact business; that on that account he did not, in his life-time, claim or ask an allowance for the maintenance of his wards, nor did his administrator for him in the final settlement of his accounts. The defendant further says that the said Junkins was entitled to an allowance for maintaining, clothing, and educating his wards; that his failure to do so was owing to his condition as aforesaid; and that said guardian was not in fact indebted to his wards in any sum at the time of his death, and that the said claim against him is not valid or equitable."

The plaintiff's demurrer to this answer was sustained, the defendant excepted, and, on his failure to answer further, judgment was rendered



against him for the amount demanded in the petition. The district court, on error, affirmed this judgment. To reverse the judgment below the present proceeding is prosecuted.

If Braiden was entitled to the relief demanded in his answer, the judgments below are erroneous, and should be reversed.

The single proposition to which we address our consideration is the right of Braiden to a review, in the action below, of the finding and order of the probate court upon the settlement of the guardian's dealings by his administrator. Braiden was not made a party to, and it is assumed that he had no knowledge of, the settlement proceeding in the probate court. That the settlement was final as between the wards and their guardian's administrator, in the absence of an appeal from it, or a proceeding to open it in accordance with the statutes, will be conceded. Section 6289, Rev. St.; *Woodmansie v. Woodmansie*, 32 Ohio St. 18.

Whether a surety upon a guardian's bond is concluded by a settlement in the probate court of his principal's accounts has not heretofore been determined by this court. In *Bartlet v. Humphreys*, 7 Ohio, (part 1,) 224, it was held that an action against the sureties in a guardian's bond was sustainable without previous liquidation of the amount due from the principal. This case was explained in *Newton v. Hammond*, 38 Ohio St. 435, and the principle established that a right of action against the sureties first accrues to the ward for the amount remaining in the hands of the guardian, when such amount is ascertained by the probate court on the settlement of the guardian's final account. It is said in that case by McILVAINE, J.: "The statement of accounts in the probate court must be verified by the oath of the guardian,—a requirement alike important to the sureties and the ward."

If the liability of the sureties is not fixed, nor they concluded, by the settlement, it is not apparent why the verification of the accounts is of equal importance to them and the wards. The principle that a final settlement of a guardian's accounts, and the determination by the probate court of the amount due his wards, should, in the absence of fraud and collusion, conclude the sureties in an action against them upon the guardian's bond, finds strong support in both reason and authority. The sureties undertake that their principal will faithfully discharge his duties as guardian. Section 6259, Rev. St. With other duties the law requires him to "render on oath to the proper court an account of his receipts and expenditures, verified by vouchers or proof, etc.; \* \* \* at the expiration of his trust, fully to account for and pay over to the proper person all of the estate remaining in his hands; \* \* \* to obey and perform all the orders and judgments of the proper courts touching the guardianship." Section 6269, Rev. St. By their bond the sureties contract with reference to the action of a court, and that their principal will obey its orders and conform to such action. Can they say they are strangers to such proceedings? Upon their principal's failure to obey the orders of the court, there is clearly a breach of the bond. The relation they assume to such court and its action so far makes them privy to the proceedings affecting their principal as to deny to them the right, when called upon to answer for the breach of the bond, to call in

question the grounds upon which the court based its action, and to have the same cause retried.

We find in our law numerous illustrations of this principle. The sureties in an undertaking in attachment contract to pay the defendant all damages sustained by reason of the attachment if the order prove to have been wrongfully obtained. Has it ever been doubted that the determination by the court, in the attachment proceeding, that the order was wrongfully obtained, concluded the sureties upon that question in an action upon their undertaking? By an undertaking in replevin the sureties contract that their principal will duly prosecute the action, and pay all costs and damages which may be awarded against him. Nobody will claim that the award of damages in the replevin suit is not final against the sureties in an action against them upon the undertaking. An undertaking in an injunction proceeding is conditioned to secure the party enjoined the damages he may sustain if it be finally decided that the injunction ought not to have been granted. It has never been supposed that the sureties, in an action against them, could be heard to say that they were strangers to the injunction proceeding, and that the decision of the court, that the injunction ought not to have been granted, should be disregarded, and that question again litigated.

It is not easy to distinguish the principle involved in these proceedings from the one we are considering. Indeed, it may well be considered an established principle that, whenever a surety has contracted with reference to the conduct of one of the parties in some suit or proceeding in court, he is, in the absence of fraud and collusion, concluded by the judgment. *Shepard v. Pebbles*, 38 Wis. 373; *Lothrop v. Southworth*, 5 Mich. 436, 448; *Towle v. Towle*, 46 N. H. 434; *Willey v. Paulk*, 6 Conn. 74; *Stovall v. Banks*, 10 Wall. 588; *Heard v. Lodge*, 20 Pick. 58; *Sturgis v. Knapp*, 33 Vt. 521; *Black v. Caruthers*, 6 Humph. 87; *Dowling v. Polack*, 18 Cal. 626; *Warner v. Matthews*, 18 Ill. 86; *Evans v. Com.*, 8 Watts, 398; *Garber v. Com.*, 7 Pa. St. 266; *Watts v. Gayle*, 20 Ala. 817; *Casoni v. Jerome*, 58 N. Y. 322; *Douglass v. Howland*, 24 Wend. 35; *Brandt*, Sur. §§ 533, 534.

This principle was applied in an action on an injunction bond in *Lothrop v. Southworth*, 5 Mich. 448, where it was held that a surety was bound by a decree against his principal, and could raise no question of its correctness. It was said in this case that the surety undertook that his principal should abide the judgment of the court. "He can therefore raise no question of the correctness of the decree, nor impeach it in this collateral proceeding."

The same holding was made in a similar case, *Towle v. Towle*, *supra*, where the court say:

"By signing the bond in suit with Towle, the plaintiff in the suit in equity, the sureties voluntarily assumed such a connection with that suit that they are concluded by the decree in it in the present suit upon the bond, so far as the same matters are in question."

The supreme court of the United States applied the same rule to the sureties upon an administrator's bond, in *Stovall v. Banks*, 10 Wall. 588. It is there said that the surety "cannot attack collaterally a decree made

against an administrator for whose fidelity to his trust he has bound himself."

The same application of this principle was made in *Heard v. Lodge*, 20 Pick. 58, where the court say:

"To most purposes it seems to us that the sureties in an administration bond, as well as the principal, are estopped from controverting the validity of a judgment ascertaining the amount of a debt to be paid by the administrator. They are in many respects like the sureties in a bail-bond, and equally bound by the proceeding against the principal. The duty they assume is that their principal will pay on demand all debts ascertained by judgment of a court of law against him in his capacity as administrator, if the estate be solvent. His failure to make payment is a breach of the administration bond."

In the case of an administrator's bond, the court say, in *Casoni v. Jerome*, 58 N. Y. 322:

"Sureties are bound by the decree of the surrogate in such a case, because by their contract they have made themselves privy to the proceedings against their principal; and, when the principal is concluded, the surety, in the absence of fraud or collusion, is concluded."

In *Shepard v. Pebbles*, 38 Wis. 373, it was held that the sureties on a guardian's bond are concluded by the order of the county court on the guardian's accounting, as to the *amount* due from him to the ward. COLE, J., said:

"The general rule, of course, is that a judgment is conclusive only as to parties and privies; but to this there are exceptions. And it is conceded that, whenever the surety has contracted in reference to the conduct of one of the parties in some suit or proceeding in the courts, he is concluded by the judgment. \* \* \* In the case before us, the order of the county court fixed the amount of the proceeds of sale in the hands of the guardian, and directed its payment to the ward. The sureties had contracted that the guardian should and would justly account for the proceeds, and dispose of them according to law, and would perform all orders of the county court by him to be performed. There was a breach of the obligation on the default of the guardian to pay over as he was ordered to do; and the sureties, as well as the principal, are estopped from controverting the correctness of the order ascertaining the amount. They occupy, in many respects, a position like that of sureties in a replevin or bail bond, and are equally concluded by the proceedings against the principal."

The strong analogy of this case to the one at bar is apparent. The settlement by the administrator of the deceased guardian is the same, in effect, as if made by the guardian himself. Section 6291, Rev. St. The amount due the wards was ascertained by the court, and its payment to the plaintiff below ordered. In this, default has been made. No fraud or collusion is alleged in the settlement, but a rehearing of the matter of the accounts is asked as if no settlement had been made.

The only case cited by the plaintiff in error to support the claim that the surety may be heard to have a new accounting and settlement is *Dawes v. Howard*, 4 Mass. 97. This was an action of debt on a bond of a guardian; *the wards being minor children of the guardian*. The guardian had made no claim in his life-time, but the court allows it to the

sureties. There is no intimation in the report of the case that there ever had been a settlement of the guardian's accounts prior to the action upon the bond. The question we have considered was not suggested by court or counsel, and did not arise upon the record.

The more recent case of *Heard v. Lodge*, 20 Pick. 58, *supra*, presents the view of the same court upon this question, and fully supports the conclusion we have reached, which is that, in an action upon a guardian's bond for the recovery of the amount found due the wards upon a final settlement of the guardian's accounts in the probate court, the sureties are concluded by the settlement, and will not be heard, in the absence of fraud and collusion, to question its correctness or to demand a rehearing of the accounts.

There was no error in sustaining the demurrer to the answer. Judgment affirmed.

(141 Mass. 61)

WILLETT v. WHITE.

(*Supreme Judicial Court of Massachusetts. January 14, 1886.*)

HUSBAND AND WIFE—MARRIED WOMAN—CONVEYANCE OF REAL ESTATE BY—RELEASE BY HUSBAND—PROMISSORY NOTE—EVIDENCE.

A married woman conveyed real estate to the plaintiff, without her husband signing the deed, and gave to the plaintiff a note to indemnify her against any possible assertion by the husband of his rights. After the death of the wife the husband offered to sign a release on condition that the note was given up, and the plaintiff accepted the offer, but no deed of release was given. *Held*, that at the trial of an action brought by the plaintiff upon the note, the court rightly rejected the offer of the defendant to give to the plaintiff a release of his interest in the real estate conveyed by his wife to the plaintiff; no agreement by the plaintiff to accept the offer of defendant having been set forth in the answer.

This was an action of contract upon a promissory note for \$500, purporting to be signed by Lois P. B. White, the defendant's intestate, payable on demand to the order of the plaintiff. At the trial in the superior court, before MASON, J., it was admitted that said Lois P. B. White was the wife of the defendant; that she died on May 25, 1882; and that the defendant was duly appointed her administrator on May 23, 1882. The plaintiff put in evidence the note declared upon, with evidence tending to prove the signature and delivery. No question was made at the trial as to the due proof of the signature and the delivery of the note. It appeared in evidence that said Lois P. B. White conveyed certain real estate to the plaintiff by deed dated September 29, 1876, which was put in evidence by the plaintiff's counsel during his cross-examination of the defendant, which deed the defendant, for reasons given by him, had refused to sign. The defendant testified that a short time after his wife's death he called at the plaintiff's house, and had a conversation with her, which was in substance as follows: That he said, "Hannah, how about that deed which you once wanted me and my wife to sign?" that plaintiff then told him that his wife had signed the deed, and that it had been recorded in Dedham long ago. And upon further conversation she also told him that his wife had given her a note for \$500,

which she now held against his wife's estate, (which afterwards appeared to be the note sued on in this case;) and that, when asked what this note was given for, she replied that she did not know, but that he might get her land away from her, and that his wife gave her the note for this reason, so that he might not get her land away from her. The defendant then said to her, "Then, if I will sign the deed, you will give up the note?" to which the plaintiff replied, "If you will sign the deed, I will not press payment of the note." Not long after the above conversation, the defendant again called upon the plaintiff for the purpose of talking with her about the deed and note, when the plaintiff declined to have anything to say to him about the matter, and referred him to her counsel. On cross-examination of the defendant by the plaintiff's counsel, the defendant testified that subsequently to the above conversation the defendant consulted counsel on the matter, and his counsel advised him that the best way to bring about a settlement was to bring proceedings for possession; accordingly a writ of entry was brought September 6, 1882, and is now pending. On cross-examination of the defendant by the plaintiff's counsel, the defendant was asked whether he had not signed and executed a deed conveying to the plaintiff his right, title, and interest in the real estate conveyed to the plaintiff by said Lois P. B. White, the alleged maker of the note, to which the defendant replied, "Yes; I have." The defendant then produced a deed of release, without offering to amend his pleadings; the same being a release of all his right, title, and interest in the premises conveyed by said deed of Lois P. B. White to the plaintiff, the due execution and sufficiency of which release in matter of form was admitted, and the same was then and there at the trial offered and tendered to the plaintiff and her counsel, and, after tendering the same as aforesaid, said release was offered in evidence. The presiding judge, on the plaintiff's objection, ruled that said release was inadmissible, and the defendant rested his case. The court then ruled that the plaintiff was entitled to a verdict for the whole note as a matter of law, and a verdict was rendered accordingly, and the defendant alleged exceptions.

*John V. Beal*, for defendant.

*Frank W. Lewis*, for plaintiff.

By THE COURT. The only question presented by this bill of exceptions is whether the superior court was right in rejecting the offer of the defendant to give to the plaintiff a release of his interest in the real estate conveyed by his wife to the plaintiff. This was not admissible under any of the issues of the case. The bill of exceptions does not show what the consideration of the note was. But if it was given to her because, at the time of the conveyance by his wife, the defendant refused to sign the deed, as the defendant claims, the plaintiff was not obliged to accept his offer unless she had agreed with the defendant's intestate to do so. No such agreement is set up in the answer, and, under the pleadings as they stand, the court rightly excluded the offer and the deed of release. Exceptions overruled.

v.7n.e.no.2—11

(102 N. Y. 512)

BANK FOR SAVINGS IN THE CITY OF NEW YORK *v.* GRACE, Mayor, etc.,  
of New York.

(Court of Appeals of New York. April 30, 1886.)

1. MUNICIPAL CORPORATIONS—NEW YORK CITY—CONST. N. Y. ART. 8, § 11—  
STOCK OF NEW YORK CITY HELD BY COMMISSIONERS OF SINKING FUND NOT  
A DEBT AGAINST THE CITY.

Plaintiffs ask that the defendants be enjoined from issuing bonds of the city of New York for the purpose of raising money for the dock department, on the ground that the funded indebtedness of the city is in excess of that allowed by law; but it appears that \$34,000,000 of this is held by the commissioners of the sinking fund for the redemption of New York city stock, making the balance of the indebtedness less than 10 per cent. of the value of real estate. *Held*, that the stock so held by the commissioners of the sinking fund was not a debt against the city within the meaning of the constitutional prohibition (Const. art. 8, § 11, as amended in 1884) forbidding a city of over 100,000 inhabitants from increasing its indebtedness to more than 10 per cent. of its taxable real estate.

2. SAME—PAYMENT OF CITY DEBT.

*Held, also*, that the amount required to pay the city debt, if it all came presently to maturity, was so much as is equal to its bonds or stock, not including that held by the sinking fund.

3. SAME—LAWS 1878, CH. 883, § 4.

Laws 1878, c. 883, § 4, relates to the funds and revenues of the city, and to the management of the sinking fund itself, and not to the effect of purchase upon the city stock bought by its moneys.

Appeal from a judgment of affirmance of the general term of the court of common pleas of the city of New York, of a judgment absolute, at special term, on demurrer to the complaint in favor of the plaintiffs, and from an order of the general term affirming an order of injunction restraining the defendants from issuing certain bonds of the city of New York, which were threatened to be issued in violation of the constitutional amendment of January 1, 1885, limiting the amount of the city debt.

*Chas. E. Miller*, for appellants, Wm. R. Grace, Mayor, etc.

*Simon Sterne*, for respondents, Bank for Savings in the City of New York.

DANFORTH, J. This action was commenced by certain individuals and moneyed corporations, citizens and tax-payers of the city of New York, and holders of bonds and stocks issued by it. They sue on behalf of themselves and all others similarly situated, and by their complaint show that the assessed valuation of real estate of the city, subject to taxation for the year 1884, was \$1,119,761,597, and for the year 1885, \$1,168,443,137, and that 10 per cent. of these valuations is respectively \$111,976,160 and \$116,844,314; that its funded indebtedness is already upwards of \$126,000,000, and therefore, as they allege, in excess of the indebtedness allowed by law, but it also appears by the complaint that upwards of \$34,000,000 of this indebtedness is held by "the commissioners of the sinking fund for the redemption of New York city stock," and that the balance of indebtedness is, at either estimate, at least \$19,000,000 less than 10 per centum of the valuation of real estate above referred to; that the defendants, other than the mayor, compose the com-

missioners of the sinking fund, and are about to issue bonds of the city to the amount of \$2,000,000, for the purpose of raising money for the dock department. The plaintiffs prayed that the defendants be enjoined from issuing these bonds, or doing anything to increase the debt or liability of said city. A preliminary injunction pursuant to that prayer was obtained. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The special term continued the injunction and overruled the demurrer. Its decision was affirmed by the general term, and the present appeals were then brought.

The question to be determined is whether or not the "stock or fund created by the corporation of the city of New York," and held by "the commissioners of the sinking fund," can be brought within the purview of that provision of the constitution on which alone the plaintiffs rely, and which declares that no city "of over one hundred thousand inhabitants, whose present indebtedness exceeds ten per centum of the assessed valuation of its real estate subject to taxation, shall be allowed to become indebted in any further amount until such indebtedness shall be reduced within such limits." Article 8, § 11, Const. N. Y., as amended November 4, 1884. We think it plain that the indebtedness here referred to is an indebtedness to be met in the future by taxation, for (1) before its possible limit can be defined, the value of the real estate subject thereto must be ascertained; (2) by the express words of the provision, water bonds issued for a fixed term are not to be included, but a sinking fund must be created "for their redemption;" (3) so the issue of certificates of indebtedness or revenue bonds in anticipation of and payable out of the taxes for the current year is permitted. The mischief to be prevented was the creation of an excessive debt for local improvements, or public works, or the loaning of municipal credit, so payable that the burden should not fall upon those who contracted the obligations, or on their revenues, but on posterity. The judgment appealed from stands upon the idea that the debt of the city of New York is already in excess of the measure allowed by the constitution, and it must prevail if the city stocks held by the commissioners of the sinking fund are so circumstanced that their satisfaction can directly or indirectly involve taxation; or, putting the proposition in another form, if the city stocks held by the commissioners are debts which the municipality can be called upon to pay. This depends upon the construction and effect of the statutes and ordinances relating to the sinking fund.

The first to which our attention is called, is a statute entitled "An act to regulate the finances of the city of New York," passed June 8, 1812, (chapter 99, § 9.) It authorized the city of New York to create a sinking fund to pay the principal, and pledged the credit of the state to provide for the interest, of a public debt. This was followed by an ordinance of the mayor, etc., of the city of New York, passed August 9, 1813, (page 105, quoted as from the manuscript ordinances of New York passed during the mayoralty of De Witt Clinton,) entitled "A law making provision for the redemption of the New York city stock." The pre-

amble, which in this case at least may be said to state the ground and cause of making it, and to be "a key to open the minds of the makers of the act," so that what was really intended by it may be seen, declares that whereas, it is highly useful to establish a fund out of which purchases of the New York city stock may, from time to time, be made whenever the same can be done at par, or the true value thereof, whereby the said stock will be prevented from depreciating, and the redemption of the same will be regularly progressing, then enacts that all moneys derived from certain specified sources, "and all such other sources of revenue or sums of money as the said corporation shall hereafter think proper to appropriate to that purpose, shall and hereby are firmly and inviolably pledged, appropriated, and applied to and constitute and form the fund for the purpose aforesaid, until the final redemption of the whole of the said stock."

Whether we give these words their ordinary and common meaning, or define the completed act according to its legal signification, it is difficult to find that those who used them had any other object in view than the extinction of the stock, to the purchase of which the funds were to be applied. The fund was established by the party who created or made the stock. The utility anticipated by that party was—*First*, redemption so far as the money in hand would go; and, *second*, the maintenance of the market value of the unredeemed stock. Repurchase of notes or other evidences of debt, by the issuer from the holder, is redemption, and is equivalent to and has the force of payment. Here the whole fund is to be so applied until final redemption of the whole stock; which, in this connection, means until the maturity of the stock, when by its terms it is no longer an executory obligation. We find nothing in the other provisions of the statute to conflict with this view. The purchases were to be made under the direction of the mayor, recorder, comptroller, and treasurer of the city, and the chairman of the finance committee, for the time being, who are denominated as the "commissioners of the sinking fund for the redemption of the New York city stock." They were authorized to invest all the moneys of the fund in the purchase of the city stock, or, if that could not be had, then, as they may see fit, in the stock of the United States, or in bank stock; but these last were to be sold, "and the proceeds invested in city stock," when, in the opinion of the commissioners, it could be done without injury. In the mean time the moneys constituting the fund were to be deposited in the treasury to their credit, "kept separate and distinct from other moneys of the corporation," and to be drawn on their warrant when required "for such purchase and investments." These stocks, of whatever kind, when purchased, were to be transferred to the treasurer of the city "in trust for the sinking fund for the redemption of the city stock," to be held by him until its final redemption, and the interest of the stock so purchased is, "at each quarterly payment thereof, and the interest and dividends on the other stocks, to be carried to the credit of the sinking fund," and thereafter to form part of it.

In 1817 (Ordinances, p. 69) a similar ordinance was enacted, with



some change in the detail, but none in the preamble, or the expression of its general purpose. It did not allow the purchase of bank stock; the treasurer was no longer to act as trustee; but the city stock bought by the commissioners "was to be held by them until the final redemption of the city stocks." In 1821 (Ordinances, c. 32) the commissioners were allowed to invest in state stocks, or stock of the United States, but preference was at all times to be given by them to the purchase of New York city stock if it could be obtained at a reasonable rate. Although ordinances under the same title were enacted in 1823 (chapter 31) and in 1827, (chapter 31,) no material change was made. In 1834 (chapters 10, 9) the clauses of former ordinances were rearranged, and it was declared that the powers conferred on the commissioners should be so construed as to render it imperative on them at all times to give preference to the purchase of the city stock if it could be procured at a reasonable rate, and they were permitted, in their discretion, to sell such stock of the United States, or of this state, as they held, and purchase any of the city stock at such prices as they might judge best for the public interest. In 1839 the law was re-enacted, and a clause added by which the term "city stock," therein used, was declared to mean any stock or fund created by the corporation of the city of New York. Section 11, tit. 1, c. 17, Corporation Ordinances. Up to and including this ordinance it was made the duty of the commissioners to hold the city stock purchased by them until its final redemption. In 1844 (Corporation Ordinances, p. 211) these provisions, and some additional features, were included in a new ordinance then passed, section 4 of which (tit. 4) declares that the commissioners "shall from time to time invest the moneys which shall constitute the sinking fund for the redemption of the city debt, or as much as they can, in the purchase of stocks created by the corporation of the city of New York, at the market price, not exceeding the par value thereof; and if, at any time, such investments cannot be made at par, then the said commissioners shall be authorized to invest the said moneys, or such part thereof as they may see fit, either in the purchase of the said stock, or the stock of the state of New York, or the stock of the United States, notwithstanding such stocks may be above the par value thereof." Section 5 makes it imperative to give preference to city stock if it can be procured at a reasonable rate. Section 6 permits them to sell the United States or state stock, and invest the proceeds in city stock, and section 7 provides that if they "shall have invested any part of the said fund in the purchase of city stock, and shall at any time thereafter be enabled to purchase any of the city stock which shall be by its terms redeemable at an earlier day, they may forthwith sell the same, and invest the net proceeds in such other city stock, if, in their opinion, such exchange shall be desirable and beneficial to the public interest;" and it also declares (section 10, Id.) that "the city stock which shall be purchased by the commissioners shall not be canceled by them until the final redemption of the said stock; and all interest accruing thereon shall regularly be carried to the said sinking fund for the redemption of the city debt."

We are referred to no ordinance of later date which in any material particular changes the scheme which the ordinance of 1844 re-enacts or establishes; but, before considering the effect of these provisions, it is important to look at subsequent statutes which bear upon this matter. In 1845 (Laws 1845, c. 225) it was declared that the ordinance last referred to, that of 1844, should not be amended without the consent of the legislature, except by appropriating to and for the purpose of the sinking fund, additional revenue, and that it should "remain in full force until the whole of the debt created for the introduction of the Croton water into the city of New York should be fully redeemed." The provision of section 7, *supra*, of that ordinance, taken in connection with section 10, *supra*, is cited by the respondent as having a material bearing upon the question before us. It is said, however, for the appellant that, so far as the ordinance (section 7) confers power upon the commissioners to sell stock after its purchase by them, it was repealed by the Laws of 1873, section 102, c. 335, which declares:

"It shall be lawful for the commissioners of the sinking fund of the city of New York, in their discretion, and they are hereby empowered in such discretion, to cancel any portion of the indebtedness of the said city held by them, which is by law redeemable from the sinking fund, and to sell any stocks and bonds which they may hold that are not payable from said fund, and, with the proceeds of such sale of stocks and bonds, to buy any other stocks and bonds which are payable from said fund."

We shall refer again to the clause permitting cancellation, but upon the proposition just referred to it is not material, for no act of that kind has been attempted. Nor can we give to the other branch of the sentence the effect claimed for it by the learned counsel for the appellant. The act of 1873 (*supra*, § 119) expressly declares that the ordinances of the common council of the city of New York then in force should so continue. The ordinance of 1844 was one of them. It was, as we have seen, rendered inviolable by the act of 1845, *supra*, and we can discover no intention in the act of 1873 to derogate in any way from the power conferred by the ordinance. The contention of the learned counsel is that all city bonds and stock are payable from the sinking fund; and, as the statutes permit the sale of such only as are not payable from the sinking fund, the permission to sell given by the ordinances is repealed. It might be conceded that if the assumption of fact and its application be as claimed, the authority given by the ordinance, and the authority given by the statute, cannot co-exist; the ordinance permitting the sale of any city stock when that redeemable at an earlier date can be purchased, while the statute takes no notice of this distinction, but permits only such stocks or bonds as are not payable from the fund, to be sold. We cannot learn from the complaint that there are no city stocks or bonds other than those payable from the sinking fund. A repeal by implication can only be presumed in a clear case, and upon the statement in the complaint we cannot say that effect could not be given to the ordinance and also to the statute. It seems apparent, then, that the stock of the city, when issued, represents an indebtedness of the city.

While held by the commissioners, it is the basis of increase by interest computed thereon, which must be regularly carried to the sinking fund, and the stock may again be put upon the market, where it becomes a valid obligation, even if it had for a time ceased to be a debt of the city. From the time of its inception, then, to its final redemption, it is the subject of sale, at all times the basis of interest, and, in the hands of all owners, save the commissioners, a part of the apparent indebtedness of the city. When, then, is it to be deemed paid? Although, as I have already suggested, the necessary consequence of purchase was extinguishment of the debt, we find, in 1844, a prohibition against cancellation of the evidence of it, accompanied by permission, for a certain purpose, to put it again in circulation.

The statute last cited, however, (that of 1873,) becomes very important, not only in removing the prohibition against cancellation, but as disclosing the legislative understanding as to the true condition and character of the stock while in the hands of the commissioners. By that act it was made lawful for them, without the application of any fund, or the interposition of the city treasurer, or other financial agent of the city, without new consideration in form or substance, but in their mere discretion, to cancel, that is, to wipe out, any portion of the indebtedness of the city held by them, which is by law redeemable from the sinking fund; and that, in view of the provisions of the ordinance of 1844, *supra*, includes all of it. Clearly, the legislature looked upon the stock so held by the commissioners as already redeemed or paid, and while it is difficult to see why its cancellation should have at any time been prohibited, it is made apparent by this statute that the purpose was one of form only, and not of substance. Its actual cancellation deprived it of no efficacy, for by redemption it was already, for all practical purposes, extinguished.

But, notwithstanding all this, we cannot overlook the fact that in the ordinance of 1844, § 7, is still in force, the commissioners may, in the exercise of a like discretion, sell the city stock at any time held by them. This is permitted, however, for a single purpose: to buy with the proceeds of such sale other city stock redeemable at an earlier day; and the character of the transaction is indicated by the terms on which alone it may take place, viz., if, in the opinion of the commissioners, "such exchange shall be desirable and beneficial to the public interest." This word "exchange" declares the nature of an act, the result of which does not enlarge the body or amount of indebtedness for which taxation is possible. Stock of the state or of the United States may be sold. City stock may be "exchanged" by the commissioners, and the annual report of their proceedings must specify the disbursements, purchases, "exchanges," and sales made by them. Section 15 of same ordinance.

The view already expressed as to the effect of purchase, and the meaning of the word "redemption," as used in the sinking-fund ordinance, finds confirmation in the statute of 1878, (chapter 383,) which provides that "the fund known as 'the sinking fund of the city of New York for the redemption of the city debt' shall be continued, and any excess

there may be in said fund, after providing for the payment of the bonds and stocks of said city, payable therefrom, as provided by law, shall form a fund for the payment of other bonds and stocks of said city and county as by this statute provided;" and declares that the moneys and revenues of the city constituting the sinking fund shall continue to be appropriated to the fund until all of said bonds and stocks of the city shall be fully and finally redeemed. Indeed, in all the statutes and ordinances relating to the sinking fund we find the words "purchase," "redemption," and "payment" used interchangeably, evidently referring to an act which in ordinary transactions, when performed by the debtor, or the agent of the debtor, operates to discharge or extinguish a debt or obligation.

The argument of the respondent has been instructive. Its object is to show that the city stocks purchased by the commissioners is held by them as an investment, to be applied ultimately, indeed, in payment of the city debt, but not immediately, or by the act of purchase; that by it provision merely is made for payment of the city debt; and that until the period of final payment arrives the stock remains a debt of the city in all respects as it was before. If that be so, the sinking fund would seem to have been established for no purpose; that, although many millions of money belonging to the city have been paid out of it in order that, according to the law of its creation, "the redemption of the New York city stocks may be regularly progressing," no progress has been made. The entire debt exists, but as to part a change of creditors only. But the object of every sinking fund is to diminish the debt whose existence warranted its foundation, and this general principle lies at the foundation of the scheme provided for the city of New York. The construction we give to it cannot lead to a diversion of the fund, but to the accomplishment of its object. It satisfies also the intent of the constitutional prohibition. That is aimed at an actual, not a theoretical, indebtedness; at a substantial liability which can be discharged only by the enforcement of a tax or an assessment which, when levied, will be a charge upon the tax-payer, and a burden for him to remove; not a formal obligation which may remain as evidence of a once existing debt, but which can in no way be regarded as a present debt to be enforced, and which, if not before canceled in the discretion of the commissioners, becomes waste paper by the mere efflux of time.

We hold that the stock purchased is not a debt against the city, within the meaning of the constitutional prohibition. Nevertheless, payment of interest upon it may be compelled, because for that purpose the ordinance expressly enacts that all interest accruing upon the purchased stock shall regularly be carried to the sinking fund for the redemption of the city debt. It is by force of the ordinance that interest is to be credited, not by reason of the contract, or the terms upon which the stock was issued. Nor could that interest or other money be applied in payment of the stock held by the commissioners. That was paid by the purchase; yet, if the argument of the respondent should prevail, it must be paid again before its extinguishment.

The question, then, really comes to this: what amount would be required to pay off the city debt if it all came presently to maturity. Only one answer seems possible: \$92,000,000, or so much as is equal to its bonds or stock, not including that held by the sinking fund. The theory of the respondent is that the commissioners would even then be required to exact payment from the city. We find no foundation or reason for the argument. A debt once paid has no existence, and it is impossible that taxation should be resorted to in order to meet a fanciful objection, or one which, by redemption, is in the hands of the debtor. Such may be the apparent, it is not the real, debt. The result reached by us in no respect impairs the validity or diminishes the usefulness of the sinking fund. It will still serve the purposes for which it was created, in securing the redemption of the city stocks and the upholding of its credit.

We have not overlooked the provisions of the act of 1878, upon which much reliance is placed by the learned counsel for the respondent; especially section 4, which enacts that, "between the city and its creditors, holders of its bonds and stocks as aforesaid, there shall be, and there is hereby declared to be, a contract that the funds and revenues of the city, and the funds to be collected from assessments as aforesaid, by this statute pledged to the sinking fund for the redemption of the city debt, shall be accumulated and applied only to the purposes of said sinking fund, until all of said debt is fully redeemed and paid, as herein provided." It relates to the funds and revenues of the city, and to the management of the sinking fund itself, and not to the effect of purchase upon the city stock bought by its moneys. That stock can in no sense be regarded as security. Its extinguishment increases the value of the stock, or city debt held by its creditors.

We are unable to agree with the learned court below upon the only question presented by this appeal. Its judgment should therefore be reversed. It follows that the injunction order should also be reversed; and, as the point upon which the demurrer turns cannot be obviated by an amended pleading, the complaint should be dismissed, with costs, and, in this court, with costs of one appeal.

(All concur.)

(102 N. Y. 395)

FOWLER v. CALLAN.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. CHAMPERTY AND MAINTENANCE—3 REV. ST. 449, § 59—CODE, §§ 73, 74.

Defendant was a devisee, under a will, of certain real estate, and the validity of the will was threatened in proceeding instituted in the surrogate's court. He sought and retained plaintiff as attorney, and gave him a deed of the undivided half part of the property, taking back his covenant to conduct the defense, paying all costs and expenses, and indemnifying defendant against liability. *Held*, that this did not constitute champerty, and the statute did not condemn such an agreement.

2. SAME—RULE IN NEW YORK.

The old rules regarding champerty are abrogated except as preserved by the statutes. The attorney may agree upon his compensation, and it may be contingent upon his success, payable out of the proceeds of the litigation.

<sup>1</sup> Reversing 4 Civ. Proc. R. 413.

**8. SAME—WHEAT CONSTITUTES.**

The New York Code contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney, and by which the latter, by officious interference, procures the suit to be brought, and obtained a retainer in it.<sup>1</sup>

Appeal from general term New York common pleas.

*Scott Lord*, for appellant, N. Hill Fowler.

*J. A. Kamping*, for respondent, Charles T. Callan.

FINCH, J. It does not affect the validity of the contract between the attorney and his client that, measured by the old rules relating to champerty and maintenance, it would have fallen under their condemnation; for neither doctrine now prevails except so far as preserved by our statutes. *Sedgwick v. Stanton*, 14 N. Y. 289. The attorney may agree upon his compensation; and it may be contingent upon his success, and payable out of the proceeds of the litigation. Such contracts are of common occurrence, and, while their propriety has been vehemently debated, they are not illegal, and, when fairly made, are steadily enforced. In substance, that was the contract here made, and there would be no question about it had it not contained a provision by the terms of which the attorney not only agreed to rely upon success for his compensation, but also to assume all costs and expenses of the litigation, and indemnify his client against them. It is this feature of the contract which raises the question necessary to be determined.

The facts of the case are not very fully developed, but appear to be that the defendant, as devisee under a will, was entitled to certain real estate; his right dependent upon the validity of the will, and in some manner threatened by proceedings before the surrogate, which put his interest in peril, and made a defense essential to its protection. In this emergency he sought the aid and professional service of the plaintiff, and retained him as attorney. The latter neither sought the retainer, nor did anything to induce it. So far as appears, it was not occasioned by any offer or solicitation of his, but originated in the free and unbribed choice of the client. The evidence does not show whether the latter had gained possession of the land devised, or was out of possession, but he gave to the attorney a deed of the one undivided half part of the property, taking back his covenant to conduct the defense to its close, paying all costs and expenses of the litigation, and indemnifying the devisee against all such liability.

The agreement appears to have been purely one for compensation. If the client had given to the attorney money instead of land, the contract would have differed in no respect except the contingent character of the compensation. The arrangement contemplated success in the litigation, in which event the land would pay the costs and expenses and the attorney's reward, and both would be discharged out of the property of the client placed in the hands of the attorney for that precise purpose. The

<sup>1</sup>See note at end of case.

contract in no respect induced the litigation. That was already begun, and existed independently of the agreement, and originated in other causes. It did not tend to prolong the litigation. It made it to the interest of the attorney to close it as briefly and promptly as possible, and at as little cost and expense as prudence would permit. The plaintiff, therefore, stirred up no strife, induced no litigation, but merely agreed to take for his compensation so much of the value of the land conveyed to him as might remain after, out of that value, the costs and expenses had been paid.

We do not think the statute condemns such an agreement. 3 Rev. St. (6th Ed.) p. 449, §§ 59, 60; Code, §§ 73, 74. The Code revision changed somewhat the language of the prohibition, but nevertheless must be deemed a substantial re-enactment of the earlier sections. *Browning v. Marvin*, 100 N. Y. 148; S. C. 2 N. E. Rep. 635. They forbid—*First*, the purchase of obligations named by an attorney for the purpose and with the intent of bringing a suit thereon; and, *second*, any loan or advance, or agreement to loan or advance, “as an inducement to the placing, or in consideration of having placed, in the hands of such attorney” any demand for collection. The statute presupposes the existence of some right of action, valueless unless prosecuted to judgment, which the owner might or might not prosecute on his own behalf, but which he is induced to place in the hands of a particular attorney by reason of his agreement to loan or advance money to the client. It contemplates a case in which the action might never have been brought but for the inducement of a loan or advance offered by the attorney; and in which the latter, by officious interference, procures the suit to be brought, and obtains a retainer in it. The statute speaks of a “demand” which, by enforcement, will end in a “collection;” phrases which have no aptness to the situation of one simply defending a good title to land against the efforts of others seeking to destroy the devise under which he claims. The plaintiff made no “loan or advance,” in any proper sense of those words. They imply a liability on the part of the client to repay what was thus lent or advanced. The attorney loaned nothing, and he advanced nothing to the client which the latter was bound to reimburse. Simply, he was paid in advance an agreed price, taken in land instead of money, and out of which he was first to pay costs and expenses.

The facts before us are not within the terms of the statutes, as it respects a “demand” which is the subject of “collection;” but our conclusion rests more strongly upon the conviction that the agreement made was one for compensation merely, and had in it no vicious element of inducing litigation or holding out bribes for a retainer.

The judgment should be reversed, and a new trial granted; costs to abide the event.

(All concur.)

#### NOTE.

Champerty is an aggravated species of maintenance. *McIntyre v. Thompson*, 10 Fed. Rep. 532.

A mere agreement for a contingent fee is not champertous. To constitute champerty there must be an agreement on the part of the champertor to carry on the party's suit

at his own expense, as well as for a share of the thing or money to be received. *Jewel v. Neidy*, (Iowa,) 16 N. W. Rep. 141.

Agreement to prosecute a claim for a stipulated amount of the proceeds, with full power to compromise as shall be thought best, is not a champertous agreement. *Jeffries v. Mutual Life Ins. Co. of N. Y.*, 4 Sup. Ct. Rep. 8.

In *Vimont v. Chicago & N. W. Ry. Co.*, (Iowa,) 21 N. W. Rep. 9, J., who was injured by the negligence of defendant railroad company, assigned his claim for damages to V., and V. executed the following agreement: "In consideration of the assignment to me by J. of his claim for damages against the Chicago & Northwestern Railway Company, resulting to him by reason of an injury received by him on or about the thirty-first day of August, 1881, on said railway, I hereby agree to dispose of the entire amount realized on said claim as follows: For my own compensation in and about the prosecution of said claim, and for the use of any advances of money I may make, I am to retain thereof the sum of fifty dollars: I am also to retain all sums of money that I may advance in the prosecution of said claim; next, I agree to pay out of the proceeds of said recovery the reasonable fee of the attorneys and agents employed to prosecute said claim, or such fee therefor as may be agreed upon, if any agreement for a specific amount shall be agreed upon, and the balance of said recovery I agree to pay to the said J." It was held that the cause of action was assignable; that the assignment and agreement did not constitute barratry, champerty, or maintenance; and that V. was entitled to maintain an action for damages against the railway company in his own name.

A contract between an attorney and his client that the attorney shall prosecute a claim at his own cost, for a share of the recovery, is champertous and illegal. *Martin v. Clarke*, 8 R. I. 389.

Where an attorney was employed to bring an action, the client agreeing to give or allow and pay him the first \$50 collected by him therein, held not champertous. *Scott v. Harmon*, 109 Mass. 237.

An agreement by which a defendant in attachment assigns to his attorney the property attached, in consideration of his services in the suit, and in prosecuting a contemplated action of damages on account of the attachment, stipulating for his own diligence in the attachment suit, and giving the attorney the entire management and control, is not void for champerty or maintenance. *Ware's Adm'r v. Russell*, 70 Ala. 174.

In *Stanton v. Haskin*, 1 McArthur, 558, R. & S., attorneys at law, agreed to conduct a suit in chancery for the recovery of lands claimed by H. and wife, who agreed to give them one-third of whatever land or money might be received. A decree was obtained in favor of H. and wife for the lands, and also for the rents and profits. In a suit to enforce the agreement for an undivided third of the land so recovered, the court held that the contract was champertous and therefore void.

For a full discussion of the general subject of champerty, see *Courtright v. Burnes*, 13 Fed. Rep. 317, and note by Judge SEYMOUR D. THOMSON, 323-330.

(102 N. Y. 343)

### *In re Application of THIRTY-FOURTH ST. RY. CO., etc.*<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. STREET RAILROAD—APPOINTMENT OF COMMISSIONERS TO DECIDE AS TO NECESSITY OF, NOT DISCRETIONARY—CONST. N. Y. ART 3, § 18.

The language of the constitution, that the court, upon application, *may* appoint commissioners to decide as to whether a street railroad shall be built, where the property owners will not consent, does not confer upon the court a discretion to appoint or not as it shall deem just or discreet. It confers authority to appoint when a case is presented contemplated by the constitution.

2. SAME—DISCRETION OF COURT.

The court has not the discretion to grant or deny the application upon the question of the utility or necessity of the proposed road. The determination as to whether the proposed road ought to be constructed shall, in the first instance, be decided by commissioners.

3. SAME—LAWS 1884, CH. 252, § 14—CONSENT OF ROAD OCCUPYING STREET.

Chapter 252, § 14, of the Laws of 1884, is not unconstitutional on the ground that it constitutes a delegation of legislative power in requiring the consent of roads already occupying the street, before a street railroad can be built upon such street.

<sup>1</sup> Reversing 37 Hun, 442.



**4 SAME—GROUND FOR REJECTING APPLICATION.**

That such existing road had refused to consent to the construction and operation of the road of petitioners is not a ground for rejecting the application for the appointment of commissioners.

Appeal from general term supreme court, First department, denying motion for the application of commissioners to determine whether the road should be constructed.

*Joseph L. Auerbach*, for appellant.

*Horace Russell*, for respondent.

ANDREWS, J. The order of the general term, from which this appeal is taken, denied the application of the Thirty-fourth Street Railroad Company, a corporation organized under the street surface railway act, passed May 6, 1884, for the appointment of commissioners to determine whether the proposed road of the petitioner ought to be constructed. The petition upon which the application was made, avers the incorporation of the petitioner under the act of 1884; that its route extends from the ferry on Hudson river, at Forty-fourth street, in the city of New York, to Tenth avenue, and thence to Thirty-fourth street, and through Thirty-fourth street from the Hudson river to the East river; that it had obtained the consent of the mayor, aldermen, and commonalty of the city of New York to the construction and operation of its road, but had been unable, after diligent effort, to obtain the requisite consent of the owners of property bounded on that portion of the streets upon which the proposed road was to be constructed; that due notice of the application had been given, pursuant to the fifth section of the act; and concludes with a prayer for the appointment of commissioners under its provisions. The granting of the application was resisted by the owners of abutting property on Thirty-fourth street, on two grounds: *First*, that the route of the proposed road of the petitioner is coincident, in part, with the routes of existing surface street railroads in actual operation, constructed prior to the passage of the act of 1884, whose consent to the construction of the petitioner's road had not been obtained, but had been refused; and, *second*, that the proposed road would greatly damage property abutting on the streets through which it was to be constructed, and that neither public necessity nor convenience required the construction of a street railroad on the route of the petitioner.

On the hearing of the application the petitioner proved the substantial averments of the petition; and on the part of the contestants it was shown that the part of the petitioner's route on Forty-fourth street and Tenth avenue, comprising about three-fifths of its whole line, was coincident with the route of other street railroad corporations who had constructed and were operating roads thereon under their several franchises, and that these corporations had refused to consent to the construction of the road of the petitioner. The contestants also gave evidence tending to show that the proposed road would seriously impair the value of private property on Thirty-fourth street, and that no public interest required its construction.

The majority of the judges of the general term concurred in opinion that the authority vested in the court by the act of 1884, to appoint commissioners to determine whether a proposed surface street railroad ought to be constructed and operated, in case the requisite consents of property owners could not be obtained, was discretionary, and not imperative, and that, as it had been made to appear that the consent of the other railroad companies operating coincident routes could not be obtained, and as, under the act, the obtaining of such consent was a condition precedent to the right of the petitioner to proceed with the construction of its road, the application should be denied, in accordance with the maxim, *lex neminem cogit ad vana*. One of the two judges who concurred in the decision was of opinion that the application should be denied upon the further ground that it appeared by the affidavits on the part of the contestants that the property abutting on Thirty-fourth street, on the line of the proposed road, would be greatly depreciated in value by its construction and operation.

We cannot review an order resting in the discretion of the court below, and the point to be determined is whether, upon the case presented, the petitioner was, as matter of law, entitled to an order appointing commissioners pursuant to the application. The determination of this question involves a consideration, to some extent, of the legislative scheme embraced in the act of 1884. The legislature, in dealing with the subject of street railways, was under certain restrictions imposed by article 3, § 18, of the constitution. It is sufficiently exact for our present purpose to state that, under the constitutional provision, authority to construct and operate street railroads must be conferred by general laws, and then only on condition of obtaining the consent of the local authorities, and also of the owners of one-half in value of the property bounded on that portion of the street or highway upon which the proposed road is to be constructed, or, in case the consent of property owners cannot be obtained, the section declares that "the general term of the supreme court in the district in which it [the railroad] is proposed to be constructed, may, upon application, appoint three commissioners, who shall determine whether such railroad ought to be constructed or operated; and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners." The act of 1884 is a general law for the construction of surface street railways, and embodies the constitutional conditions of consent by the local authorities and of the property owners, with the proviso, also authorized by the constitution, for a determination by commissioners to stand in lieu of the consent of property owners, in case such consent cannot be obtained. In addition to the constitutional conditions the act annexes a third condition not enjoined therein, viz.: that no surface street railroad company shall construct, extend, or operate its road or tracks in that portion of any street, avenue, road, or highway in which a street railroad is or shall be lawfully constructed, except with the consent of the company owning and maintaining the same, with a qualification not material to the present inquiry. Section 14. The fourth and fifth sections of the act are framed to give

effect to the last clause of article 3, § 18, of the constitution, relating to the appointment of commissioners. The fourth section authorizes the company, in case the consent of property owners required by the act cannot be obtained, to apply to the general term of the supreme court for the appointment of three commissioners to determine, after a hearing of all parties interested, whether such railroad ought to be constructed and operated. The fifth section directs that notice of the application shall be given and served upon the non-consenting property owners, and that the general term, to which the application shall be made, upon due proof of the service of the notice, "shall appoint" three disinterested persons to act as commissioners. The sixth section declares that the commissioners shall determine, after a public hearing of all the parties in interest, whether the proposed railroad ought to be constructed and operated, and shall make a report thereon, with the evidence, to the general term, and that the determination of the commissioners that the road ought to be constructed and operated, confirmed by the said court, "shall be taken in lieu of the consent of the property owners."

The right of the Thirty-fourth Street Railroad Company, under the act of 1884, to construct and operate roads, was subject, therefore, to three precedent conditions: the consent of the local authorities; the consent of property owners, or, in lieu thereof, the determination of commissioners in its favor; and the consent of the companies having coincident routes. It is clear that all these conditions must be performed before any right to proceed with the construction of the road, or any part thereof, can be exercised. This proposition, however, assumes that the condition requiring the consent of railroad companies having coincident routes was lawful. This point was considered by the general term, and the power of the legislature to annex this condition was affirmed, and we concur in the conclusion of the court below upon this branch of the case.

The opposite view is urged upon two grounds: *First*, that the constitution has prescribed the conditions upon which street railroads may be constructed, and by implication excludes the imposition by the legislature of conditions other than those prescribed therein; and, *second*, that a condition requiring the consent of existing railroad companies to the construction or operation of another road is a grant of legislative power to the company whose consent is required, and is therefore void. The first contention proceeds upon a misconception of the object of the constitutional provision, and of the rules governing the interpretation of constitutional restraints upon legislative power. The plain purpose of the constitution in requiring the consent of the local authorities and of property owners to the construction of a street railroad was the protection of public and private interests against hostile and injurious legislation, and to prevent the appropriation of highways to railroad uses by legislative grant, without consulting the interests of the locality. The consent of the local authorities and of property owners was therefore made necessary; but, to meet the contingency of an unreasonable opposition on the part of property owners, a tribunal was authorized to be created to de-

termine whether the public interests required the construction of the proposed road, whose determination in its favor, when confirmed by the court, was to stand as a substitute for such consent. But the constitution, neither by express language nor by implication, abridges the legislative power over the subject outside of the matters particularly enumerated. It needs no citation of authorities to sustain the postulate that, except as restrained by the constitution, the legislative power is untrammelled and supreme, and that a constitutional provision which withdraws from the cognizance of the legislature a particular subject, or which qualifies or regulates the exercise of legislative power in respect to a particular incident of that subject, leaves all other matters and incidents under its control. Nothing is subtracted from the sum of legislative power, except that which is expressly or by necessary implication withdrawn. The legislature is prohibited from granting a franchise to construct a street railroad, except upon certain specified conditions. But it is not prohibited from annexing further conditions not inconsistent therewith; and whether other conditions are necessary or proper is a matter resting in the wisdom and discretion of the legislature.

The claim that the provision in the act of 1884 requiring a company organized thereunder, whose route is coincident with that of another road, to obtain the consent of the latter to the construction of the new road, before it can proceed to construct or operate the same, constitutes a delegation of legislative power, is not, we think, well founded. The act of 1884 was complete and operative from the moment of its passage. The franchise acquired by a company organized under its provisions is perfect; according to the nature of the franchise intended to be given, from the moment the corporation comes into existence. The legislative grant was conditional, and not absolute. The consent of another company, in a case where such consent is required, confers no franchise upon the company by whom it is obtained. The consent simply meets one of the conditions prescribed by the statute upon which the right of the company to construct and operate its road depends. If consent is refused, the law is not defeated, but remains perfect and complete as before. The company, upon consent being refused, is not deprived of its franchise. A failure to obtain such consent simply puts in abeyance its right to proceed with the construction of the proposed road until the obstruction is removed; and this precise situation was within the contemplation of the legislature when the act was passed. The legislature imposed the condition, in its discretion, for the protection of existing companies. It may hereafter, in its discretion, remove the restriction and abrogate the condition. But its right to impose it is unquestionable. Whether the legislature, in creating this condition, proceeded upon public reasons, or had in view the protection of private interests only, does not affect the question of legislative power. The legislature, by the act of 1884, in substance determined that it was inexpedient to permit a competing street railroad to be constructed on the line of another road, unless the existing road should consent. This was a contingency subject to which the petitioner acquired its franchise. The existing com-

pany, whether it consents or refuses to consent, neither creates the franchise, nor defeats it; and whether it consents or not there enters into its decision no element of legislative power.

In the legislation considered in *Barto v. Himrod*, 4 Seld. 483, the vice consisted in the legislature remitting to the decision of the people, at a popular election, the question whether a certain enactment should have the force of law. The legislature in that case abdicated its function as the law-making power, and in substance proposed a law for enactment or rejection by the people. The law now in question contains no such element, and there are numerous precedents of analogous legislation to be found in our statute. See *In re New York Elevated R. Co.*, 70 N. Y. 348; *In re Gilbert Elevated R. Co.*, Id. 374; *Bank of Rome v. Village of Rome*, 18 N. Y. 38; *City of Philadelphia v. Street R. Co.*, 4 Brewst. 14; *State v. Monmouth Plank Road Co.*, 26 N. J. Law, 99.

The grounds upon which the decision at general term mainly proceeded in denying the application—viz., that the appointment of commissioners would be futile by reason of the non-consent of the other roads occupying coincident lines, and that the construction of the petitioner's road would occasion great injury to private property—remain to be considered. We think it cannot be justly claimed that, under the constitution, the court, on the application for the appointment of commissioners, is vested with any discretion to grant or deny the motion upon a consideration of the question of the utility or necessity of the proposed road. The act of 1884 is to be construed in the light of the scheme of the constitution, with reference to which the act was passed. The constitution declares the general principle that street railroads shall not be constructed without the consent of property owners interested. But it recognizes that there may be a conflict between public and private interests, and that the public convenience may require the construction of a street railroad in a case where the consent of the property owners cannot be obtained. To meet this contingency it creates a tribunal to determine this question, consisting of commissioners to be appointed by the court. The language of the constitution, that the court, upon application, may appoint commissioners, does not confer upon the court a discretion to appoint or not as it shall deem just or discreet. It confers authority to appoint when a case is presented contemplated by the constitution. When either by the constitution, or by statute, jurisdiction is conferred upon a court, the court cannot entertain or decline jurisdiction in its discretion. It is bound to exercise it when the case arises, and its exercise is invoked by a party interested and having the right to make the application. See *Macdougall v. Paterson*, 11 C. B. 772; *The Queen v. Tithes Com'rs*, 14 Q. B. 459. The constitutional scheme contemplates that the determination whether a proposed railroad ought to be constructed, in case the consent of property owners cannot be obtained, shall in the first instance be decided by commissioners. We concur, on this point, with the view of the learned judge who dissented in this case, that the constitution confers upon the court primarily a mere naked power of appointment, and that it gives no power to the

court to hear, try, or determine, in the first instance, the question that is to be sent to the commissioners. The power of the court to pass upon the merits of the application arises only after the commissioners have made their report and returned the evidence taken by them; and this power, though not expressly given, is implied from the provision that the determination of the commissioners, "confirmed by the court," may be taken in lieu of the consent of the property owners. While, on the one hand, the decision by the court, in the first instance, that the proposed road ought to be constructed, would not satisfy the constitutional provision, and justify the construction of the road, on the other, a contrary determination cannot deprive the applicant of the right to have the question determined in the first instance by the tribunal designated in the constitution.

We find nothing in the act of 1884 in conflict with the plain sense of the constitution. It is supposed that the provision in fifth section, requiring notice to be given of the application to non-consenting property owners, implies a right on their part to be heard on the question of the propriety or necessity of the proposed road, and to have the question decided at that stage of the proceedings. It is not necessary to attribute this purpose to the legislature in requiring notice to property owners. The requirement of notice enables property owners to appear on the hearing, and oppose the application on the ground that the petitioner is not in a situation to make it, and also to be heard in respect to the selection of commissioners. It cannot be assumed that the legislature intended, by the provision for notice, to confer upon the court a power inconsistent with the scheme of the constitution.

The ground that the appointment of commissioners would be futile by reason of the fact that other companies had refused their consent to the construction and operation of the road of the petitioner is not, we think, a sufficient answer to the application. Inability to obtain the consent of property owners is, under the statute, the only prerequisite to the application for the appointment of commissioners. The consent of other railroad companies having coincident routes is another but independent condition, for which the statute provides no alternative or substitute. Nor does it prescribe the order in which the several consents shall be obtained. It may be granted that if it had been made to appear that an insurmountable difficulty stood in the way of the construction and operation of the road of the petitioner, and not a mere present obstacle to the exercise of the franchise, the court would not have been bound to grant the application. But the fact that the other companies had, prior to the application, refused the consent, does not show that the appointment of commissioners would be a vain and useless proceeding. The decision of the competing roads was in its nature revocable. The question on their part was one of prudence and policy, and it is quite conceivable that circumstances might subsequently arise which would lead to a reversal of the prior decision, and to the giving of a consent which had been previously withheld. The determination of commissioners that the proposed road ought to be constructed, if sanctioned

by the court, might itself operate as a reason for changing the prior decision. The petitioning company could not safely enter into engagements with other companies for the acquisition of the right to construct its road on the street occupied by their tracks, so long as it remained uncertain whether it could obtain a favorable determination of commissioners as a substitute for the consent of property owners.

We are of opinion that the court erred in refusing to appoint commissioners, and that the order appealed from should therefore be reversed, and the case remitted to the general term for further proceedings.

(All concur.)

(102 N. Y. 362)

MERRITT v. FITZGIBBONS and others.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

**NEGLIGENCE—CART OBSTRUCTING SIDEWALK.**

By an ordinance of New York city it was lawful, where the rails of a street railroad are so near the sidewalk as to prevent a cart or other vehicle from passing, for the owner or occupant of a store to have such cart drive on part of the sidewalk. Plaintiff stepped on a coal-hole cover in the sidewalk in front of defendant's store; and, slipping under a horse belonging to defendant, was injured. *Held* that, as the truck and horse were necessarily on the walk, and sufficient space was retained for the passage of pedestrians between the cart and the store, and the validity of the ordinance was unquestioned by plaintiff, a refusal to grant defendant's motion for nonsuit was improper.

Appeal from judgment general term supreme court, Second department, affirming judgment and order refusing to set aside verdict and denying new trial.

*De Witt C. Brown*, for appellants, Maurice Fitzgibbons and others.

*P. Q. Eckerson*, for respondent, Leonard A. Merritt.

DANFORTH, J. The action was for damages sustained by the plaintiff while attempting to pass along a sidewalk in front of certain stores occupied by the defendants, and known as Nos. 65 and 67 on the east side of Crosby street, in the city of New York. The material facts are as follows: On the last day of December, 1879, the plaintiff and his brother were at work on the west side of Crosby street, but it commenced snowing, and they left at half past 1 o'clock. They crossed to the east side, below the defendant's stores, and, going up, they there found a team of horses and truck, and at that point, while passing, the plaintiff stepped upon the iron cover of a coal-hole, slippery with snow, and fell under the horse nearest to him, touching its leg. The horse raised its foot at that instant, and then put it down, striking the plaintiff's ankle, and breaking it. The sidewalk was seven feet and nine inches wide; the street a narrow one, and in part occupied by a double-track horse railroad. Between the curbstone and track is five feet three inches, one foot of which is covered by the projecting car. The truck was seven feet eight and one-half inches wide. It and the horses belonged to the

<sup>1</sup> Reversing 82 Hun, 465.

defendants, and on this occasion they were partly in the street and partly on the sidewalk, but in their customary place, and, from necessity, one horse being on the sidewalk, the other in the street, leaving just room for the cars to pass. The team was then in care of its driver. The horses were gentle, and at the time in question, except as above stated, neither stirred. Sufficient space was left on the sidewalk for wayfarers. This was testified to by the plaintiff and by the defendant's witnesses. It was also practically demonstrated by the safe passage of many persons; and there is no room for doubt that the plaintiff would have gone through uninjured except for the coal-hole and its condition.

The plaintiff also put in evidence a city ordinance, prohibiting, under a penalty, the going of any horse upon any of its sidewalks. The defendants, upon the other hand, both by answer and by evidence, relied upon an ordinance of the city which made it lawful for the owner or occupant of any store or other building, on any street "in which the rails of any railroad company are laid so close to the curbstone as to prevent the owner or occupant from keeping any such cart or other vehicle in the carriage-way in front of his place of business without interference with the passing of the cars of any such railroad company, to occupy with such cart or other vehicle during business hours so much of the sidewalk as may be necessary for such cart or other vehicle, provided that sufficient space be retained for the passage of pedestrians between the cart or other vehicle so permitted to occupy such portion of the sidewalk and the stoop or front of every such store, warehouse, or other building;" and, by evidence which was not controverted, showed that the street in question was situated as described in the ordinance.

On the trial the contention in behalf of the defendants was that there was no fault or negligence on their part; and, even if there were, that there was contributory negligence on the plaintiff's part in stepping upon the cover of the coal-hole, and in going unnecessarily near the horses; and they moved the trial judge to dismiss the complaint. The motion was denied, and the defendants excepted. The learned judge then submitted the case to the jury upon both of these propositions, at the same time saying that the plaintiff had no right of recovery against the defendants by reason of the coal-hole, or any incident to it; that they were responsible neither for it nor its condition. No exception was taken to the charge by either party, and the only question for us to consider is whether the evidence was such as in any view would justify a verdict for the plaintiff.

It appears that he was rightfully upon the sidewalk, and the jury might find, as they did, that he was proceeding on his way with reasonable care, and in a proper manner, without notice of any circumstance of danger which required extraordinary caution. But, assuming this to be so, we are unable to find that the defendants neglected any duty or were guilty of misconduct towards him. It may be conceded that the plaintiff would not have been injured if the defendant's horse had not been upon the sidewalk, and, in ordinary cases, its presence at that place would have been an obstruction, and its owner answerable for the



consequences; but both conditions of the ordinance last cited were satisfied by the circumstances of the case. The truck and horse were necessarily on the walk, and sufficient space was retained for the passage of pedestrians between the cart and store. The evidence left no room for doubt as to either; and, as the validity of the ordinance was unquestioned by the plaintiff at the trial, it furnished a complete answer to his action, unless, as is now argued in his behalf, its permission is limited to "a cart or other vehicle," and does not include the animal by which the vehicle is drawn. The contrary was assumed by both parties and the court upon the trial, and it was, we think, the reasonable construction. The ordinance in one part speaks of "driving" or "backing the cart or vehicle" "on the cross-walks," "or onto the sidewalks," implying, of course, a cart or vehicle drawn or moved in the ordinary way; and the same construction must apply to the other part,—that now in question. It cannot be supposed that the owner of the cart would be expected to detach his horses, leaving them in the street between the cart and the street car, while the cart itself was put in a place of safety. The ordinance is, in substance, a declaration that as the railroad encroaches upon the street, so certain vehicles in use therein, and the animals by which that use is made possible, may, in prescribed cases, encroach upon the sidewalk.

We think the exception was well taken; and for the error to which it points the judgment appealed from should be reversed, and a new trial granted, with costs to abide the event.

(All concur.)

(102 N. Y. 377)

CLUTE v. KNIES and another, Survivors, etc.<sup>1</sup>

(*Court of Appeals of New York. June 1, 1896.*)

**1. EJECTMENT—RECEIVER—UNDERTAKING—DISMISSAL OF COMPLAINT—SUBSEQUENT REVERSAL—MISTAKE.**

In an action of ejectment, defendants gave an undertaking that "the plaintiff" would account for and pay over the rent of the premises "as the court may direct in the above-entitled action." The complaint was dismissed, but on appeal the general term reversed the judgment. On the second trial defendant was again successful, and on appeal it was again reversed; and on the third trial, the undertaking having been corrected on motion, the plaintiff was successful, and judgment was given that the undertaking be amended, and for the rental value of the premises. *Held* no error; that the undertaking was valid and binding until a final judgment was reached.

**2. SAME—COURT MAY AMEND UNDERTAKING.**

Where, by mutual mistake, the word "plaintiff" is inserted where "defendant" should have been, the court has power to amend and enforce it.

Appeal from general term supreme court, First department, affirming judgment for plaintiff in action in ejectment.

*William G. McCrea*, for appellants, Jacob Knies and another, Survivors, etc.

*T. J. Clute*, for respondent, Isabella B. Clute.

<sup>1</sup>See 99 N. Y. 342, 2 N. E. Rep. 6, and 26 Hun, 10.

EARL, J. In 1874 the plaintiff commenced an action of ejectment against the defendant Emmerich, and afterwards made an application for the appointment of a receiver of the rents of the land claimed, pending the action. Thereupon, to avoid the appointment of a receiver, Emmerich consented to the entry of the following order on the second day of May, 1874:

"A motion having been made herein for an order appointing a receiver of the rents of the premises described in the complaint during the pendency of the action, the defendant objecting thereto, but consenting that an order be made and entered herein in lieu thereof directing him to file security for the payment of said rent in case the court should so order and direct herein, now, on reading and filing such consent, ordered that said defendant file security in the penalty of \$3,000, with two sufficient sureties, conditioned that said plaintiff will account for and pay over the rent of said premises as the court may direct by order in the above-entitled action."

In pursuance of that order, Emmerich, with the defendant Knies and one Fisher, executed an undertaking, of which the following is a copy:

"An order having been made herein, by consent, that the defendant file security with the clerk of this court in the penalty of \$3,000, conditioned that plaintiff will account for and pay over, under the direction of the court, the rents of the premises described in the complaint, we, Adam Emmerich, of No. 337 West 40th St., in the city of New York, Anthony Fisher, of No. 437 West 43d St., in said city, and Jacob Knies, of No. 450 West 45th St., in said city, do undertake, pursuant to said order, in the sum of \$3,000, that said plaintiff will account for and pay over the rent of said premises in case the court so directs, according to any order that may be made herein, not exceeding the sum above mentioned."

That action was thereafter tried, and a judgment rendered in favor of Emmerich, dismissing the complaint. From that judgment an appeal was taken by the plaintiff to the general term, and there the judgment was reversed, and a new trial was ordered. A second trial was had, and the defendant was again successful, and the plaintiff again appealed to the general term, and the judgment against her was reversed, and a new trial ordered. Previous to the third trial, upon the motion of the plaintiff, an order was entered directing that the former order of May 2, 1874, be amended *nunc pro tunc* by striking out the word "plaintiff" where it appeared therein, and substituting the word "defendant" instead thereof, so that the order should read as follows:

"Now, on reading and filing such consent, ordered that said defendant file security in the penalty of \$3,000, with sufficient surety, conditioned that said defendant will account for and pay over the rent of said premises as the court may direct by order in the above-entitled action."

Thereafter the third trial took place, and resulted in a judgment in favor of the plaintiff for the possession of the premises claimed, and for the sum of \$2,562.72 as the rental value of the premises from October 21, 1871, to May 6, 1881, at the rate of \$900 per year, after deducting certain payments and allowances made by the court to the defendant. In the mean time Fisher, one of the obligors in the undertaking dated May 2, 1874, had died. This action was commenced against the two surviv-

ors, the defendants, Emmerich and Knies, to reform that undertaking by striking out the word "plaintiff" where it occurs therein, and inserting the word "defendant," so that the undertaking would bind the obligors that the defendant Emmerich would account for and pay over the rent of the premises in question in case the court should so direct, according to any order that might be made by the court, not exceeding the sum mentioned in the undertaking, on the ground that the word "plaintiff" was inserted in the bond by mutual mistake, instead of the word "defendant;" and judgment was also demanded upon the undertaking as thus corrected for the sum of \$3,000, with interest. The court ordered judgment for the plaintiff correcting the bond as prayed for, and for the sum due to the plaintiff for the rental value of the property. The defendants appealed from that judgment to the general term, and from affirmance there to this court.

The first claim the appellants make is that the undertaking was merged in and superseded by the first judgment which was rendered dismissing the complaint. It is true that, if that judgment had never been disturbed, it would have been final, and would have absolved the obligors in the undertaking from any liability. But it was subsequently reversed, and finally in the action a judgment was rendered in favor of the plaintiff, and then the undertaking by its terms became operative. This was not a statutory but a common-law undertaking, founded upon a sufficient consideration. There was a final judgment in the action which directed the defendant Emmerich to pay to the plaintiff certain rents, and that judgment was a direction and order of the court, within the meaning of the undertaking. It is quite true that the dismissal of the complaint dissolves an injunction, and vacates and annuls an order of arrest; but there is no analogy between such cases and the case now before us. The undertaking bound Emmerich to account for and pay over the rent of the premises as the court might direct, by any order or judgment which might be obtained in the action, and, when a final judgment was obtained directing such payment, the condition had arisen which rendered the obligors liable upon the undertaking.

No point was made upon the trial, or by any exception, that the amount awarded to the plaintiff in this action was too large. In the action against Emmerich it was found that the rental value of the property from October 21, 1871, to January 21, 1881, was \$900 per year, and after making certain deductions a judgment was rendered against Emmerich for \$2,561.73, and that was the amount of the recovery in this action. It is objected that the defendants are not liable for the rental value, but simply for the rents actually collected. No such point was taken at the trial, and it does not appear that Emmerich did not collect the full amount awarded against the defendants. In the absence of any proof, it may be assumed that he received rents equal to the full rental value. The undertaking was dated May 2, 1874, and the final judgment in the action was rendered seven years thereafter; and, as the rental value appears to have been \$900 per year, it cannot be said that the amount of the judgment is too large. It is a fair inference from the

evidence that the balance of rents due from the defendant between the dates named was fully equal to the amount of the recovery.

It is also claimed that the court had no authority to amend the undertaking. It was simply a common-law instrument between the plaintiff and Emmerich, and his two sureties. The evidence is ample and conclusive that, by mutual mistake of the parties, the word "plaintiff" was inserted where the word "defendant" should have been, and upon the proof there was ample power in the court to order the undertaking to be amended, and enforced as amended, and thus make the instrument conform to what all the parties intended and expected.

It matters not that the order of May 2, 1874, was amended without notice to the sureties in the undertaking. It was wholly unnecessary to amend that order, and the amendment was harmless, as this action could have been maintained without such amendment. Nor does it matter that in the amended order Emmerich was required to file a new undertaking in conformity therewith. The new undertaking was not filed, and the former was not, therefore, superseded.

We discover no error in the judgment, and it should be affirmed, with costs.

(All concur.)

(107 Ind. 132.)

BLACK and others v. THOMSON and others.<sup>1</sup>

(Supreme Court of Indiana. May 22, 1886.)

WAYS—GRAVEL ROADS—PROCEEDINGS TO ESTABLISH—PRACTICE ON APPEAL TO CIRCUIT COURT—DISMISSAL.

On appeal to the circuit court, proceedings for establishing a gravel road are tried *de novo*; and, where the board of commissioners have properly acquired jurisdiction, no irregularity in their subsequent proceedings is cause for dismissing the petition in the circuit court because such irregular proceedings are vacated by the appeal.

Appeal from Carroll circuit court.

Applegate & Pollard, for appellants.

S. D. Boyd, for appellees.

NIBLACK, C. J. Samuel Black and more than 100 others, as resident freeholders of the county of Carroll, in this state, presented a petition to the board of commissioners of that county at its June term, 1884, praying for the establishment and construction of a gravel road upon a certain route and between certain points therein specified. The board appointed viewers and an engineer, as required by the statute, and ordered that they should meet and proceed to discharge the duties which had been assigned to them, on the sixth day of October, 1884. No order of continuance or order of any other kind was made in the cause at the next regular session, in September, 1884, but at a special session which was held in that month the board ordered that the time of the meeting of the viewers and engineer should be postponed until the sixth day of November, 1884. The county auditor thereupon notified the viewers and engineer of their appointment, and of the time of their meeting lastly

<sup>1</sup> Rehearing denied.

above named, and also gave notice of the time and place of such meeting, by four weeks' publication in a weekly newspaper of the county. On said sixth day of November, 1884, the viewers and engineer met, as they had been notified to do, and, after qualifying as required by law, proceeded to examine the proposed line of road, and on the ninth day of December, 1884, made a report of their proceedings to the board of commissioners, expressing the opinion, among other things, that the contemplated road would be a work of public utility. Opposition being made to the report thus submitted, and Francis Thomson and others having remonstrated against the construction of the proposed road, the matter was continued until the March term, 1885, of the board, during which term the report was confirmed, and an order was entered for the construction of the improvement prayed for in the petition. Thomson and the other remonstrators appealed from the order made, as lastly above stated, to the circuit court, in which, at the next succeeding term, they moved to dismiss the petition upon the ground that as the time for the meeting of the viewers and engineer was fixed at a time beyond the September session, 1884, of the board of commissioners, and as the board made no order of continuance or other order in the premises, at that session, the jurisdiction of board over the subject-matter of the proceeding had lapsed, and that thereafter such jurisdiction had not been in any manner regained by the board. This motion was sustained by the circuit court, and the petition was dismissed, at the costs of the petitioners.

Whether the commissioners have the power, in a case like this, to fix the time at which the viewers and engineer shall meet at a period beyond their next regular session is a question not now fairly before us, and hence involves an inquiry upon which we are now not required to enter. The order made at the special session in September then next ensuing, fixing the time of meeting on the sixth day of November, 1884, vacated and superseded the order fixing a previous day of meeting. While the provision of the statute requiring the board to fix the time at which the viewers and engineer shall meet is mandatory, (see section 5092, Rev. St. 1881,) there is nothing having any connection with that provision from which it may be inferred that the board may not thereafter change the time and fix a different day for the meeting. It has, on the contrary, been held in analogous cases that the time fixed by the board for similar purposes may be changed or enlarged. *Munson v. Blake*, 101 Ind. 78; *Lipes v. Hand*, 104 Ind. 503; S. C. 4 N. E. Rep. 160. In this latter case, which was a proceeding for the drainage of lands, it was said that the court had the authority to extend the time of filing the report of the commissioners. It is a familiar rule that, where a judicial tribunal has a general power to designate a time within which an act shall be done, it may extend the time, in the exercise of a reasonable discretion, and that rule is applicable to cases like the one under consideration. It is also a familiar rule that in all judicial or quasi-judicial proceedings a cause does not either lapse or abate on account of a failure to enter a continuance of it, or to make some other disposition of it at a term of the court in which it is pending. In case of such a failure the

cause stands continued by operation of law. Rev. St. 1881, §§ 1325, 1326, 1327; *McMullen v. State*, 4 N. E. Rep. 903, (decided February 13, 1886.)

It is conceded by all parties that the board of commissioners acquired jurisdiction in this case when the petition was filed, and that it consequently had authority to appoint viewers and an engineer in the first instance. However irregular, therefore, the subsequent proceeding may have been, the jurisdiction thus acquired was not lost. *McMullen v. State*, *supra*. Whether regular or irregular, these subsequent proceedings were vacated by the appeal to the circuit court, where the cause stood for trial *de novo*, and not, as in an appellate court, for the review and correction of errors. *Fleming v. Hight*, 95 Ind. 78; *Munson v. Blake*, above cited. Such subsequent proceedings being vacated by the appeal, nothing disclosed by them, whether of omission or commission, afforded any cause for dismissing the petition. *Sunier v. Miller*, 4 N. E. Rep. 867.

The judgment dismissing the petition is reversed, with costs, and the cause is remanded for further proceedings not inconsistent with this opinion.

(106 Ind. 283)

#### KLEESPIES v. STATE.

(*Supreme Court of Indiana*. May 22, 1886.)

##### 1. GAMING—RENTING PROPERTY FOR—INDICTMENT.

An indictment for permitting and renting a house to be used for gaming purposes need not state the name of the tenant, and it is sufficient to charge that the building is in the county and the property of the defendants, without any particular description.

##### 2. CRIMINAL LAW—APPEAL—WEIGHT OF EVIDENCE—NO REVERSAL.

The supreme court will not reverse on the mere weight of the evidence, even in a criminal case.

##### 3. SAME—NEW TRIAL—AFFIDAVIT IN SUPPORT OF MOTION—NOT IN RECORD—NO QUESTION PRESENTED.

Where affidavits in support of a motion for a new trial on account of newly-discovered evidence are not properly brought into the record, they present no question for the supreme court.

Appeal from Clark circuit court.

J. B. Merriwether, for appellant.

The Attorney General and F. B. Burke, for the State.

Howe, J. In this case the appellant, George Kleespies, and one Louis Kleespies were jointly indicted at the October term, 1885, of the court below, to-wit, on the twenty-sixth day of October, 1885. The indictment contained two counts. The first count charged that at Clark county, "on the first day of July, 1885, and continuously from that day to the day of making this presentment, Louis Kleespies and George Kleespies did then and there, and during all of said time, unlawfully suffer and knowingly permit their building and room, then and there situated, to be used for gaming, and did then and there, and during all of said time, unlawfully suffer and knowingly permit" six named persons, whose names we omit, "and divers other persons to the grand jurors unknown, to play at a certain game called faro, for money and

other articles of value." The second count charged "that at said county, on the first day of July, 1885, and from that day to the day of making this presentment, Louis Kleespies and George Kleespies did then and there, and during all of said time, unlawfully rent their building and room, then and there situated, to be used for gaming." Upon their joint arraignment and plea of not guilty, the appellant and Louis Kleespies were jointly tried by a jury; and a verdict was returned into court finding Louis Kleespies not guilty, and finding appellant guilty as charged in the indictment, and assessing his fine at \$250. Over his motion for a new trial, the court rendered judgment against the appellant, on the verdict, for the fine assessed, and costs. Errors are here assigned by appellant upon the overruling of his motions to quash each count of the indictment, and his motion for a new trial.

Appellant's counsel first insists that each count of the indictment is insufficient because the description of the building and room therein was too general and vague, and did not inform the defendants what room or building was permitted by them to be used, or rented by them to be used, for gaming purposes. We do not think that this objection is well taken as to either count of the indictment. In each count the premises are described as the defendant's building and room, at Clark county. This follows substantially the language of the statute defining the offenses, and is sufficient. *Padgett v. State*, 68 Ind. 46; *Hamilton v. State*, 75 Ind. 586.

It is further objected by appellant's counsel that "the second count does not state to whom the room or building was rented for gaming purposes." It was not necessary that the count should state the name of the tenant. Under the statute it is the renting of the room or building "to be used or occupied for gaming" which constitutes the public offense; and the renting for such use is charged in the second count with sufficient clearness and certainty. Section 2079, Rev. St. 1881.

These are the only objections pointed out by appellant's counsel to either count of the indictment; and neither of such objections seems to us to be well taken.

Under the alleged error of the court in overruling the motion for a new trial, appellant's counsel very earnestly insists that the verdict of the jury is not sustained by the evidence. The case is not a strong one on the evidence; but we think there is evidence in the record tending to sustain the verdict on every material point. In such case this court will not, even in a criminal cause, disturb the verdict, or reverse the judgment, on the weight or sufficiency of the evidence. *Long v. State*, 95 Ind. 481; *Murphy v. State*, 97 Ind. 579; *Dolke v. State*, 99 Ind. 229; *Clayton v. State*, 100 Ind. 201; *Padgett v. State*, 103 Ind. 550; S. C. 3 N. E. Rep. 377.

Appellant's counsel further claims that the motion for a new trial ought to have been sustained, on the ground of newly-discovered evidence. This cause for a new trial seems to have been supported by certain affidavits therewith filed. But these affidavits were not made a part of the record of this cause, either by a bill of exceptions or by an order of

court, or in any manner known to our law. The alleged newly-discovered evidence, therefore, is not, in any proper or legal sense, a part of the record of this cause, and cannot be considered here for any purpose. This is settled by our decisions. *Fryberger v. Perkins*, 66 Ind. 19; *Williams v. Potter*, 72 Ind. 354; *Chambers v. Kyle*, 87 Ind. 83; *Harrison School Tp. v. McGregor*, 96 Ind. 185; *Shields v. McMahan*, 101 Ind. 591.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment. The judgment is affirmed, with costs.

(106 Ind. 492)

McCoy v. McCoy.

(Supreme Court of Indiana. May 24, 1886.)

**LIBEL AND SLANDER—ANSWER IN MITIGATION—DEFENDANT ENTITLED TO OPEN AND CLOSE**

Where the only answer in an action for slander sets up matter in mitigation of damages, the burden of proof is upon the defendant, and he is entitled to open and close both the evidence and argument.

Appeal from Clark circuit court.

*P. H. Jewett, M. Clegg, and C. L. Jewett*, for appellant.

*J. K. Marsh*, for appellee.

**NIBLACK, J.** Action for slander by Mary A. McCoy against Mary McCoy. The complaint was in eight paragraphs; each counting upon words imputing to the plaintiff the crime of larceny. The defendant answered, in mitigation of the damages, a series of facts and circumstances by which she was surrounded at the time of speaking the words charged in the complaint, and which she alleged induced her to believe that the words as spoken were true; also averring that the words were spoken for the sole purpose of aiding in restitution of a sum of money which she had theretofore lost under circumstances indicating that it had been stolen. And this was the only answer filed in the cause. The plaintiff replied in denial, and after a jury was impaneled the defendant, insisting that she had the burden of the issue, claimed that she had the right to open and close both in the introduction of the evidence and in the argument before the jury, but the court denied her claim in these respects, and instead accorded to the plaintiff the privilege of opening and closing in both instances. The trial thus proceeding, the plaintiff obtained a verdict and judgment for \$150 in damages.

In actions for slander the defendant may allege the truth of the matter charged as defamatory, and mitigating circumstances, to reduce the damages, and give either or both in evidence. Rev. St. 1881, § 373. In such actions, matters in mitigation of the damages may be given in evidence under the general denial, as also under an answer in justification. Hence an answer in mitigation merely, is unnecessary where either the general denial or justification has been pleaded. But an answer in mitigation may nevertheless be filed, and evidence may be introduced in support of it under circumstances in many respects analogous to an answer in justification. *Swinney v. Nave*, 22 Ind. 178; *O'Conner v. O'Con-*



ner, 27 Ind. 69. Where an answer in justification only has been pleaded in an action for slander or libel, the defendant has the burden of proof, and is entitled to open and close at the trial. *Heidman v. Shanklin*, 60 Ind. 424. It is, indeed, a well-settled rule of practice in this state that, where the defendant confesses and avoids only in his defense, he is entitled to open and close; the burden of the issue being upon him. Rev. St. 1881, § 533; *Hyatt v. Clements*, 65 Ind. 12; *Barclay v. Miers*, 70 Ind. 346; *McCormick H. M. Co. v. Gray*, 100 Ind. 285. It is upon the principle that the answer in justification in a slander case is a confession and avoidance that the defendant is accorded the right of opening and closing. An answer in mitigation merely, is as much a confession of the matters charged in the complaint as is an answer in justification; the distinguishing difference being that the answer in mitigation sets up matters only in partial avoidance of the plaintiff's right of recovery.

It follows that both of these defenses are affirmative in their character, and imply an assumption of the burden of the proof to be adduced. Our conclusion necessarily is that the circuit court erred in refusing to permit the defendant to open and close both in the introduction of the evidence and in the argument before the jury. As to the test to be applied in determining who has the burden of the issue, see the case of *Judah v. Trustees of Vincennes University*, 23 Ind. 272.

The conclusion thus reached is in no manner inconsistent with the case of *Shulze v. McWilliams*, 104 Ind. 512; S. C. 3 N. E. Rep. 243; since in that case there was not a full confession of the speaking of the defamatory words charged in the complaint, and the answer was in consequence held to be, in legal effect, an argumentative denial of the matters so charged, and hence not, in the proper sense, an answer only in mitigation of the damages.

The judgment is reversed, with costs, and the cause remanded for a new trial.

(106 Ind. 422)

BOARD, ETC., OF MARION CO. v. CENTER TP., ETC., and others.<sup>1</sup>

(*Supreme Court of Indiana. May 24, 1886.*)

APPEAL—PRACTICE—REHEARING NOT GRANTED TO AMEND RECORD.

The supreme court will not grant a rehearing in order to amend the record, after an opinion has been rendered on the faith of the record as it stands.

Appeal from Marion circuit court.

On petition for rehearing. See 2 N. E. Rep. 368.

*Claypool & Ketcham*, for appellant.

*Byfield & Howland, Shepard, Elam & Martindale*, and *H. N. Spaan*, for appellee.

Howk, C. J. Center township, of Marion county, has presented in this cause a very earnest and elaborate petition for a rehearing, fortified as to matters of fact by numerous certificates and affidavits, and strongly supported by the able and exhaustive briefs of its counsel. On the other hand, a number of counter-affidavits have been filed on behalf of

<sup>1</sup> See 10 N. E. 291.

the Indianapolis, Decatur & Springfield Railway Company, in whose favor the judgment below is reversed, and the cause is decided by this court in the principal opinion, and also a learned and carefully prepared argument by its counsel in opposition to the petition for rehearing. The principal ground upon which the rehearing is prayed for is that the record of the cause does not speak the truth as to one matter of fact upon which our opinion is largely rested in deciding the case in favor of such railway company. The fact referred to, as specially found by the trial court, was substantially that such railway company, as the successor of the Indiana & Illinois Central Company, some time prior to the trial of the cause, had located and built its principal machine-shops within the limits of Center township. It is claimed in the petition for rehearing, and correctly so, it appears, that the fact thus found by the court as special term is not true; but, on the contrary, the fact is that the principal machine-shops of such railway company are located and built beyond the line dividing Center and Wayne townships, in Marion county, and within the limits of Wayne township. It is further claimed that this mistake of fact, as it is called, in the special finding of facts, had its origin in the mutual mistake of the counsel engaged in the cause as to the actual and true location of the principal machine-shops of the railway company. However this may have been during the pendency of the cause in the court below, it is shown with reasonable certainty, as it seems to us, that the able attorney of Center township was fully informed of such mistake of fact in the special finding of facts, and that such railway company had in fact located and built its principal machine-shops within the limits of Wayne township, and not, as specially found by the trial court, in Center township, before the oral argument of the case in this court was fully heard, or the cause was finally submitted for our decision. We were not informed of any mistake of fact in the record, but we heard and decided the cause with the belief and upon the supposition that the record before us, as it ought to have done, imported "absolute verity."

Our decision of the cause, as presented by all the parties to the record, is adverse, and therefore is not satisfactory, to Center township. We are now asked, on behalf of such township, to grant a rehearing and a stay of proceedings in the pending appeal until such time as the record below can be so corrected that it will "speak the truth." This court has always refused, and in cases of as much or more magnitude and importance as the case in hand, to grant a rehearing in order that the record may be amended. *Warner v. Campbell*, 39 Ind. 409; *Pittsburgh, etc., R. Co. v. Van Houten*, 48 Ind. 90; *Cole v. Allen*, 51 Ind. 122; *State v. Terre Haute, etc., R. Co.*, 64 Ind. 297; *Merrifield v. Weston*, 68 Ind. 70; *Board, etc., v. Hall*, 70 Ind. 469; *Mansur v. Churchman*, 84 Ind. 573; *Robbins v. Magee*, 96 Ind. 174; *State v. Dixon*, 97 Ind. 125. There is nothing exceptional in the case under consideration, so far as we are advised, which can or ought to induce us to depart from this long-established and reasonable rule of practice. On the contrary, we are of opinion that the case before us is one where this rule of practice ought to be

closely adhered to and strictly enforced. Upon the case as it was submitted to us by all the parties to the record, Center township included, and considering, as we must, in the absence of any sufficient showing to the contrary, that the record spoke the exact truth in regard to every fact therein found by the trial court, we are content with our original opinion herein, and adhere to the law of the case, as therein declared, on every material point. We have nothing to add thereto nor take therefrom. We need not, therefore, extend this opinion in the re-examination or further discussion of any of the questions involved in the cause.

The petition for rehearing is overruled, at the costs of Center township.

ELLIOTT, J., was absent when the petition was considered, and the rehearing denied.

(106 Ind. 468)

WESTERN UNION TEL. CO. v. KINNEY.

(*Supreme Court of Indiana*. May 24, 1886.)

TELEGRAPH COMPANY—FAILURE TO TRANSMIT—SENDER ALONE CAN RECOVER.

No one but the sender of a telegraphic message can recover the penalty provided by section 4176, Rev. St. 1881, for failure to transmit; and where a message is sent to one at a certain place, and is by his agent, under instructions from him, forwarded to him at another place, he cannot recover, under said section, for failure of the company to properly forward the message.

Appeal from Bartholomew circuit court.

*McDonald, Butler & Mason*, for appellant.

*John C. Orr*, for appellee.

NIBLACK, J. This was a suit by Emanuel H. Kinney against the Western Union Telegraph Company, to recover a penalty of \$100 under the provisions of section 4176, Rev. St. 1881, for the alleged failure of the company to transmit a dispatch as it was required by law to do. The complaint charged that the defendant was, at the time it was filed, engaged in telegraphing for the public, and had a line of telegraphic wires partly within the state of Indiana, which extended from the city of Columbus, in said state, to Hillsdale, in the state of Michigan; that the plaintiff, on the twenty-first day of December, 1884, intending to be absent on business from his home in said city of Columbus, directed and instructed his clerk and agent, engaged and employed in his office in said city, to telegraph to him at Hillsdale, in said state of Michigan, any message for him that might be delivered to such clerk and agent at Columbus aforesaid during the following day; that during the said last-named day, that is to say, on the twenty-second day of December, 1884, the following telegraphic message was delivered at the plaintiff's office at the city of Columbus:

"ALBION, MICHIGAN, December 22, 1884.

"To E. H. Kinney, Columbus, Indiana: Yes. If not number one, must stand shrinkage. Pay first April. Cannot meet you.

"A. J. BAILY & SON."

—That upon the delivery of said message to the plaintiff at his office, in Columbus, he, by his clerk and agent aforesaid, at that place, took and delivered to the defendant, during the usual business hours, at its office, in said city of Columbus, a message as follows, which it, the defendant, received and agreed to transmit to the plaintiff's temporary residence at Hillsdale, in the state of Michigan, to-wit:

"COLUMBUS, INDIANA, December 22, 1884.

"*To E. H. Kinney, Hillsdale, Michigan:* Yes. If not number one, must stand shrinkage. Pay first April. Cannot meet you.

"A. J. BAILY & SON."

—That the plaintiff paid to the defendant the usual and required charges, to-wit, the sum of 73 cents, for the transmission of said last-named message to his address at Hillsdale, Michigan, aforesaid, but that the defendant wholly failed and neglected to transmit said message as the plaintiff had addressed the same, and wholly failed and neglected to transmit said message to said Hillsdale, in the state of Michigan, on said twenty-second day of December, 1884, or at any time thereafter. A demurrer to the complaint being first overruled, the jury, under the direction of the circuit court, returned a special verdict, upon which a judgment was rendered against the defendant for the penal sum of \$100.

Error is first assigned upon the overruling of the demurrer to the complaint. The most important objection urged against the sufficiency of the complaint is that it is only the sender of a telegraphic message who can recover the penalty prescribed by section 4176 of the Revised Statutes, hereinabove referred to, and that, upon the facts charged, the plaintiff was in no sense the sender of the message which the defendant failed and neglected to transmit to him at Hillsdale. It was held by this court in the carefully and very elaborately considered case of *W. U. Tel. Co. v. Pendleton*, 95 Ind. 12, that it is only the sender of a message who can recover the penalty provided by the section of the statute upon which this action is based; and the doctrine of that case was, as we believe, rightfully reaffirmed in the subsequent case of *W. U. Tel. Co. v. Reed*, 96 Ind. 195. In regard, therefore, to the parties to an action like this, the construction given as above to the section in question may now be accepted as an authorized and well-established construction, resting upon competent authority. With this construction in view, we know of no principle upon which it can be said that the plaintiff was the sender of the message which his clerk and agent directed should be forwarded to him from Columbus to Hillsdale. The message was substantially the same message which A. J. Baily & Son had sent to the plaintiff in the first instance, with only the address as to the place of destination changed by his authority and direction. It continued, as it was from the first, to be a message from Baily & Son to the plaintiff, and the relations of Baily & Son to the message, as the persons who sent it, and who were alone responsible for its contents, were not changed by the new address which was attached to it. The plaintiff was the receiver of the message at Columbus, and, in legal contemplation, would have been its receiver, and its receiver only, if it had reached him at Hillsdale.

The transaction described in the complaint, when briefly summarized, means that a message sent to the plaintiff to Columbus was by his authority ordered to be forwarded to him at Hillsdale, which was not done by reason of some failure or neglect on the part of the defendant. This ordering a message to be forwarded was in no respect the sending of a message by the plaintiff, within the meaning of the statute; and the averment of the complaint that it was such a sending was a mere conclusion of law, inconsistent with the facts relied upon for its support. A complaint to recover a statutory penalty must aver facts which bring the case presented by it within both the letter and the spirit of the statute. *W. U. Tel. Co. v. Astell*, 69 Ind. 199. Whether the defendant may not have incurred a liability to the plaintiff under section 4177, Rev. St. 1881, is a question not now before us, and which consequently has not been considered at the present hearing. That might depend upon additional facts not contained in the complaint now under consideration. *W. U. Tel. Co. v. Trissell*, 98 Ind. 566.

Other objections are urged to the sufficiency of the complaint, as well as to several points in the proceedings at the trial; but, as the judgment will in any event have to be reversed for want of a sufficient complaint, we need not further extend this opinion.

The judgment is reversed, with costs, and the cause remanded for further proceedings.

(106 Ind. 373)

WATKINS, Adm'x, v. ROMINE and others.

(*Supreme Court of Indiana*. May 20, 1886.)

**EXECUTORS AND ADMINISTRATORS—SETTING ASIDE ALLOWANCE—BURIAL EXPENSES.**

The court made an allowance for the expense of removing and reintering the remains of the deceased upon the petition of the administratrix, and subsequently set aside the allowance on the petition of the heirs. *Held*, that the court had authority to set aside the allowance, and that the fact that the administratrix had expended money on the faith of the order of the court did not preclude the court from annulling it upon evidence that the petition on which it was made did not fully and truly state the facts.

Appeal from Warren circuit court.

*C. V. McAdams*, for appellant.

*John W. Sutton*, for appellees.

ELLIOTT, J. The heirs of Enoch S. Watkins, deceased, filed exceptions to the final report of the appellant as the administratrix of the decedent's estate. The first question presented by these exceptions is as to the allowance of \$250 to the administratrix for the expense incurred in removing the body of the decedent from the cemetery in which it was first interred to another, some miles distant. We have carefully studied the evidence, and find that it sustains the judgment of the trial court setting aside the allowance which had been previously made. We think that the evidence shows that the place first chosen for the burial was a suitable one, that it was the one selected by the deceased prior to his death, and was the place which he had prepared for himself. Not only

does the evidence show that, but it also shows that his first wife was buried in the cemetery where his remains were first placed, that it was the place where his children desired he should be interred, and was nearer his home than the one chosen by his second wife, the appellant. Under these circumstances we cannot say that the court erred in setting aside the allowance.

It is said by counsel that "the court here made an order on which the appellant, in her capacity as an officer of the court, had a right to rely. On the faith of this order she expended the money." From this premise counsel concludes that, the money having been expended on the faith of the order, the allowance should not be set aside and loss cast upon the administratrix. This argument is not without force, but is specious rather than sound. The infirmity in it lies in the assumption that the facts stated in the petition were the same as those developed by the evidence, whereas they are essentially different. We regard it as too clear to require discussion that an administratrix who secures an unusual allowance cannot claim that the order making it is conclusive, unless she shows that it was made with a full and accurate knowledge of the facts. In this instance the evidence shows that the petitioner did not fully place before the court all the facts, and, as she failed to do this, she cannot justly complain that the court, when fully informed as to the facts, changed its ruling. In such cases as this, the court must depend, in a great measure, upon the facts stated in the petition asking the allowance, and the petitioner must, at her peril, state the facts fully and correctly. *Collins v. Tilton*, 58 Ind. 374.

We are bound by long-settled rules to respect the finding of the trial court upon the evidence, unless it is made to appear that a wrong was certainly committed, and that is far from being made to appear here.

The second question presented by the exceptions is as to the refusal of the trial court to allow the appellant \$600 for her services as administratrix. We cannot say that there was any abuse of discretion in this ruling. The amount received by her was \$2,764, and the amount disbursed was \$2,164. The claim for \$600 for the services rendered in managing an estate not larger than that of the appellant's intestate was entirely too much. It is true that she shows that she lived some distance from the county-seat, and made a great many trips to consult with her counsel, but she ought not to be allowed for this extraordinary expense; for, if she found that she lived at such a distance from the county-seat as to make it an unusual expense for her to discharge her duties, she should have resigned, rather than overburden the estate.

It is our opinion that the allowance of \$300 for services was a very liberal one. We are, indeed, inclined to the opinion that the court erred in making the allowance so large. Judgment affirmed.

(106 Ind. 406)

**KELLER and others v. ORR and others.***(Supreme Court of Indiana. May 22, 1886.)***1. PLEDGE AND COLLATERAL SECURITY—APPLICATION OF AVAILS.**

A creditor who receives collateral security from his debtor, under an agreement to apply it to a specified debt, is bound to apply the avails to the payment of the debt specified.

**2. CONTRACT—NEGLIGENCE IN SIGNING.**

A party who signs a written contract without reading it, or causing it to be read to him, where there is an opportunity afforded him of doing so, is guilty of such negligence as will prevent him from escaping from the legal effect of the contract.<sup>1</sup>

**3. HUSBAND AND WIFE—MARRIED WOMAN AS SURETY—PLEDGE OF SEPARATE PROPERTY FOR HUSBAND'S DEBT.**

A married woman, who pledges her separate property by mortgage or otherwise to secure the debt of her husband, occupies the position of a surety.

**4. CONTRACT—CONSIDERATION.**

Where parties agree upon a consideration, the courts will not disturb their contract.

**5. TRIAL—BY COURT—SPECIAL FINDING—CONSIDERATION.**

Where the facts stated in a special finding show a consideration for a contract, it is not necessary that the court should state in direct terms that there was a consideration for the contract.

**6. HUSBAND AND WIFE—MARRIED WOMAN—NOTICE TO PARTY WHO CONTRACTS WITH HER.**

A party who contracts with a married woman is bound to take notice of the capacity in which she contracts.

**7. MAXIM—CONTRACT NOT OVERTHROWN BY.**

A plain contract cannot be overthrown by the maxim that "he who asks equity must do equity."

Appeal from Fayette circuit court.

*Chas. Roehl and Claypool & Claypool, for appellants.*

*Conner & Frost, for appellees.*

ELLIOTT, J. The complaint of the appellants, who were plaintiffs below, is founded on a promissory note and a mortgage executed by the appellees to secure its payment. The note and mortgage were executed to Francis M. Roots, and by him assigned to the appellants. The appellees answered separately, but the second paragraph of the answer of William J. Orr is substantially the same as the third paragraph of Mary E. Orr's answer, and a decision as to the sufficiency of one of them will determine the sufficiency of both. It is alleged in these answers that the defendant William J. Orr held four promissory notes against David Veatch, and three against Walter E. Thomas; that the plaintiffs received of the defendant these notes, and executed to the defendant the following agreement:

"Received of William J. Orr seven mortgage notes. Four of said notes were given by David Veatch to William J. Orr, bearing date January 1, 1876; said four notes amounting to \$1,400. The other three of said seven notes were given by Walter E. Thomas to William J. Orr, bearing date January 27, 1877; the last-named three notes amount to \$300, with the interest now due. Said notes being placed in our hands as collaterals to secure to us the

<sup>1</sup>See note at end of case.

payment of a mortgage on a house and lot in the city of Connersville sold by William J. Orr to Keller & Uhl, said mortgage amounting to \$800; also to secure the payment of an execution in favor of David Baker and against William J. Orr and William C. Moffitt, amounting to about \$1,300; also to secure the payment of a mortgage given by William J. Orr to Francis M. Roots, dated October 26, 1877, for \$2,000. It is mutually understood by and between said parties that said notes are first to be applied to the \$2,000 mortgage, then the \$800 mortgage, and last the \$300 execution; and we further agree not to foreclose the \$2,000 mortgage mentioned above for one year from the date of this receipt, provided the said William J. Orr shall keep the interest paid on said mortgage.

KELLER & UHL.

"January 23, 1879."

It is further alleged that the plaintiffs received of Thomas, in payment of one of his notes, \$120 on the twenty-eighth day of February, 1880; that on the twenty-eighth day of March, 1881, they received of Thomas, in payment of the other notes executed by him, \$250; and that on the fourth day of January, 1882, they received of David Veatch, in payment of his notes, \$1,000. The prayer of the answer is that the amount received by the appellants be credited on the note and mortgage described in the complaint.

These answers are unquestionably good. It is settled that an agreement, although in form a receipt, is valid and enforceable. If a creditor accepts collateral security, and agrees to apply it to a designated debt, he must perform his agreement. The appellees had a right to fix the terms upon which they would transfer the notes of Thomas and Veatch as collateral security; and the appellants, having accepted the notes on the terms proposed, are bound to apply the avails of the notes as they agreed to do. It is entirely immaterial whether the avails of the notes would pay all of the debts or not, for the appellants agreed to apply the avails to a designated debt, and they cannot escape from their contract. There is no ambiguity in the instrument evidencing the agreement of the parties, and extrinsic aid is needed to interpret its provisions.

The second paragraph of the appellants' reply attempts to avoid the answer by alleging that John Uhl, who signed it on behalf of Keller & Uhl, "was not very conversant with the English language," and that the instrument does not embody the agreement of the parties as he understood it. Of this reply it is only necessary to say that it is bad, because (1) a written contract cannot be varied by parol evidence of what one of the parties understood it to mean; (2) because it is settled that a party must read the contract which he signs, or, if he cannot read, use diligence in endeavoring to have it read to him; (3) because a party is bound to know the legal effect of an instrument which he signs.

The evidence shows that the real estate described in the mortgage assigned to the appellants was the separate property of Mary E. Orr, and that she mortgaged it to secure the debt of her husband. It also shows that at the time it was executed the husband pledged the Veatch and Thomas notes as collateral security to the appellant's assignor, Francis M. Roots, and that, after the assignment of the note and mortgage by the mortgagee to the appellants, they executed the agreement of January 23,



1879. Upon this evidence appellants' counsel insist that there is no foundation for the special finding made by the court. We think otherwise. At the time the mortgage was executed, October 26, 1877, the wife had power to mortgage her property to secure the debt of her husband; but, in so pledging her property, she did not become liable as a principal; on the contrary, she became a surety, with all the rights and privileges incident to that position. *Trentman v. Eldridge*, 98 Ind. 525. Mrs. Orr, as surety, had an undoubted right to require that the collateral remain with the creditor as additional security for her husband's debt, and the husband had that right because they were pledged for that purpose. If there had been no written contract, the appellants would have had no right to divert the securities from the purpose for which they were originally pledged; but they elected to make an express contract, and on the faith of that contract they received the notes of Veatch and Thomas. If Roots had refused to apply the proceeds of those notes on the mortgage debt, the appellees would have had a right of action against him, and he had therefore a right to retain them notwithstanding the fact that he had assigned the mortgage, and to exact from the appellants such a contract as that executed to the appellees by them. Roots owed a duty to the appellees to use reasonable care and diligence as to the collection of the notes deposited with him as collateral security, and was under an imperative obligation to apply the proceeds realized to the payment of the debt for which they were pledged. He was not absolved from these obligations by a mere transfer of the mortgage, and he, as well as the appellees, had a right to an agreement that the proceeds of the notes should be applied to the payment of the debt for which Mrs. Orr stood as surety. There was therefore a benefit to the appellants, for they obtained additional security for the debt assigned to them, and hence it is not material whether the appellees or Roots suffered any inconvenience or loss. Roots, as counsel say, refused to deliver to the appellants the Veatch and Thomas notes, and this was his right until he had secured such a contract as would release him from liability. There was therefore an adequate consideration for the agreement, and the parties for whose benefit it was made are entitled to have the agreement enforced. Where parties agree upon a consideration, the courts will not disturb their contract. *Wolford v. Powers*, 85 Ind. 294. It is not material from whom the consideration moves; for, if a contract is sustained by a consideration, it may be enforced by the party for whose benefit it was executed. But here the parties who are seeking to enforce the contract themselves yielded a consideration, and the contract rests upon a consideration moving from them, and independent of the operation of the principle just stated, and is enforceable. A debtor undoubtedly has a right to direct the application of notes pledged as collateral security, and to designate the terms upon which he will pledge them.

It is said by counsel that the finding of the court does not show that there was any consideration for the agreement, but is silent upon this subject. We cannot concur with counsel, for the facts stated in the special finding fully show that there was a consideration, and this was suf-

ficient, without stating in express terms that a consideration was yielded by the appellees or any one else. Where the facts embodied in a special finding show a consideration, there is no necessity for stating in direct terms that there was a consideration for the contract. Such general statements are seldom of any importance, for they are generally regarded as mere conclusions, adding no force to the finding. *Sohn v. Cambern*, 6 N. E. Rep. 813, (May 12, 1886.)

It appears from the special finding that on the twentieth of June, 1876, the appellees conveyed to appellants by warranty deed certain real estate, and received as a consideration for the conveyance \$3,000; that prior to that date the land had been mortgaged to the Franklin Insurance Company for \$800; that at the January term, 1878, of the Fayette circuit court, David Baker recovered judgment against Orr for \$288.33; that prior to January 23, 1879, Orr had assigned to the appellants the Veatch and Thomas notes under an agreement that they should be held as collateral security to indemnify the appellants against loss by reason of the mortgage and judgment just referred to; that the agreement heretofore copied was executed on the twenty-third day of January, 1879; that Mary Orr was the owner of the property embraced in the mortgage sued on, and executed the mortgage to secure the debt of her husband. It also appears that appellants, to protect their title, paid off the Franklin Insurance Company mortgage and the Baker judgment; that part of the real estate mortgaged to Roots was sold by the defendants to the plaintiffs before the mortgage was purchased by them; that the consideration was fully paid, except the amount of \$238.71, which by agreement was applied upon the insurance company mortgage. The conclusions of law upon these facts is complained of, because, as counsel say, "it applies all the money received from the Veatch and Thomas notes upon the \$2,000 debt."

It is contended that this was inequitable, even as to Mrs. Orr, and, in support of this contention, it is asserted that it should appear that the appellants knew that Mrs. Orr had pledged her property to secure her husband's debt. We think this does appear from the facts found. The appellants knew that the debt was that of the husband, and that the property mortgaged belonged to the wife, and this information charged them with knowledge of the capacity in which she contracted. *Vogel v. Leichner*, 102 Ind. 55; S. C. 1 N. E. Rep. 554. But the case need not be rested on this proposition alone, because the agreement of January 23, 1879, expressly bound the appellants to apply the avails of the Veatch and Thomas notes to the mortgage executed to Francis M. Roots. There is nothing in the facts stated in the special finding releasing the appellants from that agreement, or impairing its validity. That agreement was executed after full information as to debts due from the mortgagors, and we can perceive no reason for holding that the appellants can escape its operation. We cannot presume that there were any facts relieving them, for it is now well settled that facts not embodied in the special finding are deemed not to exist. Nor do we see anything in the evidence which impairs the force of that agreement. The maxim

that "he who asks equity must do equity" cannot be successfully invoked to overthrow a plain contract voluntarily entered into with knowledge of all the facts. Judgment affirmed.

## NOTE.

A party who, having capacity to read an instrument, signs it without reading, and without requesting it to be read to him, is bound by it, if no device is used to put him off his guard. *Gullihier v. Chicago, R. I. & P. R. Co.*, (Iowa,) 13 N. W. Rep. 429.

Where a party negligently signs a written contract, he cannot avoid it by alleging that it contains provisions he did not understand or know of at the time of execution. *McKinney v. Herrick*, (Iowa,) 23 N. W. Rep. 767. See *McCormack v. Molburg*, 43 Iowa, 561

(106 Ind. 464)

## MITCHELL v. COLGLAZIER and others.

(*Supreme Court of Indiana*. May 24, 1886.)

## 1. HUSBAND AND WIFE—PURCHASE OF LAND WITH WIFE'S MONEY—TRUST.

Where a wife furnishes money for the purchase of real estate for herself, but her husband, without her consent, takes the property in his own name, he holds it in trust for his wife, although he may have given his own note for a deferred payment, and his creditors cannot reach it.<sup>1</sup>

## 2. SAME—EVIDENCE.

Evidence in such case that the wife, as soon as she discovered the husband's action, declared that her money paid for the land, and demanded that it be conveyed to her, which was done on the same day, is admissible as part of the *res gestæ*, and to show the consideration for the deed.

Appeal from Washington circuit court.

*Mitchell & Mitchell and Zaring, Voyles & Morris*, for appellant.

*Asa Elliott and Alsbaugh & Lawler*, for appellees.

MITCHELL, J. The complaint in this case charges that David Colglazier, with the intent to defraud the plaintiff, a judgment creditor, and without consideration, conveyed certain real estate of which he was the owner to his wife. The suit was to set aside this conveyance. Louisa Colglazier answered separately, and the ruling of the court in overruling a demurrer to her answer presents the principal question for decision. The substance of her answer was that in 1871 she was the wife of David Colglazier, and was possessed of certain moneys and choses in action which were her separate property, and that she appointed her husband to purchase for her the property in controversy. It was averred that, while so acting for her, he did purchase the land for \$2,100, and that he made the entire cash payment of \$100 with her money, and gave his own notes for the deferred payments. He also took the title to himself, without her knowledge or consent. As the notes for the deferred payments came due, she, supposing the title to the land was in her name, furnished the money with which they were all paid off. Upon discovering that the title was in her husband she demanded that the property should be conveyed to her. In pursuance of her demand, and before the plaintiff's judgment was recovered, the conveyance, the making of which is the subject of the suit, was made. The objections, which are

<sup>1</sup> See note at end of case.

made to this answer are that it does not controvert the charge of fraud, nor deny that the deed was made without consideration.

This view does not seem to be sustained. Conceding that there is no direct denial of the imputed fraud, and that it is not stated in terms that a valuable consideration was paid for the conveyance, the conclusion nevertheless follows irresistibly that the deed was neither fraudulent nor without consideration. The husband having undertaken, as the agent of his wife, to purchase the land for her, she having confessedly paid every dollar of the purchase price under the belief that the title was, as it should have been, taken in her name; the imputation that the deed subsequently made to her was fraudulent and without consideration is thereby clearly repelled. One who undertakes, as agent, to purchase land for another, cannot, by taking the title to himself in violation of his trust, defeat the rights of his principal, even though he gives his own notes for the deferred payment. Nor does it alter the case that the agent is the husband of the principal. It may be a question, where an agent, who is employed by a principal to purchase particular property, pays the entire purchase price out of his own means; whether such agent can be compelled to surrender the property so purchased to his principal upon being repaid. There is, however, no question but that the purchase inures to the benefit of the principal in case any part of his money is used to pay the purchase price. *Hidden v. Jordan*, 21 Cal. 93; *Bostford v. Burr*, 2 Johns. Ch. 404; *Lees v. Nuttall*, 1 Rus. & M. 53; *Bartlett v. Pickersgill*, 1 Eden, 515.

Certainly, in this case, where the wife paid the whole purchase price, the mere fact that the husband had given his notes for the deferred payments does not defeat her equitable title. This presents the ordinary case of a wife furnishing the money, and paying for property, which the husband, without her consent, has taken to himself. In such a case he holds it in trust for his wife, and a court of equity will protect it for her, against his creditors. *Goldsberry v. Gentry*, 92 Ind. 193; *Robertson v. Huffman*, 92 Ind. 247; *Bishop v. Lord*, 83 Ind. 67; *Lord v. Bishop*, 101 Ind. 334; *Heberd v. Wines*, 105 Ind. 237; S. C. 4 N. E. Rep. 457. We recognize the principle contended for by appellant, that the trust must have resulted from the facts as they existed at the time the husband took the title, (*Westerfield v. Kimmer*, 82 Ind. 365;) but upon the facts as they existed, the cash payment having been made with her money, a trust resulted in favor of Mrs. Colglazier. Not only was the cash payment made with the wife's money, but the answer very clearly embraces the idea that the husband agreed to purchase the land for her, and take the title in her name, and that she had the means and agreed to pay for it. She subsequently did pay for it, as the notes given by her husband fell due, being all the while in ignorance that the title was not in her. The money which she furnished her husband was not to pay his debt; but, as she believed, to pay for her land, and which in equity was hers in fact.

The answer was clearly sufficient. The facts specially found by the court involve the questions already considered, and need not be further

noticed. In respect to issues, the affirmation of which it was necessary for the appellant to establish, the special finding is silent, and under the rule which has been frequently declared, it must be presumed that the evidence failed to establish such facts.

The motion for a new trial assigns, among other grounds, that the court erred in admitting certain evidence over the appellant's objection. The testimony thus admitted was to the effect that on the day Mrs. Colglazier learned that her husband had taken the title to the land in dispute in his own name, she declared that her money paid for it, and that she wanted it conveyed to her, and demanded that it should be done. The conveyance was made on the same day, in pursuance of her demand. This testimony was competent, as tending to show the consideration upon which the deed was made, and that it was made in pursuance of the demand of Mrs. Colglazier. It was part of the *res gesta*, and so connected with the execution of the deed as to make it competent as part of the transaction. *Sutton v. Reagan*, 5 Blackf. 217; *Kenney v. Phillips*, 91 Ind. 511.

The judgment is affirmed, with costs.

#### NOTE.

Where a married woman gives to her husband money to be invested for her benefit, and accounted for, and he invests it in real estate taken in his own name, the money does not vest in the husband as to such creditors of the husband as became his creditors after the enactment of section 2202 of the Iowa Code, (repealing section 2499 of the Revision,) but constitutes a debt which was a valuable consideration for the conveyance of real estate by the husband to the wife. *Jones v. Brandt*, (Iowa,) 13 N. W. Rep. 310; 8 C. 10 N. W. Rep. 854.

Real estate purchased with money inherited by the wife from the estate of her father, and placed in the hands of her husband, as agent or trustee, for the purpose of having it invested in real estate in the name of and for the wife, will not be held liable for the separate debts of the husband where the money was invested in such real estate after the passage of the act of 1871 relative to the rights of married women, and before the existence of the indebtedness of the husband for the satisfaction of which the property is sought to be applied. *Edgerly v. Gregory*, (Neb.) 22 N. W. Rep. 776.

Where a husband borrows his wife's money to buy real estate, and afterwards, while solvent, purchases other real estate, which, by agreement with each other and the vendor, is to be deeded to the wife in payment of the money already borrowed, but, by mistake, the deed is made to the husband, the wife becomes the real and equitable owner thereof from the time of the purchase, with rights superior to those of the judgment creditors of the husband. *Heberd v. Wines*, (Ind.) 4 N. E. Rep. 457.

In Maryland, property purchased with the wife's money, and held in her husband's name, prior to the adoption of the Code of 1860, will not, in equity, be regarded as held by the husband in trust for the wife. *Flynn v. Walsh*, (Md.) 3 Atl. Rep. 245.

(106 Ind. 475)

#### JOHNSON and others v. JOHNSON.

(*Supreme Court of Indiana*. May 24, 1886.)

**WILL—ATTESTATION—SUBSCRIBING WITNESSES NOT REQUIRED TO SIGN SIMULTANEOUSLY.**

It is not necessary that the subscribing witnesses to a will should sign the attestation clause at the same time.

Appeal from Vigo circuit court.

*McNutt & McNutt* and *Davis & Davis*, for appellant.

*B. E. Rhoads*, *Wm. Mack*, and *Wm. Eglestin*, for appellee.

ELLIOTT, J. The will of Cornelius Johnson, which is here the subject of controversy, was written and signed by the testator in August, 1858, and was then attested by one of the subscribing witnesses, Daniel Budd; but it was not attested by the other subscribing witness, James Ray, until the following December, when he signed as a witness at the testator's request. The contention of the appellant is that the subscribing witnesses should have attested the will at the same time, and this presents the pivotal question in the case. It was the common law until the change made by express statute, in 1837, that it was not necessary that the subscribing witnesses should attest the will at the same time, or in each other's presence. *Jones v. Lake*, 2 Atk. 176, note; *Ellis v. Smith*, 1 Ves. Jr. 11; *White v. British Museum*, 6 Bing. 310; *Wright v. Wright*, 7 Bing. 457; *Jauncey v. Thorne*, 2 Barb. Ch. 40. This rule was changed by a statute enacted in 1837, which requires that the will shall be simultaneously attested by the witnesses. 1 Jarm. Wills, (5th Amer. Ed.) 254. Our statute does not in express terms require that the witnesses shall subscribe the will at the same time, but is similar to the English statute as it existed prior to the change made in 1837; and the well-settled rule that a statute taken from another country shall be deemed to carry with it the construction placed upon it by the courts of that country would seem to make it clear that it is our duty to adopt the construction given the statute by the English courts. If we yield to this principle, then we must hold that it is not necessary that the witnesses should simultaneously subscribe their names to the attesting clause of the will. This view is well supported by authority. Following the decision in *Hoysradt v. Kingman*, 22 N. Y. 372, it was decided in *Barry v. Brown*, 2 Dem. (N. Y.) 309, that "it is an unimportant circumstance that this acknowledgment and publication were made to the witnesses on different occasions, and when they were apart from each other." In speaking of a statute very similar to ours, it was said by the supreme court of Connecticut that "the language of our statute existing when this will was made is explicit, and entirely free from ambiguity. It only requires that all the witnesses shall subscribe their names in the presence of the testator. It would be a strained and unnatural interpretation to extend it so as to require them all to sign in the presence of each other." *Gaylor's Appeal*, 43 Conn. 82. A similar ruling was made by the supreme court of Massachusetts in *Dewey v. Dewey*, 1 Metc. 349, and in *Hogan v. Grosvenor*, 10 Metc. 54. The statute of Wisconsin is essentially the same as ours; and, in speaking of it, the supreme court of that state said:

"It only requires that the will shall be attested and subscribed, in the presence of the testator, by two or more competent witnesses. Rev. St. 650, § 2282. So far as we are aware, the cases on this subject arising under statutes similar to ours (many of which are cited in the brief of counsel for the appellant) uniformly hold that the witnesses need not attest and subscribe the will in the presence of each other. To hold otherwise would be to interpolate a provision in the statute which the legislature has not written there, and which cannot properly be implied from anything that is written." *In re Will of Smith*, 52 Wis. 543; S. C. 8 N. W. Rep. 616, and 9 N. W. Rep. 665.

Without commenting further upon the authorities we refer to some of them, merely remarking that they will be found to fully sustain the rulings made in the cases already referred to by us: *Hoffman v. Hoffman*, 26 Ala. 535; *Flinn v. Owen*, 58 Ill. 111; *Rogers v. Diamond*, 13 Ark. 474; *Cravens v. Faulconer*, 28 Mo. 19; 2 Greenl. Ev. § 676; 1 Redf. Wills, 219.

The appellant relies on two cases in our own reports, *Patterson v. Ransom*, 55 Ind. 402, and *Potts v. Felton*, 70 Ind. 166; but in neither of these cases was the point decided. In the first of these cases there was some discussion of the question, but the case was decided upon another point; the court saying: "If the case turned upon this point, we should feel under the necessity of examining the authorities closely before deciding that such attestation would be a compliance with the statute." In the second case cited the case turned upon an entirely different proposition of law from the one here involved, and, of course, that decision is not of controlling force here.

We fully agree with the appellant's counsel that a will must be executed in conformity to the statute. *Patterson v. Ransom*, *supra*; *Herbert v. Berrier*, 81 Ind. 1, see page 2; *In re Probate of Will of Hewitt*, 91 N. Y. 261. But while we agree with counsel upon this proposition, we cannot concur with them that the will before us was not executed and attested as the statute requires. Judgment affirmed.

(1896 Ind. 471)

FRAZER, Trustee, etc., v. STATE, for Use, etc.

(*Supreme Court of Indiana*. May 24, 1886.)

1. DRAINS—PROCEEDINGS—DESCRIPTION OF PROPERTY ASSESSED.

The following description of property assessed for drainage is sufficient: "S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A.; and S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A."

2. SAME—COMPLAINT TO COLLECT ASSESSMENT—DEMURRER—AUTHORITY OF PLAINTIFF NOT SHOWN.

Where a complaint to collect a drainage assessment shows that the construction of a drain was referred to a certain named drainage commissioner, and another party appears as plaintiff without any allegation showing his authority, it is bad on demurrer for want of sufficient facts.

Appeal from Hamilton circuit court.

*R. Graham*, for appellant.

*Neul & Neul*, for appellee.

Howk, C. J. The first error of which complaint is here made on behalf of the appellant is the overruling of his demurrer to appellee's complaint. The suit was brought on April 17, 1885, to collect certain assessments made in certain drainage proceedings instituted in the circuit court of Hamilton county on January 24, 1883, by one Levi Huber, on certain described real estate alleged to be "lands of the defendant," and to foreclose an alleged lien on such real estate and sell the same, or so much thereof as might be necessary to satisfy the appellee's demand. The real estate mentioned in appellee's complaint was assessed for benefits, in the name of the Franklin Life Insurance Company, a corpora-

tion organized under the laws of this state, whereof the appellant was alleged to be "the appointed, qualified, and acting trustee." With such complaint the appellee filed a copy of the original assessment made by the three commissioners of drainage, to whom Levi Huber's petition for the drain described therein was referred by the court, and by them returned into court as a part of their report. Appellant, Frazer, demurred to appellee's complaint, upon two grounds, namely: (1) That such complaint does not state facts sufficient to constitute a cause of action; and (2) that there was a defect of parties plaintiff, as shown by such complaint.

Under the first ground of demurrer, appellant's counsel first insists that the description of the real estate assessed in the name of the Franklin Life Insurance Company, as found in the copy of the assessment of benefits and damages, which is filed with and made part of the complaint, is wholly insufficient. Counsel says: "There is no intelligent description of any tract of land, and no description given, that would enable an officer, or any other person, to locate any of the several tracts of land." In such assessment the tracts of land assessed in the name of such insurance company are thus described: "S. W.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A.; and S. E.  $\frac{1}{4}$  N. W.  $\frac{1}{4}$  S. 8, T. 19, R. 5, 40 A." In *Jordan Ditching, etc., Ass'n v. Wagoner*, 33 Ind. 50, a similar objection was made to a similar description of land in a drainage assessment, and of such objection the court there said: "It is sufficient to say that the description would be good in a deed or mortgage, the abbreviations being as well understood in this state as the words for which they stand." *Etchison, etc., Ass'n v. Jarrell*, 33 Ind. 131. There is no substance in this objection.

But it is further objected that the description of the lands in such assessment is fatally defective because there is no indication, in the assessment, in what county or state such lands are located. This objection is not well taken. The assessment was made by the commissioners of drainage of Hamilton county, under an order of the circuit court of such county, and it was reported to and was confirmed by such court. The presumption is, therefore, that the lands are located in Hamilton county, and this presumption must prevail and be indulged until the contrary is shown.

Under the second ground of demurrer, appellant's counsel claims, as we understand him, that there is a defect of parties plaintiff because the complaint fails to show that Ingerman, for whose use the suit was brought, was the commissioner of drainage to whom the court referred the construction of the proposed ditch or drain. The complaint shows that the construction of such ditch or drain was referred by the court to one James A. McMullen, who was at the time one of the drainage commissioners of Hamilton county. In the complaint, McMullen is once described as "the predecessor of said Ingerman in said office;" but, further than it may be inferred from this description, it is nowhere averred in the complaint that McMullen had ever ceased to be drainage commissioner, or that the construction of the ditch or drain had ever been re-



ferred to Ingerman by the proper court. Whether this showing in the complaint was or was not sufficient to indicate a defect of parties plaintiff, in this, that McMullen is thereby shown to be the only proper plaintiff, is a question we need not decide. It is certain, we think, that the complaint wholly fails to show any cause or right of action in Ingerman, or any authority in him to bring or maintain this action against the appellant. For this reason the complaint was clearly insufficient, and it was error to overrule appellant's demurrer thereto upon the first ground assigned, namely, the insufficiency of the facts therein stated.

We have held, and correctly so, we think, that a demurrer to a complaint for the fifth statutory cause of demurrer (section 339, Rev. St. 1881) calls in question not only the sufficiency of the facts stated in such complaint to constitute a cause of action, but also the right or authority of the particular plaintiff to institute or maintain a suit upon such cause of action. *Pence v. Aughe*, 101 Ind. 317; *Wilson v. Galey*, 103 Ind. 257; S. C. 2 N. E. Rep. 736; *Sinker v. Floyd*, 104 Ind. 291; S. C. 4 N. E. Rep. 10; *Walker v. Heller*, 104 Ind. 327; S. C. 3 N. E. Rep. 114.

In the case in hand the facts alleged in the complaint showed a statutory right of action in McMullen, with a doubt or suspicion cast thereon by the implication or inference arising from the recital—not the averment—of the fact that McMullen was “the predecessor of said Ingerman in said office.” To have stated a cause of action in the name of the state of Indiana, for the use of Ingerman, commissioner of drainage, and to have shown Ingerman's right and authority to bring and maintain the suit, it ought to have been alleged in the complaint, in addition to the averments already contained therein, under the provisions of sections 4276 and 4277, Rev. St. 1881, as amended by sections 3 and 4 of the amendatory act of March 8, 1883, (Acts 1883, p. 173,) that, before the final completion of such ditch or drain, McMullen's term of office as drainage commissioner had expired; that Ingerman had been appointed by the Hamilton circuit court, and had qualified, as the successor of McMullen in such office; and that such circuit court had thereupon directed Ingerman, as such drainage commissioner, to complete the construction of the proposed ditch. For the want of any such allegations of fact as these in the complaint in this cause, we are of opinion that the demurrer thereto, for the fifth statutory cause of demurrer, ought to have been sustained.

This conclusion renders it unnecessary for us to consider or decide now any question arising under the alleged error of the court in overruling appellant's motion for a new trial.

The judgment is reversed; with costs, and the cause is remanded, with instructions to sustain the demurrer to the complaint.

(106 Ind. 599)

BOARD OF COM'RS OF KNOX CO. v. BARNETT.

(Supreme Court of Indiana. May 24, 1886.)

MUNICIPAL CORPORATIONS—TAX AID TO RAILROADS—BOARD OF COMMISSIONERS.  
*Board of Com'rs of Knox Co. v. Montgomery*, 4 N. E. Rep. 915, approved and followed.

Rehearing denied.

Appeal from Daviess circuit court.

*Cullop, Shaw & Kessinger*, for appellant.

*Reily & Niblack, De Wolf & Chambers*, and *Viehe & Niblack*, for appellee.

Howk, C. J. In this case substantially the same errors are assigned by the appellant as were assigned by the same appellant in *Board, etc., of Knox Co. v. Montgomery*, 6 N. E. Rep. 915 (decided by this court at its last term.) It is manifest, therefore, there can be no material difference between the questions in the case at bar and those which were carefully considered and decided in the case cited. For the reasons there given, we hold that none of the errors assigned in the case now before us authorize or require the reversal of the judgment.

The judgment is affirmed, with costs.

(106 Ind. 478)

REUBELT v. SCHOOL TOWN OF NOBLESVILLE.

(*Supreme Court of Indiana. May 24, 1886.*)

SCHOOLS AND SCHOOL-DISTRICTS—BOARD OF SCHOOL TRUSTEES—CONTINUING BODY—CONTRACT—POWER TO BIND SCHOOL CORPORATION.

The board of school trustees, being a continuing body, may bind the school corporation by a contract employing a superintendent of schools, although the election of a new member may intervene before the performance of the contract.

Appeal from Hamilton circuit court.

*Stephenson & Fertig*, for appellant.

*Christian & Christian* and *Kane & Davis*, for appellee.

ZOLLARS, J. The school trustees of the town of Noblesville, in session on the fourth day of May, 1885, passed an order, which was entered of record, employing appellant as superintendent and teacher of the Noblesville school for the school year commencing on the fourteenth day of September, 1885, for the sum of \$950 for the year. In pursuance of that action a written contract was drawn up and signed by the parties. In June following, a new trustee was elected in place of the one in office when the contract was made, and whose term had expired. After the election of the new member, and the reorganization, as required by the statute, the board, as thus reorganized, repudiated the action of the board in May, and the contract with appellant in pursuance thereof, as illegal and void; passed an order employing another superintendent; and gave notice to appellant that he should not act as superintendent and teacher in the school, and henceforth refused to recognize him as such. This action by appellant is to recover damages resulting from the breach of his contract with the board. The case in behalf of appellee is rested upon the following section, Rev. St. 1881:

"Sec. 4439. *School Trustees in Cities and Towns.* (5) The common council of each city and the board of trustees of each incorporated town of this state shall, at their first regular meeting in the month of June, elect three school trustees, who shall hold their office one, two, and three years, respectively, as said trustees shall determine by lot at the time of their organi-

zation,) and annually thereafter shall elect one school trustee, who shall hold his office for three years. Said trustees shall constitute the school board of the city or town; and, before entering upon the duties of their office, shall take an oath faithfully to discharge the duties of the same. They shall meet within five days after their election, and organize by electing one of their number as president, one as secretary, and one as treasurer. The treasurer, before entering upon the duties of his office, shall execute a bond, to the acceptance of the county auditor, conditioned as in ordinary official bonds, with at least two sufficient freehold sureties, who shall not be members of said board, in a sum not less than double the amount of money which may come into his hands within any one year, by virtue of his office. The president and secretary shall each give bond, with like sureties, to be approved, by the county auditor, in any sum not less than one-third of the treasurer's bond. All vacancies that may occur in said board of school trustees shall be filled by the common council of the city, or board of trustees of the town; but such election to fill a vacancy shall only be for the unexpired term. The board of school trustees shall each year, within five days after the annual election of a member, reorganize their board and execute their respective bonds for the ensuing year. Said trustees shall receive for their services such compensation as the common council of the city or the board of trustees of the town may deem just, which compensation shall be paid from the special school revenue of the city or town."

It is contended in behalf of appellee that considerations of public policy, and a proper construction of the above statute, require a holding that the contract was and is invalid for the reason that the board of school trustees, as then constituted, had no authority to employ a superintendent, and thereby bind the school corporation, and forestall the board as constituted after the election of the new member. This contention is based upon that part of the above section of the statute which requires that "the board of trustees shall each year, within five days after the annual election of a member, reorganize their board, and execute their respective bonds for the ensuing year." The reorganization of the board, as required by the above statute, is not, in legal contemplation, the creation of a new board, as distinguished from an old board. The board of school trustees is a continuing body, just as a common council of a city is a continuing body. The members change with the expiration of terms and the election of new members, but together the members constitute the board of school trustees, which represents the school corporation. The chief purpose of electing one of the members each year was to make the body a continuing body. Three members constitute the board. There are three offices within the body, to be filled, one by each member. When a member goes out, there is a vacancy; and, when a new member comes in, of necessity there must be a new election. The statute provides, in effect, that the terms of each office within the board shall be but one year; and hence, when a new member comes in, the election is to fill all three of the offices. The members so elected must each give a bond. This election is called the reorganization, but manifestly the legal entirety of the board is not thereby changed.

The question, therefore, is not as to the authority of one board to bind the corporation by a contract to be performed after that board shall

have ceased to exist, and another shall have been organized, but whether the board of school trustees can bind the school corporation by contracts which are not to be performed until after the time when a new member of the board is to be elected. That such contracts of the school board bind the corporation generally, there can be no question. If this were not so, contracts for school furniture and school-houses would come to an end with the expiration of the term of one of the trustees. The authority of the board of school trustees to employ teachers and a superintendent of the schools in the town or city is given in general terms, just as the authority to make other contracts is given. "The trustees shall take charge of the educational affairs of their respective towns and cities. They shall employ teachers," etc. Section 4444, Rev. St. 1881. "The school trustees of incorporated towns and cities shall have power to employ a superintendent for their schools, \* \* \* and to prescribe his duties, and to direct in the discharge of the same." Section 4445, Rev. St. 1881.

There is nothing in this grant of power to employ teachers and a superintendent which in any way limits the authority of the board of trustees to contracts that are to be performed during the existence of any particular organization of that body. The simple fact that reorganizations are provided for, we think, clearly does not impose a limit upon the general grant. We are constrained, therefore, to hold that the contract in suit is valid and binding upon the corporation. This conclusion is fully supported by the case of *Wait v. Ray*, 67 N. Y. 36.

It may be that instances will occur when the authority to employ teachers and superintendents in advance of the incoming of a new member of the board may be abused, but the possibility is not very great, as but one member goes out at a time. But the fact that the authority may be abused, is not a sufficient reason for holding that it does not exist. On the other hand, desirable teachers and superintendents might be lost to the schools if the board were not authorized to employ them until after the election in June.

Some Illinois cases are cited in support of appellee's contention. It was held in those cases that the school directors could not, in advance of the election of a new member, employ teachers to teach the schools subsequent to such election. Those cases, however, rest upon the statutes of that state, which are materially different from ours. There the beginning of the school year seems to have been fixed by statute. The directors were elected by the people at a stated time. They reported to the people at the annual election, and at that election the people determined what branches should be taught in the schools for the coming year. Upon a consideration of the whole statute, and in view of the fact that the directors could not intelligently employ a teacher until it should be known what branches the people, at the election, might determine to have taught during the school year commencing with the election, it was held that the teachers for that year should be, and could only be, employed by the directors after the addition of the new member. *Stevenson v. School Directors, etc.*, 87 Ill. 255.

The judgment is reversed at the cost of appellee, and the cause is remanded, with instructions to the court below to overrule the demurrer to the complaint.

(106 Ind. 415)

**MILLER, Treasurer, v. STATE et rel. CITY OF INDIANAPOLIS.**

(*Supreme Court of Indiana. May 24, 1886.*)

**1. STATUTES—CONSTRUCTION—INTENTION GOVERNS.**

The intention of the legislature is chiefly to be considered in the construction of statutes.

**2. COUNTIES—OFFICERS—TREASURER—CITIES OF 70,000 INHABITANTS.**

Under the act of February 21, 1885, (Acts 1885, p. 18,) abolishing the office of city treasurer in cities of over 70,000 population, the treasurer of a county in which such a city is situated must, in general, perform the same duties as a city treasurer; and, among other things, he must furnish to the city clerk a monthly statement of receipts and disbursements on account of the city, as required of city treasurers under section 3083, Rev. St. 1881, showing the balance in his hands belonging to the city; and, when required by the proper city authorities, he must render a full account of receipts and disbursements of city money, and the general condition of the city funds in his hands as county treasurer.

Appeal from Marion superior court.

*Baker, Hord & Hendricks and Duncan, Smith & Wilson, for appellant.*

*Wm. L. Taylor and F. Winter, for appellee.*

Howk, C. J. On the twenty-second day of February, 1886, appellee's relator, the city of Indianapolis, filed in the clerk's office of the Marion superior court its verified complaint, wherein it alleged that it was, and for many years had been, an incorporated city, organized and existing under the general laws of this state for the incorporation of cities; that on and before the first day of January, 1886, appellant, Miller, was, and since had been, the duly elected, qualified, and acting treasurer of Marion county; that pursuant to law, on such first day of January, 1886, the office of treasurer of such city of Indianapolis became and was abolished, and the duties of the theretofore city treasurer were, so far as possible, transferred to the treasurer of Marion county; that on such first day of January, 1886, Isaac N. Pattison, as treasurer of such city of Indianapolis, retired from such office, and at the same time, pursuant to law, delivered and turned over to appellant, Miller, as such county treasurer, all the funds, bonds, securities, and other property then in his possession as such city treasurer; that on such last-named day such retiring city treasurer also delivered to appellant, as such county treasurer, and as the successor of such city treasurer, pursuant to law, the tax duplicate and delinquent tax-lists of and for such city of Indianapolis, theretofore duly prepared and certified, for the purpose of having the appellant, as such county treasurer, collect the taxes and penalties thereon, and do whatever else was required of him by law; and that appellant, as such county treasurer, receipted therefor to such retiring city treasurer, which receipt was on the same day filed with the city clerk of such city of Indianapolis. And appellee's relator further averred that the ap-

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pellant, as such county treasurer, on such last-named day, for and on behalf of such city, proceeded to collect, and had since been collecting, for such relator, the taxes, penalties, and other charges contained in such city tax duplicate and delinquent tax-lists so received by him, and had on every day since collected thereon large sums of money for the use and benefit of such city, the exact amount whereof the relator did not know and could not give; that it was the duty of appellant, as such county treasurer, to receive all moneys paid to such city for licenses and special privileges, and credit such city therewith; that, among other duties required of appellant by virtue of his office as treasurer of Marion county, and as the successor in office of such retiring treasurer of the city of Indianapolis, under section 33 of the general law of March 14, 1867, for the incorporation of cities, (section 3083, Rev. St. 1881,) and section 2 of an act entitled "An act concerning taxation for city and school purposes in cities containing a population of over seventy thousand, as shown by the last census of the United States, to abolish the offices of city assessor and city treasurer in such cities, and provide for the discharge of the duties of such offices, and repealing laws in conflict therewith," approved February 21, 1885, and other laws, was the duty to prepare, and deliver to the clerk of such city of Indianapolis on the last day of each month, a statement of all receipts and disbursements made by appellant on account of such city, during such month, showing the balance in his hands, as such treasurer, belonging to each fund, general and special of such city, and to deliver to such city clerk all the city orders redeemed and canceled by appellant on account of such city, during the same period, taking the city clerk's receipt therefor. But appellee's relator averred that appellant, Miller, notwithstanding his plain duty in the premises, and the great necessity there was for the relator's officers to know the condition of the finances of such city, had failed and refused to make any report to any one, in any manner whatsoever, as to the moneys by appellant so collected on the tax duplicate and delinquent tax-lists of such city, and belonging to such relator, either on the last day of January, 1886, or at any prior or subsequent time, greatly to the injury of such relator; and that appellant wrongfully refused to make such report, although requested so to do by resolution adopted by the common council and board of aldermen of such city, and served on such appellant by delivering to him a certified copy thereof. Wherefore, etc.

Appellant voluntarily appeared, and, waiving the issue and service of an alternative writ of mandate, demurred to the relator's verified complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. This demurrer was overruled by the court at special term. Appellant excepted to this ruling, and declined to answer over, and thereupon judgment was rendered at special term awarding the issue of a peremptory writ of mandate against the appellant, as prayed for in the relator's complaint. On appeal, the judgment of the court at special term was in all things affirmed by the general term; and from the judgment of the court in general term this appeal is now here prosecuted.

The question for our decision, as it was of the general term, may be

thus stated: Did the court at special term err in overruling appellant's demurrer to the relator's verified complaint, and in awarding thereon a peremptory writ of mandate against him, as prayed for in such complaint.

The city of Indianapolis, the appellee's relator, is, and has been for more than 19 years past, an incorporated city, organized and existing under the general law of this state "to provide for the incorporation of cities, prescribing their powers and rights, and the manner in which they shall exercise the same, and to regulate such other matters as properly pertain thereto," approved March 14, 1867. Acts 1867, p. 33 *et seq.* Since the approval of such general law several sections thereof have been, at different times, specially amended by the general assembly. In addition to these amendments the legislature has from time to time enacted other laws, general in form, but, by reason of their provisions, as much local to the city of Indianapolis as if such city had been expressly named therein; which other laws, notwithstanding the positive inhibition of our state constitution against the passage of "local or special" laws, have been upheld by our decisions as constitutional and valid legislation, and must be regarded as amendatory of or supplemental to the general law of this state of March 14, 1867, "for the incorporation of cities," in so far, at least, as such city of Indianapolis is concerned. *Groesch v. State*, 42 Ind. 547; *Hanlon v. Board, etc.*, 53 Ind. 123; *McLaughlin v. Citizens' Building, etc.*, 62 Ind. 264; *Heanley v. State*, 74 Ind. 99.

In section 8 of such general law of March 14, 1867, as such section was amended by an act approved March 6, 1877, (section 3043, Rev. St. 1881,) it is provided that the officers of a city incorporated under such general law shall consist (among others) of an assessor and treasurer, whose terms of office shall commence on the first Monday in September, following the general election in May, and continue for two years. Section 33 of such general law of March 14, 1867, "for the incorporation of cities," (section 3083, Rev. St. 1881,) provides as follows:

"The treasurer shall, on the last day of each month, furnish to the clerk a statement of all the receipts and disbursements made by him during the month, and the balance then in the treasury belonging to each fund, general and special, and also deliver to him all the orders redeemed and canceled by him during the same period, taking the clerk's receipt therefor; which statement, with the orders redeemed, the clerk shall lay before the common council at its next meeting, to be disposed of as the common council may direct. The treasurer shall, at least fifteen days before any annual election, and at all other times when so required by the common council, render a full account of the receipts and expenditures for the current year, and the general condition of the treasury. He shall also, at his own peril, keep the moneys of the city safely."

Under section 31 of such general law (section 3079, Rev. St. 1881) the treasurer of any such city "shall receive all moneys, notes, bonds, and orders belonging to the city, and keep an accurate account of the amounts received and paid out by him." In section 32 of such general law (section 3080, Rev. St. 1881) it is provided that "all moneys due to or collected for such city, on any account whatever, shall be paid to the

city treasurer. \* \* \* He shall receive city orders that are due, in payment of any debt, tax, or assessment due such city; and when an order is received by him for any debt, tax, or assessment due such city, or otherwise paid or redeemed, he shall cancel the same by writing or stamping, upon the face of such order, the word 'redeemed,' and the date of redemption; and such order shall never again be put in circulation." By section 1 of "An act in relation to orders issued by cities upon their treasuries, and providing for the presentation, redemption, and order of payment of the same," approved March 11, 1875, and in force since August 24, 1875, (section 3081, Rev. St. 1881,) it is provided as follows:

"The city treasurer shall pay all orders issued by the city of which he is such treasurer, when presented, whether indorsed or not, as hereinafter stated in this act, if there be money in the treasury appropriated for that purpose sufficient to pay the same. If there be not money enough thus to pay such orders, he shall write or stamp on the back thereof, over his name, the date of such presentation, and note the same 'indorsed,' in a register of orders to be provided for that purpose; and such orders shall be entitled thenceforth to draw legal interest until there shall be money on hand sufficient to pay the same."

In section 2 of the aforesaid act of March 11, 1875, (section 3082, Rev. St. 1881,) it is further provided "that city orders shall be received in payment of taxes for general purposes, and for all claims and demands due or belonging to the general fund of the city, without regard to priority of presentation or date of issue; but the treasurer shall not pay any balance thereon over and above the amount of such tax, claim, or demand, when there are outstanding orders unpaid for want of funds." By section 4 of "An act regulating the indebtedness of cities having a voting population of over sixteen thousand, as shown by the votes cast for governor at the last preceding election," etc., approved February 13, 1877, (section 3123, Rev. St. 1881,) which applies to the city of Indianapolis, and to no other city, it is enacted as follows:

"No warrant or order for money shall be drawn upon the treasurer of any such city after May 1, 1877, if at the time there be no money in the treasury; and to that end it shall be the duty of the city treasurer to keep the clerk, auditor, or other officer authorized to draw orders or warrants, informed when there is no money in the treasury; and, failing so to do, he shall be liable on his official bond for the amount of orders or warrants drawn during such failure, with interest thereon, to the person in whose favor such order or warrant was drawn."

Such are some of the provisions of the general law of this state for the incorporation of cities, under which the city of Indianapolis was and is organized, and has its corporate existence, and of the laws since passed amendatory of and supplementary to such general law, which prescribed and defined some of the duties of the treasurer of such city, in his relations to the legislative authorities of the city of Indianapolis, before and at the time of the taking effect of the act of February 21, 1885, mentioned in the relator's verified complaint. That act, as its title clearly indicates, is a general law for local purposes. In terms, the act applies



to "all cities containing a population of over seventy thousand, as shown by the last census of the United States;" but, as no other city is shown by such last census to contain the requisite population, such act is, and always will be, in the absence of further legislation, local to the city of Indianapolis. In the first section of such act it is plainly provided that on and after the expiration of the term of incumbents, at the taking effect of the act, of the offices of city assessor and city treasurer, in all cities containing a population of over seventy thousand, as shown by the last census of the United States, "the said offices shall be abolished." The first sentence of section 2 of such act reads as follows:

"The treasurer of the county in which any such city is situated shall thereafter perform all the duties which, by law or the ordinances of such city, were required to be performed by the treasurer thereof, except as herein otherwise provided, in the same manner and with like effect as such duties were required to be performed by such city treasurer."

In the relator's verified complaint, the substance of which we have heretofore given in this opinion, it is claimed that, under and by force of the provisions last quoted of section 2 of the above-entitled act of February 21, 1885, and of section 3083, Rev. St. 1881, heretofore quoted herein, it became and was the duty of the appellant, as treasurer of the county of Marion, wherein such city of Indianapolis is situate, to prepare, and furnish to the clerk of such city on the last day of each month, a statement of all receipts and disbursements made by such treasurer, on account of such city, during such month, showing the balance in his hands, as such treasurer, belonging to each fund, general and special, of such city, and to deliver to such city clerk all the city orders redeemed and canceled by him on account of such city during the same period, taking therefor the city clerk's receipt.

On the other hand, while conceding that appellant, as county treasurer, is required by law to furnish the city clerk, on the last day of each month, a statement of all receipts from sources other than taxes, and disbursements thereof made by him, on account of such city, during the month, showing the balance in his hands, etc., his counsel contend very earnestly, as we understand them, that, under and by force of the provisions of the aforesaid act of February 21, 1885, and especially of section 14 of such act, he is not required to include in such monthly statement his receipts of city taxes, current or delinquent, during the month, or to make any disbursements out of his receipts of such city taxes on account of such city until after making his annual settlement with the county auditor on the third Monday of April. In such section 14 it is provided in substance that, immediately upon such settlement being made, the auditor shall make a statement showing the aggregate amounts, separately, of all current and delinquent taxes for city purposes, including, with the delinquent taxes, the penalties and interest thereon, which appear upon the tax duplicate for such city; the amount of each class of such taxes, penalty, and interest that remains uncollected at the time of such settlement; and the amount of each class, including penalty and interest, that has been collected by such treasurer; and that

a copy of such statement shall be delivered by the county auditor to the city clerk of such city, who shall thereupon charge the amount shown thereby to have been collected to such "county treasurer as cash in his hands."

There is much force and plausibility in the contention and argument of appellant's counsel, but we are not inclined to adopt their construction of the provisions of the aforesaid act of February 21, 1885. The primary and fundamental question in the construction of all statutory provisions is this: What did the legislature intend in the enactment of the statute?

In *Clare v. State*; 68 Ind. 17, the court said:

"The true rule is, and always has been, as recognized in many decisions of this court, to make the legislative intention, in the enactment of the particular statute, the chief guide of the court in its interpretation and construction. If the object, purpose, and intention of the legislature, in the enactment of the particular statute, can be fairly ascertained and arrived at, then it is the duty of the court, \* \* \* if possible, to give force and effect to the evident reason, spirit, and intention of the law. \* \* \* It has been well said that it is the duty of courts to execute all laws according to their true intent and meaning; and that intent, when collected from the whole and every part of a statute, must prevail even over the literal import of terms, and control the strict letter of the law, when the latter would lead to possible injustice and contradictions."

The main purpose of the above-entitled act of February 21, 1885, as is apparent from its provisions, was to diminish the expenses of assessing and collecting municipal taxes in our largest and most populous city, by abolishing unnecessary offices. But surely it never was the intention of the legislature to put the municipal taxes, when collected, out of the reach of the proper city authorities, or to make the city, with its own money in the hands of the county treasurer, a borrower of the funds needed to maintain its fire department, or for police or sanitary purposes, or to repair or cleanse its streets and alleys, until such treasurer shall have his annual settlement with the county auditor. The legislature never contemplated any such results as these, we are well assured, in the enactment of the statute; and to give the act the construction contended for by appellant's counsel would obstruct the improvement of the city, and lead not only to possible but to actual injustice. Such a construction of the act is to be avoided, and we think is not required by any of its provisions.

It is said, however, that, upon the annual settlement of the county treasurer with the county auditor, the statute provides that the city clerk, upon being furnished by such auditor with a statement of the amount of city taxes, penalty, and interest that has been collected by such treasurer shall charge the amount to the county treasurer "as cash in his hands." That is true. That is the debit side of the county treasurer's account, we may suppose, on the books of the city. The law is silent in regard to the credits which such county treasurer shall receive on the credit side of such account, but, doubtless, he will get proper credits on such account for the amount of all city orders redeemed and canceled

by him on account of city taxes, or with the moneys received by him for such taxes; so that, at the same time he is charged by the city clerk with the amount of city taxes collected by him "as cash in his hands," he may possibly be prepared to balance such account by proper credits for disbursements made by him in the redemption and cancellation of city orders out of moneys collected by him for city taxes.

With respect to the relation of the county treasurer to the city authorities, in the discharge of the duties of such treasurer under the aforesaid act of February 21, 1885, we are of opinion that the first sentence, above quoted, of section 2 of such act, clearly enjoins upon and requires of him the performance of the same duties theretofore performed by the city treasurer under the law or ordinances of such city, "in the same manner and with like effect" as such city treasurer had been previously required to perform such duties. He must make and furnish the city clerk the monthly statement of all his receipts and disbursements, on account of the city, during the month, as required of city treasurers by section 3083, *supra*, showing the balance then in his hands, as county treasurer, belonging to the city funds, from whatever sources such funds may be derived; and, when so required by the proper city authorities, he must render to them a full account of his receipts and disbursements of moneys belonging to the city, and the general condition of the funds of such city in his hands as county treasurer.

We conclude, therefore, that the court at special term committed no error in overruling the appellant's demurrer to the relator's verified complaint, or in awarding a peremptory writ of mandate, as prayed for in such complaint. The judgment is affirmed, with costs.

(107 Ind. 320)

LOUISVILLE, N. A. & C. RY. CO. v. WORLEY.<sup>1</sup>

(*Supreme Court of Indiana.* May 25, 1886.)

1. PLEADING—DISMISSAL OF PART OF COMPLAINT—OBJECTIONS TO RULING.

A plaintiff may, at any time before the jury retire, dismiss part of his complaint; and a general objection to the offer to dismiss will present no available question on appeal; for, if the dismissal leaves the complaint indefinite, the defendants should move to make it more specific.

2. TRIAL—INTERROGATORIES TO JURY—INSTRUCTIONS.

It is not available error to refuse to submit interrogatories to a jury, unless they are accompanied by an instruction directing the jury to answer them in the event that they elect to return a general verdict.

3. SAME—CONCLUSIONS OF LAW.

Interrogatories to a jury must ask for statements of facts, and not conclusions of law.

Appeal from Monroe circuit court.

Geo. W. Friedley and Eli K. Miller, for appellant.

East & East, for appellee.

ELLIOTT, J. The appellee's complaint is in one paragraph, and, as originally drawn, sought a recovery for 13 mules killed by one of the appellant's trains. On the trial it appeared that the mules were killed

<sup>1</sup> Rehearing denied.

by different trains, and at different times, whereupon the appellee dismissed as to the mules killed by the north-bound train, and of the ruling permitting this to be done appellant complains. There can be no doubt, under our statute and our decisions, that a plaintiff may dismiss his action at any time before the jury retire. This general doctrine we do not understand the appellant's counsel to combat; but, as we understand them, their contention is that the court ought to have required the appellee to particularly designate the mules for which a recovery was sought. We do not think the question now argued was so presented to the trial court as to make it available on appeal. A general objection only was made to the plaintiff's motion to dismiss the action as to all the mules killed by the north-bound train. The evidence showed very clearly and definitely that mules were killed by the south-bound train, for which a recovery was asked, and the trial court and the parties were therefore fully advised as to the particular animals for which a recovery was sought. Had the appellant desired that the complaint should be made more specific, the appropriate remedy was a motion to that effect, and not a general objection to the appellee's offer to dismiss. The principle runs through all our decisions that objections, in order to be available, must be specifically made in the trial court, and that mere general objections will not be available on appeal.

The appellant submitted to the court interrogatories, and asked that they should be submitted to the jury; but the court, instead of submitting those asked by the appellant, prepared and submitted interrogatories of its own. The prayer for the submission of the interrogatories to the jury was not a proper one, for the court was not asked to instruct the jury to answer the interrogatories in the event that they returned a general verdict. *Taylor v. Burk*, 91 Ind. 252. We have, however, examined the interrogatories, and find that those propounded by the court substantially covered those asked by the appellant, so far as they were competent and material. Our decisions are that it is proper for the trial court to revise interrogatories submitted by the parties, and to prepare and propound for itself proper interrogatories to the jury. *Killian v. Eigenmann*, 57 Ind. 480.

The court submitted this interrogatory: "Could the defendant have lawfully fenced its track at the point where said mules entered upon the track?" It is contended that this interrogatory is not a proper one, as it calls upon the jury to decide a question of law, and not of fact, and thus casts upon them a duty that the court should perform. We can perceive no answer to this contention, and appellee's counsel have not suggested any. Our statute makes it the duty of the court to submit to the jury only questions of fact, and the question here submitted is, it seems to us, one of law. The purpose of addressing interrogatories to juries is to elicit decisions upon matters of fact, and not to ask them to state conclusions of law. Whether the track of a railroad company is or is not lawfully fenced, is a mere conclusion to be deduced from the facts. We have repeatedly decided that parties are entitled, in special verdicts and in special findings, to a statement of the specific facts, and that state-

ments of mere conclusions will not be sufficient. *Pittsburgh, etc., Co. v. Spencer*, 98 Ind. 186, and authorities cited; *Louisville, etc., Ry. Co. v. Balch*, 4 N. E. Rep. 288; *Indianapolis, etc., Co. v. Bush*, 101 Ind. 582; *Pittsburgh, etc., Co. v. Adams*, 5 N. E. Rep. 187. That principle governs here. The jury should be required to state facts, and not conclusions of law, and the answer to the question propounded in this instance could be, as it was, nothing more than the statement of the jury's conclusion as to whether the railroad company could lawfully fence its track at the place where the mules entered upon it. Whether it could lawfully fence at that place depended upon the character and surroundings, and when these are fixed the question whether it could be lawfully fenced becomes one of law for the decision of the court. There are many facts which make it improper for a railroad company to fence; as, for instance, the fact that to fence would interfere with the discharge of the company's duty to the public, or would make the place dangerous to its servants; and it is for the jury to state the facts, leaving the law to be applied by the court to the facts found by the jury.

It was held in the case of *Jeffersonville, etc., Co. v. Underhill*, 40 Ind. 229, that an allegation that the railroad was "not fenced according to law" was the statement of a legal conclusion, and this general principle is declared in many cases. *Indianapolis, etc., Co. v. Bishop*, 29 Ind. 202; *Indianapolis, etc., Co. v. Robinson*, 35 Ind. 380; *Pittsburgh, etc., Co. v. Brown*, 44 Ind. 409; *Singer Manufg Co. v. Effinger*, 79 Ind. 264.

We think it clear, on principle and authority, that the court erred in submitting the interrogatory under immediate mention to the jury.

In view of the fact that the court rejected interrogatories submitted by the appellant, and undertook to substitute those of its own, the error must be regarded as a material one. It would defeat the manifest purpose of the statute to allow conclusions of law, rather than statements of facts, to be made by the jury, for the purpose of the statute is to get upon record the specific and material facts in the form of answers to interrogatories. Judgment reversed.

(106 Ind. 549)

#### BRYANT v. STATE.

(*Supreme Court of Indiana. May 25, 1886.*)

#### 1. CRIMINAL LAW—INDICTMENT—MOTION TO QUASH.

Where one of several counts in an indictment is good, it is not error to overrule a motion to quash the entire indictment.

#### 2. SAME—APPEAL—EVIDENCE—REBUTTAL—WHEN NO REVERSAL FOR ERROR IN TIME OF ADMISSION.

Although evidence that should have been introduced in chief is admitted in rebuttal, it is not such error as will justify a reversal.

#### 8. HOMICIDE—SELF-DEFENSE—EXCUSABLE HOMICIDE—INSTRUCTION.

An instruction that, to constitute justifiable or excusable homicide on the ground of self-defense, "the killing must be done under a well-founded belief that it was absolutely necessary for the defendant to kill the deceased to save himself from death, or to save himself from great bodily harm," is erroneous.

Appeal from Morgan circuit court.

*Grubbs & Parks* and *John P. Allee*, for appellant.

*E. W. McCord*, *Adams & Newby*, and *N. A. Whittaker*, for appellee.

Howk, C. J. The indictment in this case charged the appellant with the unlawful homicide of Ezra Shackelford. The indictment contained four counts, whereby appellant was charged in the first count with murder in the first degree, in the second count with murder in the second degree, in the third count with voluntary manslaughter, and in the fourth count with involuntary manslaughter, in the killing of Ezra Shackelford. Upon appellant's arraignment and plea of not guilty, the issues joined were tried by a jury, and a verdict was returned finding him guilty of voluntary manslaughter, as charged in the third count of the indictment, and assessing his punishment at imprisonment in the state's prison for the period of eight years. Over appellant's motions for a new trial and in arrest, the court rendered judgment against him upon and in accordance with the verdict, and from this judgment he now here prosecutes this appeal.

In this court errors are properly assigned by appellant, which call in question the overruling of his motion to quash the indictment; (2) his motion for a new trial; and (3) his motion in arrest of judgment.

Under the first error assigned appellant's counsel insist in argument that the third count of the indictment, upon which alone the verdict of the jury and the judgment of the trial court is rested, is clearly insufficient. We do not think that this question is properly presented for our decision, by the record of this cause, and appellant's assignment of errors thereon. Appellant did not move the court to quash the third count of the indictment separately from the other counts, but his only motion was to quash the indictment as an entirety. Upon this motion there was no error in the court's refusal to quash the indictment if either of the other counts was sufficient, even though the third count of the indictment might appear to be hopelessly bad. We may add, however, that although the third count of the indictment could hardly be regarded as a model of good criminal pleading, yet if the question of its sufficiency to withstand appellant's motion to quash, or his motion in arrest, were properly presented for our decision, we would be constrained to hold that the court committed no error in overruling either of such motions.

Under the alleged error of the court in overruling appellant's motion for a new trial, his counsel first complain of the admission by the court, over proper objections and exceptions, of certain testimony offered by the state in rebuttal, in relation to statements, declarations, admissions, and sworn testimony of the appellant as to the transaction upon which the indictment is predicated. It is conceded by counsel that the testimony so offered and admitted, would have been relevant and competent if it had been offered by the state in support of its case in chief; but they earnestly insist that the trial court committed a material error against the appellant in the admission of such evidence when offered in rebuttal. This error, however, is not such a one as would authorize or

justify the reversal of the judgment. *Merrick v. State*, 63 Ind. 327; *Case v. Grim*, 77 Ind. 565; *Nave v. Flack*, 90 Ind. 205.

Some other rulings of the trial court in the admission of evidence are complained of here by appellant's counsel; but, in the view we take of this case, it is unnecessary for us now to consider these rulings.

In his motion for a new trial, appellant assigned as one of the causes that the court had erred in giving the jury certain instructions. One of these instructions reads as follows:

"Past threats or conduct of the deceased against the defendant, however violent, will not excuse homicide, without sufficient present demonstration on the part of the deceased to authorize the belief on the part of the defendant that the deadly purpose then existed on the part of the deceased to do the defendant great bodily harm, and the fear that it will then be executed. The danger must be present, apparent, and imminent, from the defendant's standpoint at the time; and the killing must be done under a well-founded belief that it was absolutely necessary for the defendant to kill the deceased to save himself from death, or to save himself from great bodily harm."

The instruction quoted is in no manner qualified, controlled, rendered nugatory, or withdrawn by any other instruction given the jury. Whatever may be said in favor or defense of such instruction, it is very certain that it does not express the law of this state on the subject of the instruction; but, on the contrary, it is directly at variance and in conflict with a number of the decisions of this court. Appellant's counsel complain chiefly, in their brief of this cause, of the law attempted to be declared by the trial court, and made applicable to the case in hand, in the last sentence of the instruction quoted. Confining what we have to say in relation to the instruction to the complaint and argument of appellant's counsel, the first point to be observed is that the court has attempted to give the jury the law in relation to justifiable or excusable homicide, and to apply such law to the case under consideration, in a single, well-rounded sentence. That the court has failed in such attempt will be readily apparent to any one who will compare its instruction with what has been said by this court in a number of its reported decisions. Thus the court instructed the jury in the cause now before us that "the killing must be done under a well-founded belief," etc. In *Hicks v. State*, 51 Ind. 407, in relation to the defendant's effort to justify the homicide for which he was prosecuted, upon the ground of self-defense, it appeared that the trial court had instructed the jury as follows:

"The jury should find, in behalf of the defendant, \* \* \* that the killing was done at a time when the defendant believed, and had reasonable cause to believe, that by the homicide alone could her own safety be secured."

In commenting on such instruction, and the error of the court predicated thereon, this court there said:

"The theory of self-defense is that the party assailed has the right to repel force by force, and he need not believe that his safety requires him to kill his adversary in order to give him the right to make use of force for that purpose. When his life is in danger, or he is in danger of great bodily harm, or when, from the acts of the assailant, he believes, and has reasonable ground to believe, that he is in danger of losing his life, or receiving great bodily harm from his ad-

versary, the right to defend himself from such danger, or apprehended danger, may be exercised by him, and he may use it to any extent which is reasonably necessary. He need not believe that he can only defend himself by taking the life of his assailant. If the death of his assailant results from the reasonable defense of himself, he is excusable, whether he intended that consequence or not, or whether he believed such result was necessary or not."

The doctrine declared in the case cited is the recognized law of this state in relation to justifiable or excusable homicide on the ground of self-defense; and it has been fully indorsed, approved, and acted upon in many of the more recent decisions of this court. *Wall v. State*, 51 Ind. 453; *Runyan v. State*, 57 Ind. 80; *West v. State*, 59 Ind. 113; *Presser v. State*, 77 Ind. 274; *Batten v. State*, 80 Ind. 394; *McDermott v. State*, 89 Ind. 187; *Story v. State*, 99 Ind. 413. The doctrine of the cases cited is clearly in conflict with the instruction quoted, and therefore it must be held, we think, that such instruction does not contain a correct statement of the law in relation to justifiable or excusable homicide on the ground of self-defense, on which ground appellant rested his defense herein.

Other instructions of the court to the jury are complained of as erroneous by appellant's counsel; but, as the judgment must be reversed for the error of law already considered, in giving the jury the instruction quoted, it is certainly unnecessary, and would be unprofitable, we think, for us to consider now and pass upon such other instructions. They are not likely to be given again on a new trial of this cause.

The case against appellant, as made by the evidence appearing in the record, is not by any means a satisfactory one. From our reading of such evidence, without knowledge of any of the witnesses, or any opportunity to see them on the witness stand, or to hear them testify, it has seemed to us that the evidence fails to show that appellant, in killing Ezra Shackelford, was or is guilty of any degree of criminal homicide. Recognizing the fact, however, so often adverted to in our decisions, that the jury and the trial court have opportunities and facilities which we cannot have for determining the probable truthfulness and value of oral testimony, and the credibility of the several witnesses, we forbear to comment further at this time on the case made by the evidence.

For the error of the court in its instruction heretofore quoted, and fully considered in this opinion, it must be held, as we now hold, that appellant's motion for a new trial ought to have been sustained. The judgment is reversed, and the cause is remanded, with instructions to sustain the motion for a new trial. The clerk of this court will issue the proper notice to the warden of the state's prison to return the defendant to the sheriff of Morgan county.

(106 Ind. 501)

#### BOARD OF COM'RS OF FULTON CO. v. RICKETTS.

(*Supreme Court of Indiana*. May 25, 1886.)

#### COUNTIES—BRIDGES—NEGLIGENCE—WHEN NO LIABILITY.

A county is not liable for an injury caused by a horse taking fright, before entering upon a bridge, at an upright plank in the bridge, although it had been so out of repair for a considerable time.



Appeal from Fulton circuit court.  
*J. Rowley and M. A. Baker*, for appellant.  
*Essick & Montgomery*, for appellee.

ELLIOTT, J. The facts as they appear in the pleadings and evidence are substantially these: The appellee was seated in a carriage drawn by two horses driven by her father along one of the highways of Fulton county on the evening of September 14, 1884. The horses approached within a short distance of a bridge, when, becoming frightened at a plank standing upright in the bridge, they suddenly leaped backward, and turned over the carriage, throwing the appellee out upon the ground and injuring her. The bridge was, and long had been, out of repair,—so long that the county was chargeable with notice,—and one, at least, of the county commissioners had actual knowledge of the unsafe condition of the bridge.

Counties are not responsible for defective highways, and no action can be maintained against a county for negligence respecting highways. Counties are liable, however, for negligence respecting county bridges. *Vaught v. Board, etc.*, 101 Ind. 123; *Patton v. Board, etc.*, 96 Ind. 131; *Board, etc., v. Bacon*, Id. 31; *Board, etc., v. Emmerson*, 95 Ind. 579; *Board, etc., v. Legg*, 93 Ind. 523; *Board, etc., v. Brown*, 89 Ind. 48; *Board, etc., v. Deprez*, 87 Ind. 509; *Board, etc., v. Prichett*, 85 Ind. 68; *Prichett v. Board, etc.*, 62 Ind. 210; *House v. Board, etc.*, 60 Ind. 580. But, while counties are liable for negligence in failing to keep bridges in a reasonably safe condition for travel, they are not liable unless the injury is the proximate result of their negligent breach of duty. They are, as we understand the effect of the decisions, liable only to those who suffer an injury because the bridge is unsafe for travel, but they are not liable where the injury is suffered by a person not actually using the bridge for that purpose. Counties are not bound to so maintain bridges so that horses will not take fright at them. The extent of their duty is to so maintain their bridges as that they may be safely used by persons traveling on the highway. If we are correct in this, then no action will lie where the injury is caused before the bridge is entered, by the horses of the traveler taking fright; for, where there is no duty, there can be no breach; if no breach, then no action. If the duty does not extend so far as to require a county to so keep their bridges as that horses shall not take fright, then an injury caused by horses becoming frightened at the condition of the bridge is not the proximate result of a breach of duty, and it is only for injuries proximately resulting from a breach of duty that a public corporation can be made liable. It seems to us too plain to require argument that, if the duty of a county does not extend so far as to require it to keep its bridges in such a condition as that horses shall not take fright, it cannot be liable where the injury occurs before the bridge is entered, and results from the horses becoming frightened at the condition of the bridge. It is, perhaps, true that the question whether the duty of the county does go to that extent is not so free from difficulty, but we think that on principle it is demonstrable that

it does not go to that extent. Counties are political divisions of government, and exercise local governmental powers. They are not liable to civil actions unless charged by law with a specific duty, and provided with the authority of securing means to enable them to perform that duty. We think that our law imposes no other or greater duty upon counties with respect to bridges than that of using ordinary care and diligence to make and keep them safe for travel for those who go upon them for that purpose. We do not believe that they are bound to erect sightly structures, nor to so maintain them as that animals shall not be frightened by them. If they are kept reasonably safe for use by those who properly go upon them, no more is required. That this is the just and reasonable rule is proved both by a consideration of the character of the political corporation, and by the evil consequences to which any other rule would inevitably lead. Counties embrace a large extent of territory, governed by three officers, and it is neither reasonable nor just to require that those officers should be compelled to so maintain bridges as that no injuries should result from horses taking fright. The rule that cities are liable for defective bridges or streets is founded on the principle that they are provided with means for keeping them safe, and it is often said that their responsibility is only commensurate with their ability. Applying this principle to counties,—and it is the only one upon which the liability of cities can be sustained with any fair show of reason,—it is manifest that the means at their command is not commensurate with the responsibility fastened upon the county by this judgment holding it liable for an accident resulting from horses taking fright at a plank standing upright in the bridge. We are not willing to stretch the doctrine to any such extent. If we should so far stretch this doctrine, then evil consequences would result, for no standard could be framed by which to measure the duty or liability of a county. Suppose the rule adopted by the trial court to be taken as the correct one, then what would be the result if the horses took fright 100 yards or one-fourth of a mile from the bridge? Or, supposing the rule to be that adopted below, what object, or what condition of the bridge, should be deemed sufficient to charge the county with negligence?

It is our deliberate conclusion that the decisions have gone to the very verge in holding a county liable where persons who have entered a bridge have sustained injury because of the negligence of the county officers in constructing or maintaining the bridge, and we can carry the doctrine no further.

We are satisfied that neither the complaint nor the evidence shows any cause of action in the appellee. Judgment reversed.

(106 Ind. 510)

## DREBERT and others v. FRIER.

*(Supreme Court of Indiana. May 25, 1886.)*

## 1. DRAINS—PROCEEDINGS—NO RIGHT OF TRIAL BY JURY—EFFECT OF FAILURE TO EXCEPT.

Trial by jury is not contemplated in drainage proceedings under section 4274, Rev. St. 1881; but, where no exceptions are taken to the submission of the cause to a jury, it cannot be complained of on appeal.

## 2. SAME—PROCEEDING TO ESTABLISH NEW DITCH ALONG LINE OF OLD ONE—EVIDENCE.

A new ditch may be constructed along the line of an old one, and the papers and proceedings in the establishment of the old ditch are admissible to show its character, and thus to aid in determining whether the new drain is necessary and practicable.

Appeal from Allen circuit court.

*Zollars, O'Rourke & Yeth*, for appellants.

*Combs, Morris & Bell*, for appellee.

NIBLACK, J. This was a proceeding under the drainage act of April 8, 1881. Rev. St. 1881, § 4274. On the fifteenth day of March, 1882, Paul Frier filed his petition in the court below, representing that he was the owner of certain particularly described tracts of lands in Allen county which would be benefited by drainage, but that such drainage could not be accomplished without affecting the lands of a considerable number of other persons, which lands were also particularly described, giving the names of the owners of each tract, respectively; also representing that the desired drainage could be best and most cheaply accomplished by the construction of a ditch, designating its place of commencement, as well as its general direction. The petition being supported by the oath of the petitioner, and proof being thereafter made of notice of his intention to present the petition, the circuit court referred the matters contained in the petition to the commissioners of drainage of the county, who, after making a personal inspection of the lands described as stated in the petition, reported, among other things, that the construction of the proposed ditch would be promotive of the public health, as well as of benefit to a public highway, and would also constitute a work of public utility. Thereupon Henry Drebert, John K. Drebert, Frederick Harris, John H. Fruechtenicht, Daniel Oppliger, and John H. Lange, persons whose lands were upon the line of the contemplated improvement, remonstrated against the construction of a ditch as recommended by the commissioners of drainage. The circuit court, upon its own motion, impaneled a jury to try the issues formed by the remonstrance, which, after hearing the evidence, returned a verdict finding all the issues submitted to them in favor of the petitioner; whereupon the circuit court rendered a judgment establishing the ditch, approving the assessments made by the commissioners of drainage, and making the necessary orders for the construction of the proposed work.

A trial by jury is not contemplated by the statute in causes like the one in hearing, (Rev. St. 1881, § 4276; *Anderson v. Caldwell*, 91 Ind. 451;) but, as the remonstrants reserved no exception to the submission

of the cause to a jury, they cannot complain of that proceeding upon this appeal, (*Neff v. Reed*, 98 Ind. 341.)

At the trial the remonstrants proposed to prove by one of their number, who was a witness in the cause, that there was already a ditch upon the line on which it was designed to locate the ditch then in controversy, and to show the dimensions of the old ditch, and its general condition at different points along its line; but the proposed proof was excluded, and no formal exception was reserved upon that particular exclusion of evidence. Later on in the trial, however, the remonstrants offered in evidence the petition, notice, report of viewers, and proceedings of the board of commissioners of Allen county theretofore establishing and opening a ditch upon the same ground on which the contemplated new ditch was to be constructed, for the purpose of showing the width and depth of such ditch so already established and opened, and the assessments which had been made for the construction of the same; but the evidence thus offered was also excluded, to which an exception was reserved and carried into the record of the proceedings at the trial. It was held in the case of *Meranda v. Spurlin*, 100 Ind. 380, that a new ditch may be constructed along and upon the line of an older and already established ditch. When, therefore, it is proposed to construct a new ditch upon the line of an old one, the question as to the facilities which the old ditch affords for drainage becomes at once a pertinent question, and, incidentally to that question, the size, capacity, cost, and general condition of that ditch are made proper subjects of inquiry. The cost of the old ditch, and the results accomplished by opening it, tend to throw light upon the reasonableness and feasibility of the further expenditure of money upon the same ground, and hence those subjects are material and pertinent matters to be considered in determining whether the new ditch prayed for is a practicable and necessary improvement. These views are in practical harmony with the case of *Meranda v. Spurlin*, cited above, and the more recent case of *Bass v. Elliott*, (No. 12,273,) 5 N. E. Rep. 663. It follows that the circuit court erred in excluding the papers and proceedings pertaining to the establishment and construction of the old ditch, referred to in this case, from the consideration of the jury.

Other questions were reserved upon the proceedings below, and have been discussed in argument; but the practice in drainage cases has, in most cases likely to hereafter arise, become so well settled by recent decisions of this court that we deem it unnecessary to express an opinion upon any of the other questions so reserved and discussed in argument.

The judgment is reversed, with costs, and the cause remanded for a new trial.

ZOLLARS, J., was absent when this cause was considered.

(106 Ind. 496)

## ARCHER v. STATE.

(Supreme Court of Indiana. May 24, 1886.)

## 1. CRIMINAL LAW—JURISDICTION—CRIME COMMITTED PARTLY IN ONE COUNTY AND PARTLY IN ANOTHER.

A conspiracy to take the life of the deceased was formed in Martin county. Pursuant to that conspiracy he was seized and bound. After such seizure he was taken into the county of Orange, and there killed. *Held*, that, under the statute of Indiana providing that where a crime is committed partly in one county, and partly in another, the jurisdiction is in either, the courts of Martin county had jurisdiction.

## 2. SAME—CONSTITUTIONALITY OF STATUTE.

A statute providing that when a crime is committed partly in one county, and partly in another, jurisdiction is in either, is constitutional; and where the assault is made in one county, and the killing done in another, the court of the county where assault was committed has jurisdiction.

## 3. CONSPIRACY—EVIDENCE.

A conspiracy may be proved by circumstantial evidence.<sup>1</sup>

Appeal from Martin circuit court.

*Moser & Houghton*, for appellant.

*The Attorney General*, for the State.

ELLIOTT, J. The appellant was jointly indicted with eight others for the murder of Samuel A. Bunch. The state elected to try the appellant separately, and the trial resulted in a judgment declaring him guilty of murder in the first degree, and adjudging that he suffer the penalty of death. The indictment was returned by the grand jury of Martin county, the trial was had in that county, and judgment was there pronounced. The facts, as we gather them from the evidence, are these: Martin Archer, a kinsman of the appellant and of five of the persons indicted with him, was killed, as they believed, by Samuel Marley. Marley fled the country shortly after the death of Martin Archer, but the appellant and his kinsmen believed that Bunch, the deceased, harbored him, and assisted him to escape. They watched the house of Bunch for several days and nights, and received information which led them to believe that he had assisted Marley to flee, and this excited in them angry and revengeful feelings. They ascertained that Bunch, on the afternoon before his death, had gone to a secluded place to secure some of his hogs which had broken into the field of a neighbor named Ryan. They there forcibly seized and bound him with hickory withes. The place where he was seized and bound was in Martin county. He was detained at this place for some hours, and then taken to a cave in Orange county, called "Saltpeter Cave." This cave was about two miles distant from the Martin county line. The men who captured and bound him were armed with guns and pistols, and with these in hand, and ready for instant use, they took him to the cave, where they shot him many times, each emptying the contents of his gun or pistol into his body. His body was left lying in the cave for some days, when it was taken out and burned.

<sup>1</sup>See note at end of case.

From these circumstances, and from the declarations of the appellant and those who united with him in the murder of Bunch, it is evident that the capture was made pursuant to a preconceived plan to take his life. This conclusion is fully warranted by the evidence, and is undoubtedly that reached by the jury. The circumstances unite with great strength in proof of the fact that the seizure and binding of the deceased were part of a previously arranged plan, and that the appellant, with at least four others, joined in arranging and executing this plan. It is true that Lynch, who was present and assisted in killing Bunch in the cave, testified, when called as a witness by the state, that the purpose to kill the captive was not communicated to him until the cave was reached; but, nevertheless, the circumstances conclusively prove that the capture was made with the intention and purpose of taking the life of the captured man. Forcibly seizing and binding a man without legal excuse or justification is an assault; and if done for the purpose of carrying into execution a preconceived plan to murder the person so seized and bound, is an initial step in the crime. An assault is an element in the crime of murder, and the assault first made in this instance constituted an important step in the crime, for it kept the victim within the power of his captors until the cave was reached on the night of his death. The crime which culminated in the death of Bunch in the cave in Orange county was a single one, although composed of several elements, and the acts done in Martin county were not distinct criminal acts, but were parts of one crime consummated in the adjoining county. Suppose, for the sake of illustration, that a man is seized, bound, and gagged in one county, pursuant to a preconcerted plan; that while he is thus helpless he is taken to a cave in another county, and there left to die: would it be doubted that the first act—the seizure and binding—was but a part of the crime of murder? There is no difference in principle between the supposed case and the real one; for, if the act is a material part of the crime, then, no matter where death results, the place of the crime, according to the weight of authority, is, at common law, in the county where the first material act was committed.

There is some conflict in the old common-law authorities as to whether the jurisdiction is in the courts of the place where death occurred, or in those of the place where the fatal blow was given; and, in order to remove all doubt, the body was sometimes taken to the county where the blow was struck. *Riley v. State*, 9 Humph. 657; *People v. Gill*, 6 Cal. 637; *State v. Gessert*, 21 Minn. 369; *Com. v. Macloon*, 101 Mass. 1; *Com. v. Parker*, 2 Pick. 550; *Tyler v. People*, 8 Mich. 320; *Green v. State*, 66 Ala. 40; S. C. 41 Amer. Rep. 744; *Steerman v. State*, 10 Mo. 503; *Hunter v. State*, 40 N. J. Law, 495. If, however, the crime was committed in part in one county, and consummated in another, jurisdiction, at common law, would seem to be in the county where the first material step in the crime was taken. Mr. Bishop says:

"In reason, and according to the better authorities, when a crime is really committed a part in one county, and part in another, the tribunals of either may properly punish it, provided that what is done in the county which takes

the jurisdiction is a substantial act of wrong, and not merely some incidental thing innocent in itself alone." 1 Bish. Crim. Law, (7th Ed.) § 116.

There were not only preparations in Martin county to commit the specific crime finally consummated in Orange, but there was an overt act, forming a material part of the crime committed, in the former county, and the parties would be indictable at common law in that county. "Dynamiting and Extraterritorial Crime," 16 Crim. Law Mag. 155. The acts done by the appellant and his associates were, we repeat, part of the crime; they were material; and they were substantial wrongs; so that it would seem that, even at common law, jurisdiction would vest in the county where those acts were committed. We are not, however, to decide this case upon the rules of the common law, but upon the provision of our statute, which reads thus:

"Where a public offense has been committed partly in one county and partly in another, or the acts or effects constituting or requisite to the consummation of the offense occur in two or more counties, the jurisdiction is in either."

The case before us comes within this statute; for the purpose to kill was formed in Martin county, the seizure and binding of the deceased took place there, the plan of carrying it into execution was there resolved upon, and was there so far executed as to deprive the deceased of his liberty, and bring him within the power of those who designed to slay him. These were acts of a criminal character, constituting a part of the offense. Not only were they acts constituting a part of the crime, but they were also acts "requisite to the consummation of the offense," for it was the seizure of the deceased, and the power obtained over him by that seizure, that enabled the appellant and his associates to conduct him to the cave in Orange county and there kill him. If it had not been for the capture in Martin county, the enemies of Bunch could not have taken him to the place where he met his death at their hands, and it was therefore the unlawful seizure that enabled them to consummate the crime of murder, according to the plan conceived by them. The capture in Martin county was as material to the consummation of the crime as almost any other step taken by the criminals, since it was the act which made it possible for them to take him to the place selected for slaying him. It was the act which put him in their power, and enabled them to take him from the county where he lived to the place chosen, in another county, and there take his life; for, if the capture had not been effected, the felonious purpose must have been consummated, if at all, in the county of which he was a resident. In construing and sustaining the validity of a statute similar to ours, it was said by the supreme court of Alabama that "if, then, we consider the fatal shooting of the deceased as the commencement merely of the crime of murder charged in the indictment, and that the death of the injured person was the consummation of the offense in Georgia, the statute conferring jurisdiction on the circuit court of Colbert county, the alleged venue was valid, and not obnoxious to legal objections." *Green v. State, supra*. So, here, if we consider the seizure and binding of the deceased as the com-

commencement of the crime, the case is within the statute; but here we have the further element that the criminal assault upon the person of the deceased was essential to the consummation of the crime in the case in Orange county, to which he was carried a captive by those who slew him.

If it be true that the unlawful seizure of the deceased in Martin county was part of the crime, then the constitutionality of the statute is clear, for there is no substantial diversity of opinion as to the power of the legislature to provide what county shall have jurisdiction where a crime is committed in two counties, part being committed in each jurisdiction. There is, perhaps, some diversity of opinion as to whether a statute is constitutional which provides for the punishment of a crime in a county where no material part of the crime was committed; but, even upon this question, the very decided weight of authority is that the legislature may provide for the punishment of the crime in either of the two counties where any part of the crime is committed. *Typkins v. State*, 14 Ga. 422; *Steerman v. State*, 10 Mo. 503; *State v. Pauley*, 12 Wis. 537; *Com. v. Parker*, 2 Pick. 558; *Tyler v. People*, 8 Mich. 320; *Com. v. Macdon*, 101 Mass. 1; *State v. Johnson*, 38 Ark. 568; *Green v. State*, *supra*; *Hanks v. State*, 13 Tex. App. 289; *Ham v. State*, 4 Tex. App. 645; *Ex parte Rogers*, 10 Tex. App. 655; *Adams v. People*, 1 N. Y. 173.

In the case before us we regard the assault upon the deceased in Martin county as an essential part of the crime, and as "an act requisite to its consummation," and we do not doubt that the legislature had power to provide for the punishment of the crime, either in the county where it was commenced or in the county where the last act was done. This power is often necessary in order to prevent an absolute failure of justice; nor is its existence doubtful, for it has ever been the law, illustrated and declared by a great number of cases, that a crime committed partly in one jurisdiction, and partly in another, may be punished in either jurisdiction. 1 Hale, P. C. 430, 431, 615-617; *Regina v. Michael*, 9 Car. & P. 356; *People v. Adams*, 3 Denio, 207; *Bulwer's Case*, 7 Coke, 2b, 3b; *King v. Burdett*, 4 Barn. & Ald. 175; *Com. v. Andrews*, 2 Mass. 14; *Com. v. Holder*, 9 Gray, 7; *Simmons v. Com.*, 5 Bin. 619; *Simpson v. State*, 4 Humph. 461. We have had for many years a statute founded upon this principle, and its validity was sustained in *Beal v. State*, 15 Ind. 378. In a still more emphatic way is this principle recognized in *Kiser v. Woods*, 60 Ind. 538, where it was held that, although the felonious intent, constituting, as is well known, an essential element of the crime of larceny, was fully formed in Ohio, yet, as it was not consummated by a taking until the property and the thief came into this state, the crime might be punished here. The decided cases fully support this doctrine. *State v. Underwood*, 49 Me. 181; *State v. Bartlett*, 11 Vt. 650.

There is, as we understand the authorities, no real conflict of opinion as to the power of the legislature to provide for the punishment of a crime partly committed in one jurisdiction, and partly in another, in either jurisdiction; but there is a sharp conflict as to whether death can be said to be a part of the crime of murder; many of the authorities maintain-



ing that death is merely the consequence of the crime; many of the authorities, on the other hand maintaining, with much reason, that death is a part of the crime, for, unless it results within a year and a day, the offense cannot be murder. "Jurisdiction in Guiteau's Case," 2 *Crim. Law Mag.* 804. But we have here no reason to enter upon this contested ground, as the acts committed in Martin county were substantive criminal wrongs, forming essential parts of the crime.

Felonious purpose or intent is seldom established by direct evidence, but in the very great majority of cases is inferred from circumstances. *Padgett v. State*, 103 Ind. 550; S. C. 3 N. E. Rep. 377. Circumstantial evidence is mainly relied on to prove this essential element in the crime of murder, but the character of the evidence is never deemed to impair or impeach the validity of the proof. It is likewise true of the element of conspiracy, which is not unfrequently a constituent element of murder, that it is not usually proved by direct evidence, but is inferred from circumstances. Dr. Wharton says:

"The actual fact of conspiring may be inferred, as has been said, from circumstances, and the concurring conduct of the defendants need not be directly proved." "Any joint action on a material point, or a collocation of independent but co-operating acts, by persons closely associated with each other, is held sufficient to enable the jury to infer concurrence of sentiment." 2 *Whart. Crim. Law*, (9th Ed.) § 1398; *Whart. Crim. Ev.* § 698; 2 *Bish. Crim. Proc.* § 227.

The circumstances developed by the evidence satisfactorily prove that the conspiracy which bound the defendants together, as well as the purpose to kill, which constituted the bond of union between them, was formed in the county of Martin; and these were undeniably parts, and very material parts, of the crime which was consummated in the adjoining county. Suppose that two of the persons who assisted in the seizure of Bunch had not crossed the line dividing the two counties, is it not perfectly clear, upon principle and authority, that they would nevertheless have been guilty of murder? This conclusion cannot be successfully controverted; and yet it can only be true on the theory that part of the crime was committed in Martin county, for, unless this be so, it is clear that it could not be justly said that they participated in the crime. If what took place in Martin county was no part of the crime, those who did no more than conspire with the persons who fired the fatal shots, and assist in placing deceased in their power, could not be guilty; but if those acts did constitute part of the crime, they are guilty, and the crime had its origin in Martin county, where the first steps towards the accomplishment of the common purpose was taken. Our deliberate conclusion is that the acts done in Martin county did constitute part of the crime, and that the court of that county had jurisdiction.

It is, perhaps, true that there is little direct testimony that the purpose to kill was formed in Martin county, or that the plan of seizing the deceased, and conveying him to the cave in Orange county, was there agreed upon; but the circumstances so strongly and directly point to this conclusion as to free the minds of all impartial men who give it

study from any doubt upon this point; and circumstantial evidence, as we have seen, is all that is required. The evidence supplied by the circumstances leads to no other reasonable conclusion, and we think that there was abundant support for the verdict of the jury upon this point, and consequently ample evidence warranting the instructions of the court. Few cases can be more strongly made out than is this one; for the evidence supplied by the circumstances, and the testimony given by the witnesses, all unite in proving that the purpose to kill was conceived in Martin county; that the plan was there agreed upon, and there partly executed by making a captive of the deceased. The night journey across the line to the cave, and the shooting there, were but steps in the crime conceived and partly carried into execution in Martin county, and the court of that county committed no error in assuming jurisdiction.

What we have said disposes of all questions as to the jurisdiction, and as to the instructions of the court upon these points, and they need not be discussed in detail.

It is true, as counsel assert, that the case against the accused depends, in a great measure, upon the testimony of John Lynch, as a confessed accomplice and a man of bad character; but it is so strongly and fully corroborated upon all material points that we cannot hold that the jury did wrong in giving it credit. A conviction will be sustained upon the testimony of an accomplice where it is satisfactorily corroborated, and that is the case here.

The first step in the offense of murder in the first degree, the intermediate steps, and the final act constitute but a single crime. There are, indeed, few crimes that are not made up of many elements, or in which there are not many steps; but, no matter how many elements or steps there are, there is but one crime. This is true of the present case. All the essential elements combined, constitute but a single crime, and, in legal contemplation, that crime was perpetrated where any one of the substantive and material parts of it were committed. If it were otherwise, a man in Martin county might deliberately conceive a felonious purpose to commit a crime, send another into Marion county to commit the overt act, and yet go free, because it could not be said that all the elements of the crime were present in either county. But it is unnecessary to pursue this discussion; for it is clear, upon principle and authority, that a crime is committed in the county where an act constituting an essential element is done. Where the crime is composed of several elements, and a material one exists in either one of two counties, the courts of either county may, under our statute, rightfully take jurisdiction of the entire crime.

We conclude, therefore, that the venue was well laid in Martin county, and was satisfactorily proved. Judgment affirmed.

#### NOTE.

The evidence, in proof of a conspiracy, will generally, from the nature of the case, be circumstantial. *The Mussel Slough Case*, 5 Fed. Rep. 680.

The declarations of one of two persons engaged in a conspiracy to defraud another are admissible against both of the conspirators; and this is true, although there is no di-

rect evidence proving the conspiracy, provided there is circumstantial evidence tending to prove it. *Riehl v. Evansville Foundry Ass'n*, (Ind.) 3 N. E. Rep. 633.

On trial for burglary, evidence that the defendant came into the store of witness on the morning following the night when the burglary was alleged to have been committed, and endeavored to sell articles similar to those claimed to have been stolen, and that while defendant was so endeavoring to sell such articles the witness looked out and saw the co-defendant standing outside, is not in itself sufficient to establish a conspiracy between such defendants; nor is it proper testimony to go to the jury as tending to establish such fact; nor is further evidence of the fact that many days after the alleged burglary the defendants were seen conversing together, evidence of such conspiracy. *People v. Stevens*, (Cal.) 8 Pac. Rep. 712.

(106 Ind. 539)

### BARNABY v. STATE.

(*Supreme Court of Indiana. May 25, 1886.*)

#### 1. CRIMINAL LAW—BILL OF EXCEPTIONS—POWER OF COURT TO EXTEND TIME FOR FILING.

The power of a court to extend the time to file a bill of exceptions, in a criminal cause, is not exhausted until judgment is rendered, and the time that may be given is only limited to 60 days thereafter.

#### 2. GAMING—KEEPING AND PERMITTING HOUSE TO BE USED FOR.

Evidence examined, and held not sufficient to sustain the verdict; there being an entire failure of proof on a material point.

Appeal from Clark circuit court.

*Howard, Read & Stannard*, for appellant.

*The Attorney General*, for the State.

NIBLACK, J. This was a prosecution based upon an indictment against Henry S. Barnaby, Samuel Tilley, and Nicholas Wayne. The indictment was in two counts. The first count charged the defendants with keeping a gaming-house, and the second with knowingly permitting their house to be used for gaming. Tilley entered a plea of guilty, and had a fine assessed against him, and *nolle prosequi* was entered as to Wayne. On the nineteenth day of June, 1885, a jury was impaneled to try Barnaby, and on the same day returned a verdict finding him guilty as charged, and assessing against him a fine of \$100. On the tenth day of July, 1885, which was during the term at which the verdict had been returned, Barnaby entered a motion for a new trial, and the cause was continued until the ensuing October term, during which, that is to say, on the seventh day of November, 1885, the motion for a new trial was overruled, and 60 days' time was given within which to prepare and file a bill of exceptions, and the cause was again continued. No bill of exceptions was, however, filed within the time thus allowed. Afterwards, on the fourth day of January, 1886, which was during the regular January term of that year, the circuit court rendered judgment against Barnaby upon the verdict, which had been returned as above stated, and granted him 30 days within which to prepare and file a bill of exceptions. On the first day of February, 1886, a bill of exceptions was filed, and it has been certified to as a part of the record in this cause.

Upon these facts counsel for the state make the point that when the circuit court, on the seventh day of November, 1885, granted an extension of 60 days' time within which a bill of exceptions might be pre-

pared and presented, its power to extend time for such a purpose was exhausted, and that, as the bill of exceptions certified to us as above was neither presented nor filed within the 60 days then allowed, it did not become, and consequently is not now, a part of the record, as it purports to be; that for the reason stated the order of January 4, 1886, granting 30 days' additional time within which to prepare and present a bill of exceptions was inoperative and void for any practical purpose.

Section 1847, Rev. St. 1881, bearing upon the question involved, is as follows:

"All bills of exceptions, in a criminal prosecution, must be made out and presented to the judge at the time of the trial, or within such time thereafter as the judge may allow, not exceeding sixty days from the time judgment is rendered; and they must be signed by the judge and filed by the clerk. The exceptions must be taken at the time of the trial."

Section 120 of the Criminal Code of 1852, (Rev. St. 1876, p. 405,) contained substantially the same provisions, except that the time for filing a bill of exceptions could not be extended beyond the term at which the trial occurred. In construing that section this court held, in the case of *Jenks v. State*, 39 Ind. 1, that the proceedings in a criminal cause are *in fieri* until the judgment is rendered, and that the word "trial," as used in that section, included all the steps taken in the cause from its submission to the court or jury to the rendition of the judgment. In placing a construction upon section 1847, above set out, this court, in the case of *Bruce v. State*, 87 Ind. 450, adopted and adhered to the meaning attached to the word "trial" by the case of *Jenks v. State*, as above; and further held that while exceptions, to be available, must be taken at the time the decision complained of was made, the exceptions thus taken will become a part of the record by being incorporated into a bill or bills of exceptions, signed by the judge, and filed by the clerk, at or before the time of the rendition of the judgment, or within such time thereafter as the court may allow, not exceeding 60 days. As an inference from and sequel to the statutory constructions given in the two cases noted as above, we think it results that the power of a *nisi prius* court to extend the time of making out and presenting a bill of exceptions, in a criminal cause, is not exhausted until the judgment is rendered, and the parties have, in legal contemplation, passed out of court. It follows that the bill of exceptions filed in this case is properly in the record.

The cases of *Robinson v. Johnson*, 61 Ind. 535, and of *Davidson v. State*, 62 Ind. 276, and perhaps others, from which a different inference may have been drawn, were civil causes, and rest upon sections of statutes differing in their phraseology from the section set out in this opinion. *Calvert v. State*, 91 Ind. 473; *Hunter v. State*, 101 Ind. 406; *Hunter v. State*, 102 Ind. 428; S. C. 1 N. E. Rep. 361.

On behalf of Barnaby, the appellant here, it is claimed that the verdict was not sustained by sufficient evidence. One Ross testified that he was acquainted with Barnaby, who was then, and for the preceding two years had been, engaged in running a saloon on Spring street, between Front and Market streets, in the city of Jeffersonville, in the county

of Clark, in this state, in the lower story of a three-story brick building, situate about the middle of the square; that he (witness) was present in the room over Barnaby's saloon when a game of faro was being played; that a man by the name of Tilley was running the game, and seemed to be in control of the room; that there were two ways of getting into the room in which the game was played, one being by a side stairway going to the upper part of the building from Spring street, without entering the saloon, and the other through a door going from the saloon into this side entrance; that witness saw this gaming going on twice within a then preceding two years, but did not see Barnaby either time in the room, or in his saloon, the bar-keeper each time having charge of the latter place; that witness never saw anything to indicate that Barnaby had any knowledge of the gaming in question, or that he had any control of the second story of the building. One Hutchings, also called as a witness, stated that he was at one time bar-keeper for Barnaby, and did not know of any gaming being carried on in the room over the saloon, and did not believe that any was while he was about the building; that he never knew of Barnaby being in control of any part of the building except the lower story. One Davern, also testifying as a witness, said he was in the room over Barnaby's saloon at the time when gaming was going on; that he saw certain persons there, naming them, but Barnaby was neither there nor at his saloon at the time; that he (witness) went up-stairs from the saloon entrance, and knew of others going up the same way when Barnaby was in the saloon; that Tilley was at the time running the game; that Barnaby had previously lived in the upper part of the building with his family. And this was all the evidence given in the cause.

Whatever the truth of the matter may have been, this evidence palpably failed to show that the appellant had any interest in or control over the room in which the gaming testified to took place, or that he had any knowledge of the manner in which it was being used at the times the games were played. His having once lived in the upper part of the building carried no presumption against him after he ceased to occupy that part of it. This was a failure of proof in an essential respect, and brings the case within the principle recognized by the case of *Padgett v. State*, 68 Ind. 46. The circuit court consequently erred in overruling the appellant's motion for a new trial.

The judgment is reversed, and the cause remanded for further proceedings.

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(107 Ind. 233)

NATIONAL BENEFIT ASS'N v. GRAUMAN.\*

(*Supreme Court of Indiana. May 24, 1886.*)

1. LIFE INSURANCE—COMPLAINT AGAINST BENEFIT ASSOCIATION—AVERMENT OF NOTICE, AIDED BY OTHER AVERMENTS.

Where an attempt is made to aver notice and proof of death as required by a certificate in a benefit association, it may be aided by an averment that the association is in default for not paying the benefit according to the terms of the certificate.

1 Rehearing denied.

**2. SAME—BENEFIT ASSOCIATION—CONDITION AGAINST DEATH FROM DISEASE—LIABILITY WHERE DISEASE AND DEATH BOTH RESULT FROM BODILY INJURY.**

Where a certificate in a benefit association provides that there shall be no liability in case of death from disease, the fact that apoplexy intervenes will not relieve the association if death is cause by bodily injury.

**3. SAME—WARRANTIES—BURDEN ON DEFENDANT TO PROVE, UNTRUE.**

The burden of proving warranties in a certificate of a benefit association untrue is upon the association.

Appeal from Marion superior court.

*Shepard & Martindale*, for appellant.

*Hill & Lamb*, for appellee.

MITCHELL, J. This action was brought by Minnie Grauman on a certificate of membership issued by the National Benefit Association of Indianapolis to Isadore Grauman. It was stipulated in the certificate that the sum represented thereby should not exceed \$5,000, which sum was to be paid to Minnie Grauman within 60 days after the receipt of satisfactory proofs that Isadore Grauman had sustained, during the continuance of his membership, bodily injuries, effected through external, violent, and accidental means, which had occasioned his death within six months from the happening of such injuries. To each of the two paragraphs of the complaint a separate demurrer was overruled. This ruling was assailed on two grounds.

It is said the complaint is insufficient because it is not averred in either paragraph that satisfactory proof of the death of Isadore Grauman was furnished 60 days before bringing the suit. It is averred in each paragraph of the complaint, substantially, that on the twenty-eighth day of April, 1882, upon a blank furnished by the association for that purpose, notice in writing was furnished of the injury and death, and that thereafter, at the request of the association, other proofs and notice were furnished, which were to be and were substituted in place of the notice and proof originally forwarded. Coupled with the further averment, which follows, to the effect that the defendant has wholly failed and still fails and refuses to comply with the terms and conditions of the certificate on its part, by refusing to pay, the averment is sufficient. It should have been averred explicitly that notice and proof had been made 60 days before the commencement of the suit, or that the plaintiff had performed all the conditions on her part to be performed. An attempt was, however, made to aver notice and proof according to the requirements of the contract, following which it is charged that the defendant was then in default for not having paid according to the conditions of the certificate. As the defendant could not have been in default, in the absence of such proof as the contract stipulated for, the inference necessarily arises that the proof furnished was such as the certificate required.

The other objection urged against the complaint is that it fails to aver that the death of Isadore Grauman did not result from disease. It was stipulated in one of the printed conditions annexed to the certificate of membership that the benefits of the certificate should not extend to any case in which there were no symptoms or visible sign of bodily hurt,

nor to any case in which death or disability should occur in consequence of disease. We agreed that, in order to recover, death must have occurred within the limits of the risk assumed by the contract. The condition above mentioned limited the risk to a case of death proximately caused by physical injuries of which there should be some visible, external sign. It excluded liability in case death resulted from disease or bodily infirmity. The complaint, however, made a case within the rule above stated. It is averred in both paragraphs that the assured sustained certain bodily injuries which were occasioned by two separate falls, the effect and results of which are minutely described. The injuries were in part external and visible. They resulted in apoplexy and death. The averments leave no room to doubt that death resulted from bodily injury, and not in consequence of disease. The fall and injury upon the head may have resulted in apoplexy. That the injury resulting from the fall produced a condition aptly designated by that name did not render it any less the cause of death. *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346. Conceding all that is said in respect to the necessity of showing, as a condition precedent to a right of recovery, that death was not the result of disease, we are nevertheless constrained to hold, since the particular facts are averred which show the physical injuries sustained by the assured, and that death resulted therefrom, that the idea is thereby effectually excluded that death could have resulted in consequence of disease. The demurrer to the complaint was properly overruled.

In the certificate of membership it was stipulated, in effect, that any statements made by the assured in his written application were to be considered as warranties that such statements were in all respects true. The court instructed the jury that the burden of proving any of the statements or warranties, thus made, untrue, was on the defendant. For the appellant it is argued that in so instructing the jury the court erred. In the recent case of *Northwestern Mut., etc., Co. v. Hazlett*, 105 Ind. —, S. C. 4 N. E. Rep. 582, we had occasion to consider the question thus made. Following the decision in the case of *John Hancock, etc., Co. v. Daly*, 65 Ind. 6, and the other authorities cited, our conclusion was that the burden of proof in like cases was, as the court instructed, on the defendant.

The appellant also complains that the court erred in refusing to give an instruction asked on its behalf. Upon consideration of the instruction refused, and an examination of the concise and carefully prepared instructions given by the court of its own motion, it appears that there is nothing material to the case embraced in that refused which was not adequately covered by those given. There was therefore no error in the refusal of the court to give the instruction referred to.

Finally it is argued at much length, and with some plausibility, that the motion for a new trial should have been sustained because the verdict was not sustained by sufficient evidence. Whatever view may be entertained as to the weight or preponderance of the evidence, it is not, as, indeed, it could not well be, denied that there is some evidence which

strongly tends to sustain the verdict. This being the case, the conclusion reached by the court and jury at the trial cannot be disturbed here. The judgment is affirmed, with costs.

(106 Ind. 500)

LEARY v. MORAN.

(*Supreme Court of Indiana.* June 1, 1886.)

1. TROVER AND CONVERSION—PLEADING—ANSWER—ARGUMENTATIVE DENIAL—DEMURRER.

An answer to a complaint for conversion alleging that the taking was with plaintiff's consent, and in accordance with an agreement therein stated, amounts merely to an argumentative denial; but if otherwise good, it is not error to overrule a demurrer to it on that ground.

2. APPEAL—WEIGHT OF EVIDENCE.

The supreme court will not reverse a judgment on the weight of the evidence, especially where it appears that the merits of the cause have been fairly tried and determined in the court below.

Appeal from Hendricks circuit court.

*Hadley, Hogate & Blake*, for appellant.

*Chas. Foley*, for appellee.

ZOLLARS, J. Appellee is charged in the complaint with having converted to his own use 40 bushels of appellant's wheat, of the value of \$50. Appellant has assigned as error the overruling of his demurrer to appellee's answer.

The following facts, substantially, are set up in the first paragraph of the answer: The wheat mentioned in the complaint was a part of a crop raised on appellee's farm by a cropper, who was to have the whole crop threshed at his own expense, and deliver to appellee at the machine one-half of the amount in the bushel. After the wheat had been harvested and ricked, appellant bought the cropper's interest therein at sheriff's sale. After buying this interest he stated to appellee that he could not have the wheat threshed, and it was agreed that appellee should have it done, and that appellant would promptly reimburse him for all outlay in paying hands, and promptly pay him for the boarding of hands, threshers, and horses, and for his own labor. Pursuant to that agreement, appellee had the wheat threshed, and, upon the terms of the agreement, thereby became entitled to receive from appellant \$32.75. Following these averments are the following:

"That after said wheat was threshed, and pursuant to an offer of the plaintiff therefor, the defendant took seventeen sacks of the plaintiff's half of said wheat in payment and satisfaction of his bill of charges for his said outlay for said hire of said hands, and for said board of said hands and horses, and for said services of two days of the defendant, which seventeen sacks of wheat constituted the identical wheat mentioned in the complaint."

If the facts thus set up are true, and that they are true is admitted by the demurrer, it is clear that appellee is not guilty of having converted the wheat, as charged in the complaint. The averments are not as specific, in some particulars, as they might be; but they sufficiently show the rights of the parties, their agreement in relation to the wheat, and



that in pursuance of that agreement, and in payment of the amount due to appellee for the threshing, it was agreed that he should take the 17 sacks of wheat, and that the amount so taken was the same wheat mentioned in the complaint. These same facts, we think, might have been proven under a general denial. In order to make his case as alleged in the complaint, appellant was under the necessity of proving that the wheat was not only taken by appellee, but so wrongfully taken as to amount to a conversion. Under a general denial, the defendant may introduce any and all proof that will meet and overthrow what the plaintiff is bound to prove in order to recover. To show that the taking was not wrongful, and that appellee was not, therefore, guilty of a conversion, he might have proven, under a general denial, that the taking was with appellant's consent, and in pursuance of an agreement as set up in the answer. *Searcy v. State*, 93 Ind. 556. The paragraph of the answer under examination amounts to an argumentative denial, but it is not for that reason insufficient to withstand the demurrer. *Loeb v. Weis*, 64 Ind. 285; *Clouser v. Jones*, 100 Ind. 126; *Dickson v. Lambert*, 98 Ind. 487. What we have said in relation to the first paragraph applies with equal force to the second paragraph of the answer. In our judgment, the court below properly overruled the demurrer to each paragraph of the answer.

The evidence is not very full nor very satisfactory, but it tends to establish the facts set up in the answer, and to sustain the finding and judgment of the trial court. We cannot, therefore, reverse the judgment upon the weight of the evidence. That appellee was to have the threshing done, and that appellant was to pay him therefor, is not disputed. The only dispute is as to the right of appellee to take the wheat in payment. The evidence tends to show that he had such right, and that, therefore, the taking was not wrongful, and that he was not guilty of a conversion of the wheat. This court is commanded by the statute not to reverse a judgment where it shall appear that the merits of the cause have been fairly tried and determined in the court below. Rev. St. 1881, § 658. This is peculiarly a case where that rule of the statute should be applied.

Judgment affirmed, with costs.

(106 Ind. 495)

BEACH v. ZIMMERMAN and others.

(Supreme Court of Indiana. May 25, 1886.)

PRINCIPAL AND SURETY—EXTENSION OF TIME—WHEN SURETY WILL BE RELEASED.

An extension of time to a principal, in order to release the surety, must be for a definite time, and not a mere forbearance to sue, for an indefinite time, however long. Evidence examined, and held sufficient to warrant the jury in finding an extension for a definite time.

Appeal from Porter circuit court.

Paul & Humphries, Kennedy & Kennedy, and Wm. Reeves, for appellant.

A. D. Thomas and W. J. Darnell, for appellees.

Howk, C. J. This was a suit by the appellant, Beach, against the appellees, Zimmerman and Welch, and the administrator of the estate of John C. Ball, deceased, upon a promissory note of which the following is a copy:

"\$650.

VALPARAISO, IND., July 24, 1879.

"One year after date, we promise to pay Harmon Beach, or order, six hundred and fifty dollars, with interest at the rate of eight per cent. per annum, without relief from valuation laws. Value received.

[Signed]

"JOHN C. BALL.

"E. ZIMMERMAN.

"STEPHEN WELCH."

In his complaint, appellant alleged that the interest on such note was paid to April 16, 1881, and that the interest since accrued and the principal of the note were due and unpaid; that since the execution of such note said John C. Ball had died wholly insolvent; and that there was no administration of such decedent's estate. Wherefore, etc.

Appellees, Zimmerman and Welch, answered jointly in four special or affirmative paragraphs, in substance as follows: (1) Admitting the execution of the note in suit, they said that since its execution, and prior to the death of John C. Ball, such note had been paid in full to appellant, Beach, by Ball, the principal therein. (2) Admitting the execution of the note, they further said that they were sureties only in such note for John C. Ball, since deceased, all of which was, at the time of the execution of the note, well known to appellant, Beach; that on or about April 6, 1881, and without the knowledge or consent of appellees, the appellant made and entered into an agreement with said John C. Ball that, in consideration that Ball would pay appellant interest on such note at the rate of 10 per cent. from April 6, 1881, to April 6, 1882, in advance, appellant would extend the payment of such note until April 6, 1882; and that thereupon said John C. Ball, in pursuance of such agreement, paid appellant the interest in advance, at the rate of 10 per cent., for one year on such note, and all without appellees' knowledge or consent. (3) Appellees further said they signed the note in suit as sureties for John C. Ball, since deceased, as appellant well knew at the time he received such note; that afterwards, on or about April 6, 1881, and after the maturity of the note, appellant agreed with said Ball, in consideration that Ball would pay appellant the interest then due on the note, and 2 per cent. in addition, and interest thereon, in advance, for one year then next ensuing at the rate of 10 per cent. per annum in advance, that appellant would extend the time for the payment of such note for such period of one year next thereafter; and appellees averred that, for that purpose, said John C. Ball paid appellant the interest then due on such note, and the further sum of \$65 in addition thereto; and that appellant then agreed with said Ball to extend, and did extend, the time for payment of such note for one year then next ensuing, without appellees' knowledge or consent. (4) And appellees said they signed the note in suit as sureties for said John C. Ball, since deceased, as appellant well knew at the time he received such note; that after the ma-

turity of such note, to-wit, on or about April 6, 1881, appellant agreed with said Ball, in consideration that Ball would pay appellant the interest then due on the note, and interest thereon in the future at the rate of 10 per cent. for one year thence next ensuing, that appellant would extend the time of payment of such note for such period of one year next thereafter; and appellees averred that, for that purpose, said Ball paid appellant, according to such agreement, the interest then due on such note at the rate of 10 per cent. per annum, and then and there promised and agreed to pay appellant \$65 as interest on such note at the rate of 10 per cent. per annum for the next ensuing year; and appellant then agreed with said Ball to extend, and did extend, the time for the payment of such note for such period of one year then next ensuing; and that, at the end of such year, said Ball paid appellant, in pursuance of such agreement, such sum of \$65 as interest on such note for such period of one year, at which time a similar agreement was made and entered into between appellant and said Ball to extend the payment of such note for another year, which agreement was abserved by such parties,—all of which was without the knowledge or consent of appellees.

Appellant replied by a general denial of appellees' answer. The issues joined were tried by a jury, and a general verdict was returned for appellees, the defendants below. With their general verdict, the jury also returned into court their special findings on particular questions of fact submitted to them by the appellant under the direction of the court, in substance as follows:

"(1) Did Mr. Beach, after the note was due, ever agree with Mr. Ball, for a valuable consideration, to extend the time of payment of the note for a definite time? *Answer.* Yes. (2) If so, what was the consideration, and how was it paid? *A.* Money consideration in the form of a bonus. (3) And, if so, what definite time was agreed upon? *A.* One year."

Over appellant's motion for a new trial, the court rendered judgment against him for appellees' costs.

In this court the only error assigned by appellant, upon the record before us, is the overruling of his motion for a new trial. In this motion, the only causes assigned for such new trial were that the general verdict and special findings of the jury were not sustained by sufficient evidence, and were contrary to law. Manifestly, therefore, the only question we are required to consider and decide in the case at bar may be thus stated: Is there legal evidence appearing in the record which tends to sustain the general verdict and special findings of the jury on every material point; Or, changing the form of the question: Is there such a failure of evidence on any material point as will authorize or justify the reversal of the judgment?

To maintain the defense interposed by appellees in the second, third, and fourth paragraphs of their answer, they had the burden of the issues joined thereon, and it was incumbent on them to prove on the trial (1) that they were, and were known by appellant to be, the sureties of John C. Ball in the note in suit; (2) that the appellant and Ball, for a new and valuable consideration, and without the knowledge or consent

of appellees as such sureties, made and entered into an agreement for the extension of the time for the payment of such note for the period of one year. While virtually conceding that there is evidence in the record which might sustain the general verdict and special findings of the jury, at least in this court, on every other material point appellant's counsel very earnestly contend that there is an absolute failure of evidence proving, or tending to prove, that the agreement for the extension of the note in suit, between the payee and principal therein, was for the period of one year, or for any other definite period of time. If counsel are right in their contention, of course a new trial ought to have been granted, and the judgment below must be reversed; for it is settled by our decisions that an extension of time to the principal which will release and discharge the sureties must be for a definite period of time, and not a mere forbearance to sue for an indefinite time, however long it may be continued. *Menifee v. Clark*, 35 Ind. 304; *Abel v. Alexander*, 45 Ind. 523; *Bucklen v. Huff*, 53 Ind. 474; *Buck v. Smiley*, 64 Ind. 431; *Starret v. Burkhalter*, 70 Ind. 285; *Lemmon v. Whitman*, 75 Ind. 318; *Cates v. Thayer*, 93 Ind. 156; *Gipson v. Ogden*, 100 Ind. 20; *Henry v. Gilliland*, 103 Ind. 177; S. C. 2 N. E. Rep. 360; 2 Daniel, Neg. Inst. § 1319.

On the trial of this cause, appellee Zimmerman was a witness for appellees, and testified as follows:

"On the thirteenth of September, 1882. \* \* \* I met Harmon Beach in Bartholomew & Crumpacker's law office, and I asked Mr. Beach to show me the note, and he showed it to me. I questioned him with regard to the payment of the interest, which I noticed, by the indorsement on the note, had been paid a considerable time after the note had fallen due. He then and there told me that Ball had paid him [Beach] a bonus over and above the rate of eight per cent. charged on the face of the note, and that he [Beach] had agreed to give Ball an extension of the time of its payment in consideration of the bonus paid him, and that is why he allowed the note to run along without attempting to collect it."

Appellee Welch testified that he asked appellant once, "What was the interest on the note?" and appellant answered: "The note calls for eight per cent., but Ball paid me [Beach] a great deal more." The examination of appellant, Beach, was put in evidence, wherein there appear the following questions and answers: "Didn't you agree with him [Ball] that the note should run another year, if the interest were paid up? *Answer*. I can't say for certain. *Question*. Isn't it your best recollection, now, Mr. Beach, that you did agree that, if he would pay up the interest, you would let him have more time? *A*. Well, I couldn't tell." And so on, for quantity.

In commenting on appellant's admission, as stated in the testimony of Zimmerman above quoted, appellant's counsel say:

"Now, taking this entire admission together, and admitting that the payment of the so-called 'bonus' constitutes a consideration for an agreement for extension, there is a total lack of anything whereby it is shown, or from which it may be inferred, that the alleged extension was for one year, as the jury found, or for any definite time."

It seems to us, however, that the jury were fully authorized, as against the appellant, to give his admission a broader and more liberal construction or interpretation, without doing violence to the language used, than is now sought to be given thereto by his counsel. In considering such admission, the jury may well have reasoned thus: Appellant admits that, for a consideration paid him by Ball, he agreed with the latter to give him an extension of time for the payment of the note. His receipt of such consideration is the only reason he assigns for allowing "the note to run along without attempting to collect it." The fact is apparent that he allowed the note to "run along" for one year, without any attempt to collect it, and therefore it follows that, for the consideration paid him by Ball, appellant agreed to give Ball an extension of the time for the payment of the note for the definite period of one year. Ball died before the commencement of this suit; and the apparently defective memory of appellant, Beach, and his equivocal answers to the questions propounded to him, justified the jury in placing but little, if any, reliance on his testimony.

We cannot say there was an absolute failure of evidence to sustain the general verdict or special findings of the jury on any material point involved in the issues. Nor can we say, from the record before us, that the trial court erred in overruling appellant's motion for a new trial; and in such case, of course, as we have often decided, the presumption must prevail that no such error was committed. *Myers v. Murphy*, 60 Ind. 282; *Foster v. Ward*, 75 Ind. 594; *Peck v. Board, etc.*, 87 Ind. 221; *Shields v. McMahan*, 101 Ind. 591.

The judgment is affirmed, with costs.

(106 Ind. 513)

PHENIX INS. CO. OF BROOKLYN v. LAMAR.

(*Supreme Court of Indiana. May 25, 1886.*)

FIRE INSURANCE—POLICY—CONDITION AGAINST OTHER INSURANCE—EFFECT WHEN OTHER INSURANCE IS INVALID.

Where an insurance policy contains a stipulation that it shall be void if any other insurance is taken, "whether valid or not," and other insurance is taken, which is shown by extraneous facts to be invalid, the policy may be avoided by the company.

Appeal from Spencer circuit court.

*Gilchrist & De Bruler*, for appellant.

*E. M. Swan*, for appellee.

MITCHELL, J. This was a suit by William S. Lamar, against the Phenix Insurance Company, to recover for an alleged loss by fire under a policy of insurance issued upon the property of the former. The policy contained this condition: "If the assured shall have, or shall hereafter make, any other insurance (whether valid or not) on the property herein described, or any part thereof, without the consent of this company written hereon," this policy shall be void. The insurance company answered that the condition above set out had been violated in this: that the insured had, prior to the receipt of the policy on which suit

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was brought, accepted a policy of insurance for \$500, covering a part of the property insured, which policy so accepted had been issued by the Germania Insurance Company of New York, and which remained in force at the time that in suit was taken out, and that no consent to this latter policy was indorsed on the policy in suit, or was otherwise given. To this it was replied that the Germania policy contained a provision avoiding it in case of the existence or subsequent procurement of other insurance upon the property therein described, unless specially agreed to in writing in or upon such policy; that at the date the Germania's policy was received the assured held a policy for \$2,000 issued by the Home Insurance Company of New York, covering the same property; and that no consent by the Germania had been given to the policy which the assured held in the Home, and that for that reason the policy held in the Germania was, and had been at all times, invalid and void. Upon demurrer this was held a sufficient reply. A recovery was accordingly had for the amount stipulated in the policy.

The reply, it will be observed, seeks to avoid the effect of the condition against other insurance, by the assumption that only such other insurance as is valid and enforceable is within the inhibition of the contract. Since, however, there is put forward no claim of mistake, surprise, or other circumstance which would authorize a modification of the condition, or relieve the insured from its effect, the contract, as the parties have deliberately chosen to make it for themselves, must furnish the measure of their rights. The inquiry must be, what have the parties agreed to?

In determining the liability of insurance companies, stipulations similar to that above set out have been the subject of much discussion, and not a little contrariety of opinion. There are cases in which the condition in respect to further insurance is general, the conventional phrase, "whether valid or not," being absent, which proceed upon such a construction of the contract as brings within its prohibition only such other insurance as is valid and enforceable. That other insurance has been taken by the insured, which at the time of the loss is inoperative or voidable, so that no action could be successfully maintained for its recovery, is held in the cases referred to not to operate in avoidance of a policy containing the ordinary stipulation against such further insurance. Conspicuous among the later cases which adopt this view are the following: *Sutherland v. Old Dominion Ins. Co.*, 31 Grat. 176; *Insurance Co. v. Holt*, 35 Ohio St. 189; *Dahlberg v. St. Louis, etc., Co.*, 6 Mo. App. 121; *Gee v. Cheshire, etc., Co.*, 55 N. H. 65. To the foregoing may be added *Hubbard v. Hartford Fire Ins. Co.*, 33 Iowa, 325, which, in a modified form, holds the same general doctrine. On the other hand, cases which seem well supported in reason proceed upon the theory that the only purpose for which provisions of the character under consideration are inserted in policies is to protect the insurer against the hazard of overinsurance, by taking away the motive which the insured might otherwise have for the destruction of his own property. Other insurance taken without consent, whether valid or not, is held to avoid the

policy in violation of which it has been taken. The assumption is that the vigilance of the property owner will be stimulated to guard against loss, by requiring him to maintain such relation to the property insured as that its destruction by fire shall not inure to his pecuniary benefit.

Such being confessedly the purpose of the contract, it is not perceived how its object is in any degree promoted by the conclusion that, notwithstanding the insured may have intended to secure overinsurance, and may have firmly believed he had succeeded in doing so, it is only when the attempt is actually successful that the prohibitory condition is operative. It might be said with much reason that such a construction defeats the purpose of the provision, and renders it practically nugatory.

Moreover, to hold that only such other insurance as is not void, and cannot be avoided by extraneous facts, is within the prohibition of the contract, affords the opportunity for the anomalous spectacle of an insured avoiding the effect of apparent overinsurance, and compelling payment of one policy by exhibiting his own turpitude in obtaining another.

It is held in some cases that subsequent or further insurance, created by policies which are totally void, is no obstacle in the way of a recovery on the policy on which the claim is made. *Rising Sun Ins. Co. v. Slaughter*, 20 Ind. 520. If, however, such policies are voidable only for some breach of condition for which the insurer might avoid them, they are within the prohibition against further insurance. *Funke v. Minnesota, etc., Ins. Ass'n*, 29 Minn. 347; S. C. 13 N. W. Rep. 164; *Baer v. Phoenix Ins. Co.*, 4 Bush, 242; *Suggs v. Liverpool, etc., Co.*, 9 Ins. Law J. 657; *Landers v. Watertown Ins. Co.*, 86 N. Y. 414; *Bigler v. Insurance Co.*, 22 N. Y. 402; *Lackey v. Georgia Ins. Co.*, 42 Ga. 459; *David v. Hartford, etc., Co.*, 13 Iowa, 69; *Carpenter v. Providence, etc., Co.*, 16 Pet. 495.

It is, however, not necessary for us to determine, or further intimate an opinion upon, the proper construction of a policy which simply stipulates that other insurance taken without the consent of the insurer shall render the policy void. It may well be assumed that the prevailing uncertainty and contrariety of opinion on that subject was the efficient cause for introducing into the policy sued on the phrase which distinguishes it from the policies involved in the cases referred to. The contract is that other insurance, "whether valid or not," taken without the written consent of the insurance company, shall render the policy void. It was thus agreed that the validity or invalidity of other insurance, taken without the written consent of the insurer, should not be the subject of future contest. Any contract of insurance, so held or accepted, was to render the policy in suit void. This agreement was not against public policy, nor prohibited by law. So far as appears, it was, with a full comprehension of its terms, deliberately entered into. It is therefore to have effect according to its plain and obvious meaning. *Northwestern, etc., Co. v. Hazlett*, 105 Ind. —; S. C. 4 N. E. Rep. 582; *Continental Ins. Co. v. Hulman*, 92 Ill. 145; *Liverpool, etc., Co. v. Verdier*, 35 Mich. 395.

So far as appears, the policy in the Germania Insurance Company was regarded, both by the insurance company which issued it and the in-

sured, as being valid and in force at the time the policy in suit was accepted, as well as when the loss occurred. Whatever we might conclude in respect to the ordinary condition concerning further insurance, we are clear that where the parties, as in the case before us, had stipulated in their contract that other insurance, whether valid or not, shall avoid the policy, the effect of such a stipulation cannot be avoided by showing that the prohibited insurance was invalid. As applicable to a policy embracing a condition of that description, this general principle may be stated: If the prohibited policy held or received by the insured is in and of itself invalid and void, so that it in fact constitutes no contract of insurance, it will not affect the validity of that under which the claim for indemnity is made; but if to avoid it requires the production of facts extraneous to the policy, it will be within the condition against further insurance, and, unless consented to, will render the other voidable. We are thus led to the conclusion that the court erred in overruling the demurrer to the reply.

A further question arising upon the evidence is suggested; but as, upon the facts disclosed, it cannot be material, in view of future considerations, that we decide it, without considering that question, the judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the second paragraph of reply, and for further proceedings not inconsistent with this opinion.

(107 Ind. 301)

INDIANA OOLITIC LIMESTONE CO. v. LOUISVILLE, N. A. & C. RY. CO.

(*Supreme Court of Indiana*, June 1, 1886.)

RAILROAD COMPANIES—CONDEMNATION PROCEEDINGS—COLLATERAL ATTACK.

Upon a collateral attack by a party to appropriation proceedings, in the absence of anything to the contrary, every reasonable presumption must be indulged in favor of the regularity and validity of the proceedings.

Appeal from Monroe circuit court.

*Buskirk & Duncan* and *C. P. Worrall*, for appellant.

*Eli K. Miller* and *Geo. W. Friedley*, for appellee.

Howe, C. J. This was a suit by the appellant against the appellee, in a complaint of two paragraphs. The objects of the suit were to recover the possession of a certain strip of land, in Monroe county, which the appellee, as alleged, had attempted to appropriate for the purpose of constructing thereon a switch or side track leading out from the main line of its railway, over and across appellant's land, to the adjacent quarry and works of the Terre Haute Stone-works, and also \$1,000 damages for the detention of such strip of land; and to perpetually enjoin the appellee from setting up any claim of title to or interest in such strip of land, and from entering upon the same, or committing any trespass thereon; and to remove any cloud that might have been cast upon appellant's title to the land by appellee's attempted appropriation pro-

1 Rehearing denied.



ceedings. To appellant's complaint the appellee answered specially, setting out at length all its proceedings and the orders of the court in relation to its appropriation of the strip of land mentioned in the complaint. The appellant demurred to appellee's answer, upon the ground that it did not state facts sufficient to constitute a defense to the action; and this demurrer was carried back and sustained by the court to appellant's complaint, and each paragraph thereof. Appellant refusing to amend or plead further, judgment was rendered that it take nothing by its suit, and that appellee recover its costs.

The first error complained of here by the appellant is the sustaining of its demurrer to its own complaint.

In its complaint the appellant alleged that it was a corporation duly organized on and before the fourth day of June, 1884, under the laws of this state; that on and since the day last named, the appellee was and has been a duly-organized corporation under the laws of this state, and was and has been the owner and operator of a line of railroad passing through Monroe county; that on such day appellant was the owner in fee-simple and in the possession of the W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 17, in township 10, range 2 W., in such county, lying near the line of appellee's railroad, and near the town of Stinesville, a station on such railroad; that appellee, at such town of Stinesville, and for five miles on each side thereof, was the owner of and occupied its right of way, 60 feet wide, which was all that was necessary for its railroad, including its side tracks and water stations, for the use thereof; and that appellant's land, above described, was underlaid with a ledge of valuable limestone suitable for quarrying purposes, and chiefly valuable therefor. And appellant further averred that a corporation known as the "Terre Haute Stone-works Company" was the owner of a tract of land on which was situated a stone quarry, which quarry was a long way, to-wit, 3,500 feet, from the line of appellee's railroad, and was at no place nearer to such railroad than the distance of 2,500 feet; that on such day the Terre Haute Stone-works Company, desiring to connect its quarry with appellee's railroad by means of a switch or turn-out over which it might haul its stone, procured the appellee to begin proceedings to appropriate a strip of land, 66 feet wide, from the line of its track, near such town of Stinesville, to the quarry of such Terre Haute Stone-works Company; that the center line of such strip of land so to be appropriated, ran over and across appellant's said land; that, in pursuance of such intention to appropriate such strip of land, appellee's attorneys, on such fourth day of June, 1884, filed in the clerk's office of the court below its pretended instrument of appropriation; that thereafter, on June 25, 1884, the judge of such court at chambers, in vacation, upon the application of appellee's attorneys, appointed by warrant Aquilla W. Rogers, George W. Finley, and Freeborn G. Pauley to appraise the damages which the owner of the land might sustain over which such switch or turn-out passed; by reason of such appropriation; that afterwards, on July 14, 1884, the appraisers aforesaid returned their appraisement to the clerk of such court, showing, among other things, that appellant would be damaged in the sum of

\$400, which sum the Terre Haute Stone-works Company, by the appellee, on the first day of ———, 1884, deposited in the clerk's office of such court, for the appellant's use and benefit; and that such sum of money was still in the hands of such clerk, no part thereof having ever been taken or accepted by appellant. And appellant further said it was informed and believed that such turn-out or switch would pass over its land in a diagonal course for the distance of 1,478 feet, and take two and one-half acres thereof; that on account of hilly and uneven surface of such land such turn-out or switch, when completed, would necessarily consist of fills and cuts, of heights and depths varying from 10 to 20 feet, and passing through appellant's valuable limestone; that such switch or turn-out would cut appellant's land into two triangular tracts; that by reason of the turn-out or switch being so constructed, and the land being so divided, appellant would suffer irreparable injury; that, by reason of appellee's owning and controlling a strip of land 66 feet wide through, over, and across appellant's land, intended for a quarry, for 1,478 feet, a large portion of such quarry would be rendered almost valueless; that continuously, since such pretended appropriation, on June 4, 1884, until January 9, 1885, appellant had been in the quiet, peaceable, and undisturbed possession of all its land,—neither appellee nor the Terre Haute Stone-works Company occupying or exercising any acts of ownership over it; that on January 9, 1885, the Terre Haute Stone-works Company, by its agents and employes, 15 in number, pretending to be appellee's employes, by virtue of such pretended act of appropriation, and in appellee's name, unlawfully, and without right, and without appellant's consent, took possession of such land, threw down the fences, and began the construction of such switch or turn-out, and had since unlawfully kept the possession of the land from appellant, who was entitled to the immediate possession thereof. Appellant then averred that such pretended act of appropriation of such strip of land over and across its real estate hereinbefore described, was illegal, null, and void for a number of reasons, which are set forth at great length.

In the view we shall take of appellant's case, in the light of appellee's answer, the averments of which were admitted to be true by appellant's demurrer thereto, it is unnecessary for us to give the substance even of its numerous reasons for claiming that the appropriation proceedings were illegal, null, and void. Some of such reasons, if they had been presented at the proper time and in the proper manner, might have been available to the appellant for some relief; but, for the most part, all such reasons are overthrown, and rendered nugatory and of no avail, by the averments of the appellee's answer, which, as we have said, are conceded to be true, as the case is here presented; for these averments show that, in the appropriation proceedings of which appellant complains, the appellee strictly followed the statute, and complied with its requirements.

It is apparent from appellant's complaint that the appellee instituted and prosecuted its proceedings for the appropriation of so much of appellant's land as it needed for the construction of its switch or turn-out described in such complaint, under the provisions of section 3907, Rev.

St. 1881, in force since May 6, 1858. In its complaint, appellant has sought to make a collateral attack upon the validity of appellee's appropriation proceedings. As in other cases of collateral attack, of course, in the absence of averment or showing to the contrary, every reasonable presumption must be indulged, in the case in hand, in favor of the regularity, legality, and validity of such appropriation proceedings, as against the appellant, who was a party to such proceedings. *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, 97 Ind. 146; *Rogers v. Beauchamp*, 102 Ind. 33; S. C. 1 N. E. Rep. 185; *Exchange Bank v. Ault*, 102 Ind. 322; S. C. 1 N. E. Rep. 562; *Baltimore, etc., R. Co. v. North*, 103 Ind. 486; S. C. 3 N. E. Rep. 144.

Thus, in the case under consideration, appellant's complaint shows that on June 4, 1884, the appellee deposited in the clerk's office of the proper court its instrument of appropriation of a strip of appellant's land, for its switch, side track, or turn-out. But the complaint fails to show whether or not appellee delivered to appellant a copy of such instrument of appropriation, as required by section 3907, *supra*. In such case, we presume, in aid of the appropriation proceedings, and in favor of their regularity, legality, and validity, that appellee did deliver to appellant, as required by the statute, a copy of such instrument of appropriation. So the complaint shows that the judge of the court, in vacation, appointed by warrant three named persons to appraise appellant's damages by reason of appellee's act of appropriation; but it fails to show whether such appraisers were or were not disinterested freeholders of the proper county, or were or were not duly sworn, as required by the statute. In such case, also, we conclusively presume, in aid of the appropriation proceedings, that the persons appointed were competent appraisers, under the statute, and were duly sworn as such, as required thereby.

Appellant states in its complaint that on July 14, 1884, the appraisers appointed for that purpose returned to the clerk of such court their award of its damages by reason of such appropriation. The statute provides that such an award may be reviewed by the court in which the appropriation proceedings were had, "on written exceptions filed by either party in the clerk's office within ten days after the filing of such award." Section 3907, *supra*. This remedy by appeal is the only remedy provided by the statute for the party aggrieved by such award; and it must be taken within the time and in the manner prescribed by the statute. Appellant filed no exceptions to the award of its damages, and took no appeal therefrom to the proper court, so far as the record shows, "within ten days after the filing of such award," nor at any other time. The damages awarded to the appellant on account of appellee's appropriation of its strip of land were promptly paid to the clerk of such court; and thereupon and thereafter, by the express terms of the statute, such strip of land belonged to the appellee, to be used for the purpose specified in its act of appropriation. Six months afterwards appellant commenced this action to recover such strip of land, and to enjoin appellee from constructing thereon its switch, side track, or turn-out.

For reasons already given, we are of opinion that the court did not err in sustaining the demurrer to appellant's complaint. The judgment is affirmed, with costs.

(106 Ind. 534)

BOARD OF COM'RS OF FOUNTAIN CO. v. THOMPSON and others.

(*Supreme Court of Indiana*. June 1, 1886.)

COUNTIES—COUNTY COMMISSIONERS—TOLL-BRIDGE EXTENDING INTO ADJOINING COUNTY—POWER TO PURCHASE.

The board of commissioners of a county has no power to purchase a toll-bridge extending partly into another county, without the concurrent action of the board in the adjoining county, and without notice to such board.

Appeal from Fountain circuit court.

*Nebeker & Dochterman*, for appellant.

*Thompson & West* and *W. E. Baker*, for appellees.

MITCHELL, J. Upon the petition of sundry citizens the board of commissioners of Fountain county, at their regular session in December, 1885, made an order declaring that the purchase of a certain toll-bridge across the Wabash river was for the public good. The order recited, further, that, in the event it could be had at a reasonable price, the bridge should be purchased by the board, and made a free bridge, and that the amount necessary to pay for the same should be paid out of any funds in the county treasury not otherwise appropriated. The appellees, who were resident tax-payers of the county, filed their bill in the Fountain circuit court, setting forth the facts at large, and praying that the board be enjoined from purchasing and paying for the bridge out of the public funds. The Wabash is the boundary line between the counties of Fountain and Warren, and the appellees claimed that by reason of that fact, and because one of the approaches and one-half the bridge were in Warren county, the proposed purchase was outside and beyond the jurisdiction of the board of commissioners of Fountain county. The appellants filed an answer; but all the facts having any practical relation to the case are undisputed. Some question is made concerning the exact location of the boundary line between the two counties; but whether it is in the center or at one side or the other of the river is of no moment, as, in either event, it is conceded part of the bridge and one of the approaches is in Warren county.

The single question is, has the board of commissioners of one county the power to purchase a toll-bridge across a stream which forms the boundary line between the counties, without the concurrent action of the board in the adjoining county, or without notice to such board?

Power to purchase toll-bridges is given in section 5801, Rev. St. 1881, in the following language:

"The board of commissioners of any county may, whenever they shall deem it proper and for the public good, purchase any toll-bridge or buy any private interest therein, and order the same paid for out of the county treasury."

It is of course not disputed but that toll-bridges, the purchase of which is authorized by this statute, are such as in some way facilitate public

travel in the county out of whose public treasury they are to be paid for. That county commissioners are not authorized to purchase toll-bridges generally and without limit, and that the public, whose good is to be conserved in making such purchases, consists of those communities and people of whom the commissioners are the representatives, is uncontroverted. With the public good outside the county the board of commissioners have manifestly no official concern. Inasmuch, therefore, as the statute conferring the power to purchase "any toll-bridge" is not to be considered in the broad sense of a grant of power to purchase toll-bridges without regard to their location or situation, the inquiry comes, what are the limitations upon the power of county boards in respect to the purchase of such structures? The legislature having manifested a certain policy in regard to the erection and maintenance of public bridges, having charged upon the several boards of commissioners the duty of keeping the bridges in their respective counties in repair, and having imposed certain duties on township trustees and road supervisors in relation to all bridges within their respective jurisdictions, we are not to suppose the statute authorizing the purchase of toll-bridges was intended to introduce into the existing economy an anomalous class of structures, concerning which the power and duty of public officers should be different from that pertaining to public bridges generally. It may therefore be assumed that a board of commissioners has no power to purchase a toll-bridge which is not on a public highway, or at a place where they could not erect a bridge; nor can they purchase a bridge at any place where such purchase would seem to impose upon the county duties or obligations different from those provided by law. *Driftwood, etc., v. Board, etc.*, 72 Ind. 226; *Board, etc., v. Deprez*, 87 Ind. 509; *Board, etc., v. Rushville, etc., Co.*, 87 Ind. 504.

The statute in reference to the purchase of toll-bridges must therefore be set into the general legislation upon the subject of bridges, and must be construed and harmonized accordingly. The erection and maintenances of bridges across streams which form the boundary line between counties has been provided for by statute. Sections 2880, 2884, Rev. St. 1881; Acts 1885, p. 58. Such bridges can only be erected by the concurrent action of the boards of commissioners of the counties of which the stream proposed to be bridged, forms the boundary line. *Browning v. Board, etc.*, 44 Ind. 11. In the event the board of one of such counties fails or refuses, after 30 days' notice, to concur or act in relation to the matter, the other may proceed. By the terms of the act of 1885 one county, in conjunction with a township, may erect or repair such a bridge without the concurrence of the adjacent county, where a tax is voted by the legal voters of any township of such county which bounds the stream.

Having no power to build a bridge except in the manner prescribed, it cannot be assumed that a county board may accomplish indirectly that which they had no power to do directly. They cannot buy a bridge where they might not, under existing circumstances and like conditions, build one. Conversely, it can hardly be doubted but that, under the

same circumstances which would authorize the erection or repair of a bridge, such board may exert the power conferred by the statute, and purchase one already existing. Section 2884 enacts that "each county shall be regarded as the owner of an interest in any bridge erected in pursuance of this act, and each shall have a voice in regulating the use thereof." Section 2892 makes it the duty of the board of commissioners of each county to cause "all bridges therein to be kept in repair." It results that all bridges, or parts thereof, or approaches thereto, which are authorized, and exist as county bridges, on county highways, are subject to the jurisdiction of the county in which they are situate, and the repair and maintenance of such bridges is charged upon the county without regard to the fact that such bridge may have been erected or purchased. A board of commissioners cannot, however, assume any liability beyond the limits of the county, nor can it acquire any extra-territorial control over a bridge after it is erected or purchased. On certain prescribed conditions, where a stream is the boundary line between two counties, one county may, without the consent of the other, impose upon the latter the ownership of and incidental liability of keeping in repair the approach to and one end of a bridge, but this cannot be done either by erecting a new bridge, or purchasing one already existing, without first giving notice, and inviting, as the statute provides, the co-operation of the county to be thus affected. Until this is done there is no power to proceed either to erect or purchase a bridge, which shall impose such liability.

Authority to purchase toll-bridges was conferred to the end that bridges which were owned by private persons or corporations, and which formed part of the public highways, might, when the public good required it, be converted into free bridges. Primarily the purpose was not that counties might buy toll-bridges as such, but that any private interest or ownership which might be held in bridges which form a part of the public highways might be extinguished in favor of the public. When such a bridge is purchased, and the private interest extinguished, it takes its place in the system of public bridges in the county or counties in which it is situate. The several municipalities then become subject to all the rights and liabilities, in respect to it, that pertain to all other public bridges. There can be no difficulty in applying the statute for the erection of bridges over streams forming the boundary between counties to the purchase of toll-bridges similarly situate. There was no error.

The judgment of the circuit court is affirmed, with costs.

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(106 Ind. 600)

**BOARD OF COM'RS OF FOUNTAIN CO. v. WRIGHT and others.**

(*Supreme Court of Indiana.* June 1, 1886.)

**COUNTIES—COUNTY COMMISSIONERS—TOLL-BRIDGE—WHEN MAY BE PURCHASED.**  
*Board Com'rs Fountain Co. v. Thompson, ante, 248, followed.*

Appeal from Fountain circuit court.  
*Nebeker & Dochterman*, for appellant.

*Thompson & West and W. E. Baker, for appellees.*

MITCHELL, J. It was stipulated by the parties to this appeal that, inasmuch as the questions involved were identical with those presented in the case of *Board Com'rs Fountain Co. v. Thompson, ante*, 248, (No. 13,099,) that the decision in that case should be decisive of this. In pursuance of the stipulation thus filed, the judgment of the circuit in the above-entitled cause is affirmed, with costs.

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(106 Ind. 573)

SHIRK and others v. BOARD OF COM'RS OF CARROLL Co.

(*Supreme Court of Indiana. June 1, 1886.*)

BRIDGES—WABASH & ERIE CANAL.

The purchasers of the Wabash & Erie Canal did not acquire title to a bridge built across it for highway purposes.

Appeal from Carroll circuit court. On petition for rehearing. See 5 N. E. Rep. 705.

*R. S. Taylor, for appellant.*

*Coffroth & Stuart, for appellee.*

ELLIOTT, J. A very able brief has been filed by the appellant's counsel on the petition for rehearing, in which, among other things, it is said:

"I admit that the public easement in the highway which crossed the Wabash river at Carrollton was not destroyed by the construction of the canal, but continues to this day. I admit that the use of the highway was possession of the easement and notice to all the world. I admit that all such existing easements followed the canal into the hands of the purchasers under the Gapen decree. I have never controverted these propositions. My contention is that the easement in the soil does not embrace the artificial stone structures placed on it as a part of the canal."

In stating what his contention is the learned counsel assumes, what we cannot grant, that the bridge was part of the canal. This assumption lies at the foundation of the argument, and, unless it can be made good, the whole argument falls. The facts stated in the special finding, and recited in the agreed statement of facts, show that the bridge was constructed as a part of the highway except the addition made to it for towing purposes, and therefore counsel's assumption is utterly without support. The bridge was a part of the highway: As such it was built and maintained. Counsel admits, what could not well be denied, that the possession and use by the state was notice to all the world, and the logical conclusion from this admission, which no ingenuity of invention, however great, can escape, is that the purchasers of the canal knew that the bridge was part of the highway, and not part of the canal.

If, therefore, the state had an interest in the bridge distinct from that owned for canal purposes, it still retains it, for the appellant knew that the highway bridge was no part of the canal, and the decree on which his title is founded orders a sale of the canal, and no other property is embraced by its terms or is within its scope. The agreed state-

ment of facts filed as part of the evidence thus states what 'property' was sold under the decree, to-wit: "That part of said canal lying between the Ohio state line and the western boundary of the city of Lafayette." If the appellant's grantor bought the canal, as it is agreed he did, we can perceive no possible ground upon which it can be claimed, with even the feeblest appearance of justice, that he got a highway bridge forming no part of the canal. If the purchasers of the various canals constructed under the internal improvement laws of the state obtained, by virtue of their purchase under the decrees directing a sale of the canal property, title to all the highways and highway bridges that crossed those canals, then we are wrong in our conclusion; but if, as we believe to be undeniably true, they bought only the canals and their appurtenances, then our conclusion is right. We confess that we are unable to perceive how it is possible for the appellant to wrest from the people of the state property that was not sold.

It is covertly assumed by counsel that we constructed our opinion upon the theory that "an easement in the soil embraced the artificial stone structure placed on it as a part of the canal," but counsel is greatly in error. We expressly declared that the bridge, so far as it was built for highway purposes, was not a part of the canal; so that there is a palpable fallacy in assuming that we conceded it to be a part of the canal. Our proposition was and is that the bridge, in so far as it was a part of the highway, is not a part of the canal, and, as the appellant bought the canal, he did not acquire title to any other property owned by the state.

It seemed clear to us on the oral argument, and continued reflection has, if possible, made it still clearer to our minds, that the appellant has rightful title to the property sold under the decree, and to nothing more, and that is the canal and its appurtenances. The question here is, what is the extent and nature of the appellant's title? That title surely is no greater than was sold under the decree upon which the claim of title rests. We cannot go behind that decree to ascertain what interest or estate might have been ordered sold, but our inquiry ends when we ascertain what property was sold. The state courts can neither review nor impair the decrees of the federal tribunals, but must enforce them as they are written. With quite as much reason might the state ask us to decide that too great an interest was directed to be sold, as for the appellant to ask us to determine that more ought to have been sold. It is a familiar principle that a decree directing the sale of property mortgaged or otherwise pledged as a security for a debt, settles the estate which shall be sold; and we must presume that the United States officers did their duty, and sold what the decree authorized them to sell. At all events, we must, where the record shows, as it does here, what property the appellant bought, decide that we cannot inquire into what lies back of the decree and sale for the purpose of ascertaining whether there is or is not some equitable grounds for giving the appellant more than he bought.

The decision in *City of Logansport v. Shirk*, 88 Ind. 563, goes much further than we need do here; for it declares, and rightly, that the ease-



ment of the public in highways simply remained in abeyance during the time the canal was in use, but revived when the use ceased. If, as we must do, we apply that principle here, it results that, when the canal was abandoned, the right of the people to the highway bridge fully revived. Nor is there any injustice in applying this principle where it is expressly admitted, as it is here, that the use and enjoyment of the bridge for highway purposes was "notice to all the world." Petition overruled.

(106 Ind. 543)

WADKINS and others v. HILL.

(*Supreme Court of Indiana*. June 1, 1886.)

PLEADING—CROSS-COMPLAINT—EXHIBITS.

A cross-complaint is to be tried by substantially the same rules as a complaint; and, where it is founded on a written instrument, it must make the instrument an exhibit except in cases where the complaint sets forth the instrument.

Appeal from Rush circuit court.

*New & Jones*, for appellants.

*Smith & Henley and Cambirn & Newkirk*, for appellee.

ELLIOTT, J. The complaint of the appellants alleged ownership of land, and prays that the title may be quieted. The first paragraph of the appellee's cross-complaint sets forth facts showing that an instrument executed by the appellants, although in form a deed, was in fact a mortgage, and asks that it may be foreclosed as a mortgage. There can be no doubt that the theory upon which this pleading is constructed, is that the instrument is a mortgage; and, unless it is good upon this theory, the court erred in overruling appellants' demurrer. It is settled law that a pleading must be good on the theory on which it assumes to be constructed, or it will fall before a demurrer. *Chicago, etc., Co. v. Bills*, 104 Ind. 13, S. C. 3 N. E. Rep. 611, and cases cited; *Messall v. Tully*, 91 Ind. 96, and cases cited. The question, therefore, is whether the pleading is good as a cross-complaint to foreclose a mortgage.

A cross-complaint which attempts, as does the one before us, to state a cause of action entitling the party to affirmative relief, must be tried by substantially the same rules as a complaint. *Conger v. Miller*, 104 Ind. 192; S. C. 4 N. E. Rep. 300. The general rule respecting the filing of instruments which constitute the foundation of a cross-complaint or counter-claim is that they must be filed with the pleading as an exhibit, or made part of it by incorporation. *Campbell v. Routt*, 42 Ind. 410; *Brown v. State*, 44 Ind. 222. There is an exception to this general rule, for it has been held that, where the instrument is fully exhibited in the complaint, it may be referred to in the cross-complaint without again making it an exhibit. *Pattison v. Vaughan*, 40 Ind. 253; *Sidener v. Davis*, 69 Ind. 336; *Crowder v. Reed*, 80 Ind. 1, *vide* page 4; *Cookerly v. Duncan*, 87 Ind. 332; *Gardner v. Fisher*, Id. 369; *Anderson v. Wilson*, 100 Ind. 407. While we recognize this exception to the general rule, we cannot hold the counter-claim before us to be within the exception,

for the reason that it does not refer to the deed set forth in the complaint as the one upon which it is founded. On the contrary, it assumes to proceed on a different instrument, and professes to make it an exhibit. The case is therefore within the rule declared in *Campbell v. Routt*, *supra*, which is distinctly approved in *Sidener v. Davis*, *supra*. Had the counter-claim directly referred to the instrument set forth in the complaint as the one upon which it is founded, then the case would have been within the rule declared in *Sidener v. Davis* and kindred cases; but so far is it from doing this, that it professes to be founded on a distinct and different instrument.

It is to be regretted that the trial courts are often led into error, through no fault of their own, by the omission of pleaders to actually make exhibits instruments which they profess to file with the pleading; but the statute upon this subject is imperative, and we cannot disregard it. The error in overruling the demurrer to the first paragraph of the cross-complaint requires a reversal, and we think it unnecessary to decide the other questions discussed. Judgment reversed.

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(106 Ind. 531)

BOARD OF COM'RS OF PUTNAM CO. v. STATE *et rel.* HORD, Atty. Gen.

(*Supreme Court of Indiana*. June 2, 1886.)

SCHOOLS AND SCHOOL-DISTRICTS—COUNTY—MISAPPROPRIATION OF SCHOOL FUNDS  
—STATUTE OF LIMITATIONS.

Where a county misappropriates the common school funds, it cannot set up the statute of limitations in bar of an action therefor.

Appeal from Putnam circuit court.

*Smiley, Neff & Myers*, for appellant.

*The Attorney General*, for appellee.

Howk, C. J. This was an appeal to the circuit court from an order of the board of commissioners of Putnam county, rejecting and refusing to allow a claim against such county filed by the state of Indiana on the relation of its attorney general. In the court below the appellee filed an amended claim or complaint, to which the appellant answered in two paragraphs; whereof the first was a general denial, and the second paragraph was, in effect, a plea that appellee's cause of action had not accrued within 20 years prior to the commencement of this suit. Appellee's demurrer was sustained by the court to the second paragraph of answer. The cause was tried by the court, and, at appellant's request, the court made a special finding of the facts, and thereon stated, as its conclusion of law, that appellee was entitled to recover the amount of its claim, and interest. Over appellant's exceptions to the conclusions of law, judgment was rendered in accordance therewith. In this court appellant has assigned a number of errors; but the only one discussed by its counsel in their brief of this cause is the alleged error of the court in sustaining appellee's demurrer to the second paragraph of answer.

Appellee sued to recover the amount of certain fees and commissions which the appellant, as alleged, had erroneously allowed and paid to its

county officers out of the common school funds; instead of out of the county revenue, for collecting and disbursing such common school funds in the years 1855, 1857, 1858, and 1859. To appellee's claim or complaint, as we have seen, appellant interposed a plea of the statute of limitations, as the second paragraph of its answer, and to this paragraph of answer appellee's demurrer was sustained by the court. Appellant's counsel insist very earnestly that this ruling of the court was and is erroneous. This precise question has recently been considered by this court in several cases, and it has been uniformly held that the statute of limitations will not constitute any valid or sufficient defense to such a claim or cause of action as the one sued upon in this case. Thus, in *State v. Board, etc.*, 90 Ind. 359, after citing and quoting the provisions of our laws, constitutional and statutory, in relation to our common school funds, and the trust thereby imposed upon the several counties of the state in regard to such funds, the court said:

"We think that the above provisions are entirely inconsistent with any statute of limitations that can be relied upon to protect the county from the execution of its trust. It cannot repudiate nor disavow its trust; and where, as in the present case, it misappropriates common school funds, no failure of the proper officials to bring suit, for any length of time after notice of the misappropriation, can be set up by way of limitation to the action, to the prejudice of the beneficiaries of the trust."

What we have quoted from the opinion of the court in the case cited, is directly in point in the case under consideration, and meets our full approval as an exact and correct statement of the law. In section 8 of article 8 of our state constitution it is declared as follows:

"The principal of the common school fund shall remain a perpetual fund, which may be increased, but shall never be diminished, and the income thereof shall be inviolably appropriated to the support of common schools; and to no other purpose whatever."

In section 6 of the same article of our constitution it is thus declared:

"The several counties shall be held liable for the preservation of so much of the said fund as may be intrusted to them, and for the payment of the annual interest thereon."

Under these provisions of the organic and fundamental law of the state, it is very clear, we think, that no county can be permitted to pay any county officers out of the common school fund, or the income thereof, any fees or commissions for the collection or disbursement of such fund or income; and where, as in this case, any such payments have been made, the county must be held liable for the amount thereof, and interest thereon, without regard to lapse of time or the provisions of any statute of limitations. *State v. Board, etc.*, *supra*, has been fully approved and followed by this court in the more recent case of *Board, etc.*, v. *State*, 103 Ind. 497, S. C. 3 N. E. Rep. 165, and *Board, etc.*, v. *State*, 6 N. E. Rep. 623, (at the last term.)

We conclude, in the case at bar, that the court committed no error in sustaining appellee's demurrer to the second paragraph of appellant's answer. The judgment is affirmed, with costs.

(107 Ind. 280)

**BRADFORD v. SCHOOL TR. OF MARION.<sup>1</sup>***(Supreme Court of Indiana. June 2, 1886.)***1. NEW TRIAL — REVIEW OF JUDGMENT — COPY OF JUDGMENT SHOULD BE SET OUT.**

A complaint to review a judgment for error in setting aside an order granting a new trial as of right, and reinstating the original judgment, should set out a copy of such judgment.

**2. SAME — NEW TRIAL AS OF RIGHT — WHEN NOT GRANTED WHERE SEVERAL CAUSES OF ACTION ARE INVOLVED.**

Where judgment is rendered on any substantive cause of action in which a new trial as matter of right is not allowable, the policy of the law is, even though other causes are included in which a new trial as of right would ordinarily be allowable, to allow that cause to control in which a second trial is not permitted as of right.

Appeal from Grant circuit court.

*Steele & St. John* and *Mr. Van Devanter*, for appellant.

*Wm. L. Lenfesty* and *R. W. Bailey*, for appellee.

MITCHELL, J. This was a proceeding to review a judgment of the Grant circuit court for alleged error of law appearing on the face of the record. A demurrer was sustained to the complaint, and this ruling presents the only question for decision. On the twelfth day of May, 1882, Bradford commenced a suit against the school township of Marion. His complaint, a copy of which is set out in the bill for review, was in three paragraphs. The first and second were actions to recover possession of and quiet the title to certain lots, which the plaintiff averred he had conveyed to the school corporation upon certain conditions, which it was charged had been violated, and the violation of which had revested the plaintiff with the title to the lots in question. The third paragraph was an action for damages for the breach of the conditions previously mentioned. The defendant answered a general denial, and, by way of cross-complaint, set up the conveyance from the plaintiff to it, claimed ownership and right of possession, and asked to have its title to the lots quieted. Upon issues made on the complaint and cross-complaint a trial was had. The school township recovered judgment against Bradford at the November term, 1882, of the Grant circuit court. There is no record entry of the judgment set out with the complaint for review. On the twelfth day of April, 1883, Bradford applied for a new trial as of right. Afterwards—the complaint does not show how long—the application was allowed, and the new trial granted. The case was tried again in the April term, 1884, and judgment rendered for Bradford. At the same term of court the school corporation made an application to have the order granting the new trial as of right set aside, and the original judgment in its favor reinstated. This motion was sustained, and the judgment accordingly reinstated, as prayed for. Setting aside the order granting the new trial, and reinstating the original judgment, is the error for which the review was asked.

The record fails to disclose the character of the original judgment. The complaint for review charges that it was rendered on the cross-com-

<sup>1</sup> Rehearing denied.

plaint. We cannot tell, from an inspection of the record, whether it was an adjudication upon all the issues presented by the several paragraphs of the complaint and cross-complaint or not. The very thing complained of, and for which a review was asked, was that the court erred in granting a new trial as of right. It was therefore indispensable that a copy of the judgment which was vacated by the new trial, and reinstated by setting aside the order granting the new trial, should have been set out in the complaint for review. Whether the order granting the new trial was properly set aside depends upon whether the judgment was an adjudication of the issues tendered by the several paragraphs of the complaint, as well as those tendered by the cross-complaint. If the judgment was for the defendant generally, and was an adjudication of all the issues presented, then, since the parties saw fit to litigate causes of action which were improperly joined, in some of which either party would have been entitled to a new trial as of right, with an action for damages in which a new trial as of right was not allowable, the order granting a new trial was improperly made, and that which set it aside was correct. Doubtless, if the paragraph counting upon damages for breach of the conditions contained in the deed had been dismissed, or if the record had shown that it was abandoned or withdrawn, the case would then have been within section 1064, Rev. St. 1881, authorizing new trials as a matter of right. So long, however, as the paragraph for damages remained a feature of the litigation, that paragraph controlled, as respects the subject of a new trial.

The rule was well stated in *Butler University v. Conard*, 94 Ind. 353, the result of which is that, where a litigation proceeds to judgment on any substantive cause of action in which a new trial is not allowable as a matter of right, then, even though it embraces other causes in which a new trial as of right is allowable, the policy of the law is to allow that cause of action to control in which a second trial is not permitted as a matter of right. The logical conclusion to which this rule leads is that a new trial was not allowable as of right in the case under review, and the order setting aside the ruling by which a new trial as of right was granted was properly made. *Williams v. Thames, etc., Co.*, 5 N. E. Rep. 17: *Jenkins v. Corwin*, 55 Ind. 21.

There was no error. The judgment is affirmed, with costs.

(106 Ind. 559)

#### GILBERT v. BAKES and others.

(*Supreme Court of Indiana*. June 2, 1886.)

#### 1. PLEADING—DEMURRER TO REPLY NOT CARRIED BACK TO COMPLAINT.

Where the answer of the defendant is held good on demurrer, a demurrer to the reply will not be carried back to the complaint by the court, of its own motion.

#### 2. VENDOR AND VENDEE—VENDOR'S LIEN—NOT WAIVED BY ACCEPTANCE OF VOID SECURITY.

A vendor's lien is not waived by the acceptance of securities that have no legal validity.

v.7N.E.no.3—17

Appeal from Switzerland circuit court.

*Works & Schroeder*, for appellant.

*Ward & Livings*, for appellee.

ELLIOTT, J. The appellant filed an answer to the second paragraph of the appellee's complaint, and the court overruled the demurrer addressed to the answer by the appellee. The appellant's counsel contend that the second paragraph of the complaint is bad, and that the court, of its own volition, should have carried the demurrer back, and sustained it to the complaint. This contention cannot prevail. Where the answer of the defendant is left standing, he cannot successfully claim that the court erred in failing, of its own motion, to carry the demurrer back to the complaint. *Haymond v. Saucer*, 84 Ind. 3; *Scheible v. Slagle*, 89 Ind. 323; *Standley v. Northwestern, etc., Co.*, 95 Ind. 254; *City of Evansville v. Martin*, 103 Ind. 206, see page 209; S. C. 2 N. E. Rep. 596; *Cupp v. Campbell*, 103 Ind. 213, see page 222; S. C. 2 N. E. Rep. 565. The rule established by these decisions is this: Where a defendant's answer is held good on demurrer, he cannot successfully urge, on appeal, that the court erred in not carrying the demurrer back to the paragraph of the complaint to which the answer was addressed. We do not deem it necessary to discuss the other questions argued by appellant's counsel, for we deem them settled against her by the decision made on the former appeal. *Bakes v. Gilbert*, 93 Ind. 70. This we say because the decision there made is the law of the case, and governs it throughout all of its stages. The principle decided on the former appeal is decisive here, and is in accordance with the law as declared by our decisions. The controlling principle there decided is that a vendor's lien is not lost by the acceptance of securities that have no legal validity. *Fouch v. Wilson*, 60 Ind. 64; *Felton v. Smith*, 84 Ind. 485, see pages 490, 491; *Himes v. Langley*, 85 Ind. 77; *Lord v. Wilcox*, 99 Ind. 491.

Judgment affirmed.

(106 Ind. 47)

NIXON and others v. CAMPBELL and others.

(*Supreme Court of Indiana*. June 5, 1886.)

MUNICIPAL CORPORATIONS—RAILROAD COMPANY—TAX AID—WHEN NO FORFEITURE BY DELAY IN BEGINNING WORK.

The failure of a railroad company to commence work within one year after the levying of a special tax does not, in the absence of a declaration of forfeiture by the county board, operate as a forfeiture of the donation voted by the township.

Appeal from Fountain circuit court. On petition for rehearing. See 4 N. E. Rep. 296.

*Nebeker & Dochterman*, for appellants.

*McCabe & McCabe*, for appellees.

ZOLLARS, J. But one question is made in the argument upon the petition for a rehearing, and that is that the second paragraph of the complaint is good by reason of the averment therein that the railroad com-

pany failed to commence work upon the line of its road in the county or township within one year after the levying of the special tax. Section 18, c. 44, of the act of 1869 (section 4062, Rev. St. 1881) provided the causes of forfeiture of the right to donations by townships. The first was the failure on the part of the railroad company to commence work upon its road in the county within one year from the levying of the special tax. The second was a failure on the part of the railroad company to complete its road ready for use within three years from the levying of such special tax. The failure to so commence the work, or to so complete the road, in and of itself, worked an absolute forfeiture of the right to the donation voted. It is conceded that the second cause, so far as it, in and of itself, worked an absolute forfeiture, has been overthrown and superseded by subsequent legislation, as held in the principal opinion; but it is contended that the first cause has not been affected by subsequent legislation, and that, therefore, so far as the above section 18, c. 44, of the act of 1869 provided for a forfeiture of such donation by a failure on the part of the railroad company to commence work upon its road within one year after the levying of the special tax, it is still in force.

In 1873 the legislature passed an act supplemental to the act of 1869. Acts 1873, p. 184; Rev. St. 1881, §§ 4068, 4069. The first section of that act provided that no tax shall be placed upon the duplicate of any county for the purpose of taking stock or making donations to railroad companies by any \* \* \* township pursuant to the provisions of the act of 1869, "until such railroad shall have been permanently located in the \* \* \* township making the donation, or taking the stock." This section, it will be observed, prescribes no time within which the railroad shall be permanently located in the township. The only limitation seems to be that until so located the special tax shall not be placed upon the tax duplicate. Of course, it could not be expected that work upon the road would precede its location in the township.

The second section of the act provided for a suspension of the collection of the special tax until an amount of work should be done upon the railroad in the township equal to the donation voted; provided a cause and a mode of forfeiture of the right to the donation; and contained a proviso that, whenever it should be shown to the satisfaction of the board of county commissioners that the amount of work done upon the road in the township equaled the amount of the donation, the board should order the tax collected. This second section was amended in 1875. Acts 1875, p. 121, c. 82; Rev. St. 1881, § 4069. The amendment made no change, except to extend the time within which the county board might declare a forfeiture of the right to the donation for a failure on the part of the railroad company to complete its road, and added a proviso which it is not necessary to notice here. Here, again, under the section of the act of 1873 as amended by the act of 1875, the provision that the county board shall order the tax collected when the value of the work done upon the road shall equal the amount donated, is without limitation as to time. Authority is given to the county board to declare

a forfeiture of the donation if, within three years after the special tax is placed upon the duplicate, a certain amount of work is not done upon the road. If, before such forfeiture shall be declared, the value of the work done upon the railroad shall equal the amount donated, the county board must order the special tax collected, regardless of the time within which the work may have been done. The several statutes upon the subject of donating to railroad companies by townships have been the source of no little difficulty to the profession and to the courts. Whatever doubts there may have been as to their proper construction, the later cases by this court hold that since the passage of the act of 1873, *supra*, the only mode of forfeiture for a failure on the part of the railroad company to commence and complete the construction of its road has been by and through an order by the board of county commissioners.

The case of *Wilson v. Board, etc.*, 68 Ind. 507, as counsel say, might have been decided without expressing an opinion as to whether or not there could be any forfeiture for a failure on the part of the railroad company to commence work upon its road within one year after the levying of the special tax, except by and through an order by the county board. And so that case might have been disposed of without reference to defective allegation in relation to the work not having been commenced within one year after the levy of the special tax, by holding that since the act of 1873, *supra*, in order to have a forfeiture of the right to a donation, it has been necessary that the county board should declare the forfeiture. In the later cases the case above has been regarded and cited as resting upon the ground of the defective averment in relation to the work not having been commenced within the year, and upon the ground that section 18, *supra*, was not in force after the passage of the act of 1873, *supra*. See *State v. Board, etc.*, 92 Ind. 499; *Sellers v. Beaver*, 97 Ind. 111.

The case of *Caffyn v. State*, 91 Ind. 324, involved the exact question as to whether or not the failure, on the part of the railroad company to commence work upon its road within one year after the levying of the special tax, operated as a forfeiture of the donation voted by the township. It was held that it did not. It was said:

"While section 18, *supra*, remained unqualified by subsequent legislation, it was held that, upon such failure of the company, the taxpayers were discharged from their obligation to pay the tax. \* \* \* So far as section 18, *supra*, established a forfeiture of the rights of the railroad company, it has been repealed by subsequent legislation. *Wilson v. Board, etc.*, 68 Ind. 507."

The act of 1877 manifests an understanding on the part of the legislature that section 18 of the act of 1869 had been repealed. The above act of 1877 again extended the time within which railroad companies, then organized, might complete their roads, and be entitled to donations voted to them by townships. The act contained a proviso that it should not be so construed as to entitle any company to donations that had failed to commence work upon its road within two years from the levying of the special tax. If that part of section 18 of the act of 1869 which



provided for a forfeiture of the township donation by a failure on the part of the railroad company to commence work in one year after the levying of the special tax was in force, the proviso in the act of 1877 would seem to have been unnecessary because the donations were or would be forfeited by a failure to commence work within one year.

Upon a re-examination of the statutes, and following the later cases above cited, and keeping in mind that no forfeiture was declared by the county board, we are constrained to hold that the petition for a rehearing should be overruled. It is accordingly so ordered.

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STARK and others v. WEST CHICAGO PARK COM'RS.

(*Supreme Court of Illinois*. May 15, 1886.)

MUNICIPAL CORPORATIONS—CITY OF CHICAGO—SPECIAL ASSESSMENT—PUBLICATION OF NOTICE FOR CONFIRMATION.

The private act of 1869 amending the charter of Chicago, and creating a board of park commissioners, required publication of notice of application to the court for confirmation of assessments at least 10 days previous to the time fixed for such application. 1 Priv. Laws 1869, p. 849. The general statute on notices (Rev. St. 1845, c. 8, § 4) does not apply to publications under such act. *Le Moyne v. West Chicago Park Com'rs*, 4 N. E. Rep. 498, and 6 N. E. Rep. 48, followed.

Error to Cook.

*Wilson & Moore*, for plaintiffs in error.

*Campbell, Hamilton & Custer and Wm. E. Mason*, for defendants in error.

PER CURIAM. This case is precisely the same, in all respects, as *Le Moyne v. West Chicago Park Com'rs*, opinion filed in vacation after September term, A. D. 1885, (4 N. E. Rep. 498,) and rehearing denied at March term, A. D. 1886, (6 N. E. Rep. 48.) For the reasons given in the opinion in that case the judgment is affirmed.

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CHICAGO DOCK CO. and others v. WEST CHICAGO PARK COM'RS.

(*Supreme Court of Illinois*. May 15, 1886.)

MUNICIPAL CORPORATIONS—CITY OF CHICAGO—SPECIAL ASSESSMENT—PUBLICATION OF NOTICE FOR CONFIRMATION.

*Le Moyne v. West Chicago Park Com'rs*, 4 N. E. Rep. 498, and 6 N. E. Rep. 48, followed. See preceding case.

Error to Cook.

PER CURIAM. This case is in all respects the same as *Le Moyne v. West Chicago Park Com'rs*, opinion filed in vacation after September term, A. D. 1885, (4 N. E. Rep. 498,) and rehearing denied at March term, A. D. 1886, (6 N. E. Rep. 48.) For the reasons given in the opinion in that case the judgment is affirmed.

(118 Ill. 52)

PEOPLE *ex rel.* LITTLE, County Collector, etc., v. TRUSTEES OF SCHOOLS OF TOWNSHIP 19, etc.

(*Supreme Court of Illinois*. May 15, 1886.)

SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL LANDS—EXEMPT FROM SPECIAL ASSESSMENT—CONSTITUTIONAL GUARANTY.

School lands donated by congress to the state (act of congress April 18, 1818; 1 Starr & C. St. 521, § 6) are exempt from liability for special assessments for improvements. This results from the guaranty by section 2 of article 8 of the constitution of 1870 (1 Starr & C. St. 141) that donations for schools shall be faithfully applied to the objects of such gifts.

Appeal from county court, Lee county.

SHELDON, J. This was an application to the county collector of Lee county, in this state, for judgment in the county court against section 16, in township 19, range 8, in Lee county, for a special drainage assessment, claimed to be due thereon and delinquent. The trustees of schools in said township appeared, and filed various objections to the rendition of judgment, all of which the county court overruled, except the first, which it sustained, and refused judgment, and the collector appeals to this court.

The objection which the court sustained to the assessment was that this section 16 was school land, and therefore exempt from the special assessment. As in *County of McLean v. City of Bloomington*, 106 Ill. 209, this court, agreeably with its former rulings, held that the courthouse square of the county of McLean was subject to a special assessment for the improvement of adjacent streets in Bloomington, it is contended that, upon the principle of that decision, school-land section 16 should be subject to special assessment. Such school land stands upon a different ground from other public property of the state, or municipalities. By the sixth section of the act of congress, enabling the people of Illinois to form a state constitution, it was enacted that "the section numbered 16, in every township, \* \* \* shall be granted to the state, for the use of the inhabitants of such township, for the use of schools." Article 8, § 2, of the constitution of 1870, provides that "all land, moneys, or other property, donated, granted, or received for school, college, seminary, or university purposes, and the proceeds thereof, shall be faithfully applied to the objects for which such gifts or grants were made."

From the above, this court, in *City of Chicago v. People*, 80 Ill. 384, deduced the conclusion that this property (school section 16) could not be subjected to taxation by the general assembly. This was not put upon the ground of any direct exemption otherwise of such property from taxation, but upon the use for which the property was granted, and the constitutional provision that the land granted for school purposes should be faithfully applied to the objects for which the grant was made; that this prohibited the legislature from directly appropriating this property to state or municipal purposes, and it could not do so by the indirect means of taxation; that so much as would be taken from the

fund by taxation would be an unconstitutional perversion of the fund to that extent. It was said the state was the real owner of the fund, to be held in trust for the purposes of the grant. This same reason which would exempt the property from taxation must be held to exempt it from special assessment. The fund would be liable to be misappropriated in the latter mode as well as in the former. It does not meet the objection to a special assessment to say that it takes nothing from the property, and the assessment is only to the extent of the benefit conferred upon it by the improvement. This may be so in theory, but not in certainty. The property should be held sacred for the use to which it has been appropriated. It may be sold, or it may be rented, for school purposes, but no authority of law is conferred upon any one to improve it. It should not be exposed to the danger of being improved away, by being made to pay for supposed benefits conferred upon it by improvements.

It is said the purpose is not to have sale made of the land to pay the assessment, but to obtain judgment, which may be paid out of any moneys unappropriated of the township; or there may be the remedy by *mandamus*, requiring the board of trustees to levy a tax for the payment of the judgment. But any payment so to be obtained would come from school moneys, and there would be equally involved a perversion of the school fund as if the property itself should be sold to satisfy the judgment.

We are of opinion this school property should be held exempt from the special assessment, and the judgment of the county court will be affirmed.

(117 Ill. 221)

**TOWN OF EVANS v. DICKEY, Ex'x.**

(*Supreme Court of Illinois. June 12, 1886.*)

**1. EVIDENCE—OPINION—ATTORNEY—EMPLOYMENT OF—INFERENCES AND CONCLUSIONS, AND ATTORNEY'S GENERAL METHOD OF BUSINESS, INADMISSIBLE.**

The principal questions in this case, which was a suit for fees by an attorney, are similar to those in *Town of Bruce v. Dickey*, 6 N. E. Rep. 435. In this case the plaintiff testified that he was "employed by the town," and that he never "thrust himself into the defense of a case in which he did not believe he was employed." Such statements of conclusion and general method of business are inadmissible.

**2. TRIAL—INSTRUCTIONS—SUMMING UP EVIDENCE.**

It is grave error, and ground for reversal, for the court to give an instruction summing up the facts as contended for by one side, and omitting and excluding from the attention of the jury evidence opposed thereto.

**3. APPEAL—FINDINGS OF CONTROVERTED FACTS BY APPELLATE COURT, FINAL—OTHERWISE OF CIRCUIT COURT.**

The findings of the appellate court upon controverted questions of fact are final and conclusive upon the supreme court; but the findings of the circuit court, in cases appealed directly to the supreme court, are not final. 2 *Starr & C. St. c. 110*, pars. 89, 90.

Appeal from Marshall.

*Mr. Jones and Mayo & Widmer*, for appellant.

*Monroe & Tewksbury and J. W. Duncan*, for appellee.

*Richolson & Gentleman*, also for appellee.

SCOTT, C. J. This action was brought by T. Lyle Dickey, since deceased, against the town of Evans, to recover for professional services as an attorney rendered for and on behalf of the town in suits brought against defendant in the circuit court of the United States, and also for services rendered in the supreme court of the United States. Most of the questions made and discussed, as arising upon the present record, have been considered and determined by this court in its opinion in the case of *Town of Bruce v. Dickey*, 6 N. E. Rep. 435, and it will only be necessary to refer to the opinion in that case for an expression of the views of this court upon all analogous questions involved in the case being considered. Only two questions not disposed of by the reasoning in the opinion in the case cited, remain to be considered. All others of sufficient importance to be remarked upon, it is thought, are settled by the decision in *Town of Bruce v. Dickey*, *supra*.

On the trial plaintiff was permitted, over the objection of defendant, to state in his testimony, given in his own behalf, that "some time in the fall, the latter part of November, or early in December, 1874, I was employed by the town of Evans in relation to a suit brought by Sanborn against the town, in the circuit court of the United States at Chicago. I don't recollect the particular mode of my employment,—whether the employment began by a copy of the summons being sent to me by the supervisor of the town, or whether my attention was called to the subject in behalf of the town by Mr. Jones, of Ottawa,—but I do remember the fact that I was in the case, and I know I never thrust myself into the defense of a case in which I did not believe I was employed." The admission of these statements of plaintiff was manifest error. Whether plaintiff had been employed by the town to defend suits brought against it is a question of fact, and it was highly improper to permit plaintiff, as witness for himself, to state that he had been "employed by the town," and that he never thrust himself "into the defense of a case" in which "he did not believe" he "was employed." So far as the employment of plaintiff by the town was a question of fact, it was within the province of the jury to determine; but so far as any question of law was involved, of course it was for the court. In no event could plaintiff be permitted to state his conclusion as to whether he had been employed by the town. He could only be permitted to state the facts as he understood them; and his version of the facts, in connection with other testimony in the case, would be submitted to the jury to find whether there had been in fact any employment of plaintiff by the town, under proper instructions from the court as to the law applicable.

The giving of the sixth instruction for plaintiff, as was done, was also error. It is faulty for several reasons. It is a mere summary of the principal facts as plaintiff insisted they were, and the conclusion to be drawn from such facts stated by the court as a matter of law. That mode of instructing is little less than the decision of the whole case by the court, and the practical effect is to withdraw the case from the jury. It might as well have been withdrawn from the jury in terms, so far as anything was left for their decision. But a more serious objection appears

on a close reading of the instruction. It is seen it assumes as facts matters that are and were the subject of serious contention between the parties. This is not allowable, and is a most hurtful mode of instructing a jury. Aside from this, another most serious error exists in this instruction. It excludes from the consideration of the jury, by its summary of alleged facts, the defense insisted upon, which certainly has some testimony in its support; that is, that Mr. Jones was the attorney employed by the town to conduct the defense of the suits brought against it, and that what plaintiff did was at the instance of Jones, and by his procurement. How this fact may be, of course this court will not now express any opinion. It may be proper, however, to say the position taken by counsel for plaintiff, that the question of fact as to the employment of plaintiff is not open for review in this court, cannot be conceded. The practice is otherwise. It is only the findings by the appellate courts of controverted questions of fact that are conclusive upon the court; not so as to the findings of the trial courts in cases which for any reason have come directly to this court. This case did not come to this court from any appellate court, and hence there is no finding of controverted questions of fact that are conclusive upon this court.

The judgment of the circuit court will be reversed, and the case remanded.

(117 Ill. 196)

ANDREWS v. PEOPLE.

(*Supreme Court of Illinois. May 15, 1886.*)

1. CRIMINAL LAW—INDICTMENT—WITNESSES INDORSED ON.

The requirement of the statute on juries, (2 Starr & C. St. c. 78, § 17,) that the foreman of the grand jury shall indorse upon the back of an indictment the names of the witnesses upon whose testimony the indictment is found, is mandatory. A disregard thereof would be fatal to the indictment. The indictment, in this case, was indorsed with the names of five witnesses, below which appeared the recital: "For other witnesses, see Off. Palmer." The indorsement is held sufficient, and the recital harmless.

2. SAME—SEVERAL COUNTS FOR DIFFERENT OFFENSES—ELECTION REQUIRED OF PROSECUTION ONLY WHERE DISTINCT TRANSACTIONS INVOLVED.

Where two or more offenses are charged in several counts, joined in one indictment, and such offenses may be parts of one and the same transaction, and of such a nature that the defendant may be guilty of both, the prosecution will not be required to elect on which count they will proceed. Election will be required only where distinct offenses, not parts of the same transaction, are involved.

3. EVIDENCE—CONFESSION—CONVICTION OF ACCUSED OF CRIME OTHERWISE ESTABLISHED.

Where a crime has been committed, the admissions of a party charged with the crime, deliberately made, are admissible, and the jury may convict on such evidence, if they believe it sufficient.

4. CRIMINAL LAW—TRIAL—INSTRUCTIONS—REPETITION.

The court is not bound to give instructions as asked where the substance of them has already been given.

Error to criminal court, Cook county.

CRAIG, J. This was an indictment against Andrew Andrews, containing two counts. In the first count defendant was charged with lar-

ceny, and in the second with receiving stolen goods. On a trial before a jury the defendant was found guilty as charged in the second count of the indictment, and was sentenced to eight years' imprisonment in the penitentiary. Several alleged errors are relied upon to reverse the judgment.

On the back of the indictment is indorsed: "A true bill. J. J. CORCORAN, Foreman of the Grand Jury;" and "Witnesses: Charles P. Crane, Lem. Flershem, Peter Lapp, Off. Cosgrove, Off. Palmer. See, for other witnesses, Off. Cosgrove & Palmer." "Filed June 19, 1885. JOHN STEPHENS, Clerk." The defendant entered a motion to quash the indictment on the ground that the foreman of the grand jury failed to note thereon the names of the witnesses upon whose evidence the indictment was found, as required by the statute. The court overruled the motion, and this is the first error relied upon to reverse the judgment. Section 17, c. 78, Rev. St., provides that the foreman of the grand jury shall, in each case in which a true bill shall be returned into court, note thereon the name or names of the witnesses upon whose evidence the same shall have been found. It is contended that the statement in the indictment, "See, for other witnesses, Off. Cosgrove & Palmer," was not a compliance with the statute, and vitiates the indorsement of the names of witnesses required by the law. The statute requiring the foreman of the grand jury to note on the indictment the names of the witnesses upon whose evidence the same is found, is mandatory, and a disregard of this requirement would, no doubt, be sufficient ground to authorize the court, upon proper motion, to quash the indictment. *McKinney v. People*, 2 Gilman, 552. The object of the statute is for the benefit of the accused, who is entitled to know the names of those upon whose evidence the indictment may have been found. It will, however, be observed that this statute does not require that the names of all witnesses who shall be called to testify on the trial of the accused shall be noted on the indictment, but the requirement of the law is confined to the names of those upon whose evidence the indictment may be found. Here the names of five witnesses were noted on the indictment by the foreman of the grand jury, as required by the statute, and the presumption is, in the absence of any contrary showing, that they were the witnesses, and the only witnesses, upon whose evidence the indictment was found. It is true there is noted on the indictment, "See, for other witnesses, Off. Cosgrove & Palmer;" but from this statement no presumption can arise that witnesses other than those whose names are noted testified before the grand jury. Before this statement appears, the noting of the names of witnesses on the indictment required by statute is full and complete, and that noting is in no manner contradicted or impaired by this statement. The statement may be rejected entirely, as no part of the indictment, or it may be treated as a mere memorandum, for the benefit of the state's attorney in finding other witnesses who were not before the grand jury, which in no manner related to the statutory duty of the foreman of the grand jury in noting the names of the witnesses on the indictment. But, however this statement may be regarded, when the foreman of the grand jury had noted the

names of five witnesses on the indictment, he had complied with the requirement of the statute. We are of opinion that there was no error in overruling the motion to quash the indictment.

As stated before, the indictment contained two counts: one for larceny, and the other for receiving stolen goods. After the evidence was all in, the defendant entered a motion to compel the prosecution to elect upon which one of the counts of the indictment a conviction would be asked. The court overruled the motion, and this decision is relied upon as error. In *Bennett v. People*, 96 Ill. 602, where a motion was made to require an election before the trial began, it was held that a count for larceny and receiving stolen goods might properly be joined in one indictment, and a trial might be had on all the counts; that where the charges all relate to one transaction, the prosecution would not be required to elect on which count a conviction would be asked. In *Goodhue v. People*, 94 Ill. 46, where an indictment contained three counts, and a motion was made by the defense to require an election, it was held that where two or more offenses form part of one transaction, and are such in nature that a defendant may be guilty of both, the prosecution will not, as a general rule, be put to an election, but may proceed under one indictment for the several offenses; though they be felonies. The right of demanding an election, and the limitation of the prosecution to one offense, is confined to charges which are actually distinct from each other, and do not form parts of one and the same transaction. The doctrine of the cases cited is fully supported in Bish. Crim. Proc. § 457, where the author says, when the counts are for different felonies, really or supposed to be connected with the one transaction,—as, for example, larceny, and receiving stolen goods, or embezzlement and larceny, and *a fortiori* where one felony is set out in various ways in the different counts to meet the varying forms of proof,—no election of counts will, in ordinary circumstances, be required, but all will be left open for the jury to pass upon. *Tobin v. People*, 104 Ill. 566, cited by counsel for the defendant, does not conflict in the least with the rule announced in the cases cited. In that case the joinder of counts was held to be proper, but the judgment was reversed because the jury had failed to determine under which count of the indictment defendant was guilty; that where there was a count for robbery, larceny, and receiving stolen property, a general verdict of guilty could not be sustained. There was no motion to require an election in that case, as here, and no ruling on the point involved in this case. Upon an examination of the evidence which was before the court when the motion was denied, it is apparent that the offense charged in the two counts of the indictment grew out of one transaction; that the two offenses charged formed a part of one transaction. Under such circumstance, it is clear that the motion requiring the prosecution to elect was properly overruled.

The court gave for the defendant eight instructions as asked, and two as modified,—in all ten instructions,—and refused four. The refusal to give the four is assigned for error. The first refused instruction, in substance, informed the jury that the defendant should not be convicted upon the un-

corroborated evidence of alleged confession made by him to a witness, and unless there is other evidence showing that defendant, at the time the goods were received, knew they were stolen they should acquit, etc. Where a crime has been committed, the admissions of a party charged with the crime, deliberately made, are always admissible, for the purpose of showing the guilt of the accused, and the jury, who are the judges of the weight to be given to all evidence, may convict on such evidence, if they believe it sufficient. We regard this rule well settled, both by the authorities and the well-established practice in criminal cases. In a case of this character it was necessary to prove that the goods had been stolen by evidence independent of the confessions of the defendant; when that fact, which may be regarded as the *corpus delicti*, was established, then the defendant may be convicted upon evidence of his own confessions. *Williams v. People*, 101 Ill. 382. As to the second refused instruction, the substance of all that is contained in it was given to the jury in defendant's instruction No. 8, and a repetition of the same thing, in a different form of expression, was not required. As to the third refused instruction, all that is embraced in it proper for the consideration of the jury was given in instruction No. 4, and modified instruction No. 6, and it was not error to refuse the instruction as drawn. Indeed, the jury were fully, and so far as disclosed by the record fairly, instructed in regard to every legal principle involved in the case; and even if it be true that some of defendant's refused instructions contained correct propositions of law, his case was not injured by their refusal.

So far as appears by the record, the defendant has had a fair and impartial trial, and the evidence was sufficient to warrant a verdict of guilty; and we perceive no ground upon which the judgment ought to be reversed. It will therefore be affirmed.

(117 Ill. 150)

**BAXTROM v. CHICAGO & N. W. Ry. Co.**

(*Supreme Court of Illinois. May 15, 1886.*)

**ERROR—FINALITY OF JUDGMENT OF APPELLATE COURT—ACTIONS SOUNDING IN DAMAGES.**

In actions sounding in damages, where the judgment of the lower court is for less than \$1,000 exclusive of costs, and that judgment is affirmed or otherwise disposed of in the appellate court, the judgment of the appellate court is final. Where the court directs a verdict for the defendant, and gives judgment thereon for the defendant, a judgment of affirmance in the appellate court is final.

Error to First district.

SCOTT, J. This action was brought by Gustav Baxtrom in the superior court of Cook county against the Chicago & Northwestern Railway Company, and was to recover for personal injuries to plaintiff alleged to have been caused by the negligent conduct of defendant in the management of one of its engines by the servants in charge. On the trial the court instructed the jury, as a matter of law, "there was not sufficient evidence to warrant a verdict for plaintiff," and directed the jury to find



"defendant not guilty," which they did. The judgment rendered on the verdict for defendant, and against plaintiff, was afterwards affirmed in the appellate court of the First district, and plaintiff brings the case to this court on error.

It is obvious no writ of error will lie from this court to the appellate court in this case. The action is one sounding in damages, and the statute (section 25, appellate court act) provides that "in all cases sounding in damages wherein the judgment of the court below is less than one thousand dollars, (\$1,000,) exclusive of costs, and the judgment is affirmed or otherwise finally disposed of in the appellate court, the judgment \* \* \* of the appellate court shall be final, and no appeal shall lie, or writ of error be prosecuted therefrom," unless where, in such cases, a majority of the judges of the appellate court shall be of opinion, and so certify, the case decided by them "involved questions of law of such importance, either on account of principle or collateral interests, as that it should be passed upon by the supreme court." The judgment in this case is less than \$1,000, exclusive of costs, and, as no majority of the judges of the appellate court have made any certificate that would give this court jurisdiction, under the statute, to hear and determine the cause, the writ of error must be dismissed, which is done.

(118 Ill. 80)

**MASSEY and others v. HUNTINGTON.**

*(Supreme Court of Illinois. June 12, 1886.)*

**1. TRUST—VACATION—UNDUE INFLUENCE AND FRAUD—ACKNOWLEDGMENT PREPONDERATES.**

On a bill by the devisee of a wife to vacate a prior disposition in trust, made by such wife jointly with her husband, on the ground of undue influence, the acknowledgment, supported by the testimony of the officer who certified thereto, is conclusive, in the absence of clear and satisfactory evidence to the contrary.

**2. SAME—DECLARATIONS OF DONOR INADMISSIBLE TO SHOW FRAUD OR UNDUE INFLUENCE.**

On a bill to vacate a trust on the ground of fraud or undue influence, the declarations of the donor, made either before or after the execution of the deed, are inadmissible to show such fraud or undue influence.

**3. SAME—EXECUTED TRUSTS—CONSIDERATION NOT NECESSARY.**

A trust is executed when no act is necessary to be done to give it effect,—when the trust is fully and finally declared in the instrument creating it. The transaction in this case comes within this rule. A consideration is not necessary to sustain an executed trust, and such a trust is irrevocable.

SCOTT, C. J., dissents.

Error to superior court, Cook county.

CRAIG, J. This was a bill in equity brought by Fannie H. Rexford to set aside a deed, bill of sale, and a declaration in trust executed by the complainant and Heber S. Rexford, Jr., her husband, to H. H. Massey, trustee, and Ephraim H. Denison, successor in trust. The three papers were executed on the fourteenth day of February, 1882. The deed, for an expressed consideration of one dollar and love and affection, and other good and valuable considerations, purported to convey five acres of land in Cook county, which was then owned by Heber S. Rexford, Jr. By the bill of sale, upon a like consideration, Heber S.

and Fannie H. Rexford granted, bargained, sold, and delivered to Massey, trustee, and Denison, his successor in trust, a promissory note for \$100 and an open account for \$2,191.21 against Norman Rexford; also one certificate of insurance, No. 25,962, in the Lumberman's Lodge, No. 1,815, of Knights of Honor, for the sum of \$2,000, bearing date the eleventh day of February, 1882, on the life of the said Heber S. Rexford, Jr., and payable at his death; also one policy of insurance issued by the Connecticut Mutual Life Insurance Company, numbered 134,395, on the life of the said Heber S. Rexford, Jr., for the sum of \$1,000, on the 10-year plan, dated May 13, A. D. 1875, and payable at his death. The declaration of trust provided that—

"The above conveyance of the real estate therein described, and the above bill of sale of the personal property therein described, are respectively made, executed, and delivered by the undersigned, Heber S. Rexford, Jr., and Fannie H. Rexford, his wife, to the said Henry H. Massey, or his successor in trust, for the following uses and purposes, to-wit: To hold the personal property, with power to sell, to lease, or incumber the real estate," etc., "(1) to pay all necessary expenses, including reasonable compensation for said trustee's services attending the management of the property above conveyed, and the execution of the trust herein created; (2) to pay to the said Heber S. Rexford, Jr., during his life the sum of forty dollars (\$40) per month, and such other amount as he may deem necessary from time to time, for the comfortable maintenance and support of the said Henry S. Rexford, Jr., and Fannie H. Rexford, his wife; and in case of the death of said Heber S. Rexford, Jr., before the death of the said Fannie H. Rexford, his wife, then and in that case the said Henry H. Massey, or his successor in trust, shall pay to the said Fannie H. Rexford during her life the sum of forty dollars (\$40) per month, and from time to time such other sums as he may deem necessary for the comfortable support and maintenance of the said Fannie H. Rexford; and all the rest and residue of such proceeds as aforesaid, and any or all of said personal property described in above bill of sale as may remain in the hands of the said Henry H. Massey, or his successor in trust, at the death of the said Heber S. Rexford, Jr., should he survive the said Fannie H. Rexford, or at the death of the said Fannie H. Rexford, if she should survive the said Heber S. Rexford, Jr., the said Henry H. Massey or his successor in trust shall pay over and deliver the same to the following named persons, to-wit: Two hundred and fifty dollars (\$250) to be paid to Mrs. Maria D. Huntington, of Blue Island, Cook county, Illinois, mother of Fannie H. Rexford, if she should survive the said Heber S. Rexford, Jr., and Fannie H. Rexford; if she should not survive the said Heber S. Rexford, Jr., and Fannie H. Rexford, then and in that event the said sum of two hundred and fifty dollars (\$250) shall be divided, with the rest, residue, and remainder of the estate, as follows: One-quarter ( $\frac{1}{4}$ ) thereof to Julia Rexford, mother of said Heber S. Rexford, Jr.; one-quarter ( $\frac{1}{4}$ ) thereof to F. D. Rexford, of Centralia, Illinois; one-quarter ( $\frac{1}{4}$ ) thereof to Norman B. Rexford, of Blue Island, Cook county, Illinois, and the remaining one-quarter thereof to Mrs. C. Caroline Massey, wife of said Henry H. Massey, of Blue Island, Cook county, Illinois, or to their or each of their administrators, executors, or assigns; and the said Henry H. Massey, or his successor in trust, shall, from the execution and delivery of this instrument, hold the legal title of said real estate above conveyed to him, subject to the other trust herein set forth, in trust for said Julia Rexford, F. D. Rexford, Norman B. Rexford, and C. Caroline Massey, share and share alike; and at the time of the distribution of any remainder of said personal property, or the proceeds thereof, and the rentals and incum-

branches aforesaid, as above set forth, the said Henry H. Massey, or his successor in trust, shall make, execute, and deliver to the said Julia Rexford, F. D. Rexford, Norman B. Rexford, and O. Caroline Massey, or their or each of their heirs, legatees, or assigns, good and sufficient deed or deeds to convey the legal title of said real estate to them, whereupon this trust shall cease and be determined."

The deed, bill of sale, and declaration of trust were acknowledged before a notary public on the day of their date, and delivered to the trustee, Massey, who filed them for record in the recorder's office of Cook county on the thirteenth day of May, 1882. Heber S. Rexford, Jr., died intestate on the twelfth day of May, 1882, leaving a widow, Fannie H. Rexford, but no child or children, or descendants of any child. On the fifth day of September, 1882, the widow filed this bill to set aside the deed, bill of sale, and declaration of trust on the ground of undue influence; the bill charging that the papers were executed without consideration, and that the complainant was overreached in the execution thereof. It is also charged in the bill that the papers executed were intended as a testamentary disposition of property, and hence not binding on the complainant. The complainant, Fannie H. Rexford, died October 27, 1882. Previous to her death she made a will devising all her estate to Bessie B. Huntington, her sister, who was substituted as a party complainant in the bill.

As respects the execution of the papers by Heber S. Rexford, Jr., it is apparent from the evidence that they were executed after mature deliberation, and with a full understanding of their terms, conditions, and the manner in which they would affect his rights, and also the rights of his wife. He and his wife were both in the last stages of consumption; and his desire, no doubt, was to make such a disposition of his property as would afford a reasonable support for himself and wife while living, and, after their death, have the remainder pass into the hands of his own relatives. While on a visit with a brother at Centralia, in January, 1882, he requested his brother to consult a lawyer as to the best mode of disposing of his property. It seems that Rexford's brother, after a consultation, informed him that the lawyer advised that a will might be defeated by an election of the widow, but that the matter might be arranged in the shape of a trust. Soon after this, Rexford returned to Cook county, and in an interview with Massey obtained his consent to act as trustee, and sent Massey, with a memorandum, to Judge Wallace to have the papers prepared. Wallace desired further information, which was obtained from Rexford, and within a few days the papers were prepared, and placed in the hands of Rexford and his wife for execution, and were executed and acknowledged as stated before. So far as appears there was no haste in the preparation or execution of the papers; but mature deliberation characterized the whole transaction.

But it is said that Fannie H. Rexford, the wife, had not understood the nature of the papers, and they were a fraud upon her rights. She never testified in the case, and what might have been her account of the transaction, had she been called upon as a witness, is mere conjecture.

The evidence of the notary public before whom they acknowledged the papers is in the record. He stated that the papers were acknowledged on the evening of February 14, 1882, at the home of Mrs. Simmons. He also testified:

"When I got there, I had a little conversation before taking the acknowledgment. Then I took the paper, and asked Heber and Fannie Rexford if these were their signatures; if they were their free and voluntary act and deed for the purposes set forth in the deed. Heber and Fannie were sitting right near together, and Heber said 'Yes,' and Fannie gave an affirmative nod of her head in each of the three acknowledgments."

The three papers had been signed by Rexford and his wife before the notary called, and the presumption is that they had read them and understood the contents; and, if reliance is to be placed on the evidence of the notary,—and we perceive no reason to question it,—Fannie H. Rexford freely and voluntarily executed the three papers with a full knowledge of their contents and bearing on her rights. The complainant, Bessie B. Huntington, sole devisee of Fannie Rexford, testified to a certain conversation between Massey, the trustee, and Mrs. Rexford which occurred after the death of her husband; and reliance is placed upon this evidence to show that Fannie Rexford was misled in the execution of the papers. She testified that her sister, Mrs. Rexford, called on Massey for money to furnish a room, and he told her he had no money for that purpose, when Mrs. Rexford said it was not at all as she had understood it when she had signed the paper. She said she understood she was to have whatever she wanted, and that it was not to be a matter of Mr. Massey's deciding what she wanted; that she was simply to go to him when she wanted it; and she repeatedly said it was told her so, and that was the way she understood it; and she said once that Mr. Massey understood it just so, she felt sure.

The declarations of a testator or grantor, made before or after the execution of a will or deed, might be competent evidence to prove mental condition, but such declarations are not competent to show undue influence or fraud. The law is well settled that a party cannot impeach a deed or other instrument of writing, which he has voluntarily executed, by his own parol declarations. *Dickey v. Carter*, 42 Ill. 384. As observed before, when the papers were executed, Rexford and his wife were both weak in body, and neither were expected long to live; but, so far as is shown by the evidence, their mental faculties were not impaired, and they were fully competent to transact any ordinary business. It is no doubt true that, after the death of Rexford, his wife became dissatisfied with the disposition which had been made of the property; but this record contains no sufficient evidence to establish undue influence or fraud practiced upon her; and she, and those claiming under her, must be held bound by the papers which she voluntarily executed.

*Schaper v. Schaper*, 84 Ill. 604, has been cited by complainant's counsel as an authority in her favor. We are entirely satisfied with the decision made in the case cited, but the facts there are so different from the facts of this case that it cannot be regarded as an authority here.

*Thayer v. Thayer*, 14 Vt. 107, has also been cited. That case was doubtless decided right on its facts. There the wife did not join in the execution of the papers, and the transaction was entered into by the husband in order to defraud her out of her just rights, and the court properly held that she was entitled to relief. Other cases have been cited, but they will all be found, upon examination, to be so widely different in their facts from this case as not to be authority here.

But it is urged that the disposition of the property was testamentary in character, and hence not conclusive on the wife. If the deed which was executed by Rexford and his wife, purporting to convey the property to Massey, was an instrument to take effect in the future, as upon the death of the grantor, then it might be regarded as testamentary in character. If, on the other hand, the deed was an executed and delivered instrument, to take immediate effect, and nothing left for the grantors to do in order to complete the contemplated arrangement, then it is a trust. 1 Sand. Uses, 371. Upon an inspection of the deed under which the property was transferred to the trustee it is manifest that the transaction is an executed trust. The property is absolutely transferred to the trustee. The grantors retain no control whatever over it. The trustee takes the property, and, by the terms of the deed, he is required to pay Heber S. Rexford, Jr., during his natural life, \$40 per month, and such other amount as he may deem necessary for the support of Rexford and his wife; and, upon the death of Rexford before the death of his wife, then the trustee is required to pay her \$40 per month, and such other sum as he may deem necessary for her comfortable support. Upon the death of both Rexford and his wife a certain and absolute disposition of the property remaining is provided for. No power of revocation is reserved, nor was anything left for the grantors to do; but the property vested absolutely in the trustee, on delivery of the deed, for certain specified purposes. A testamentary disposition of property does not take effect until the death of the testator, and hence is within the control of the testator, liable to be changed or abrogated at his pleasure; but this transaction contains no element of that character. In 2 Pain, Eq. Jur. § 1001, the author says: "A trust is executed when no act is necessary to be done to give it effect,—when the trust is fully and finally declared in the instrument creating it." Such is this transaction.

It is said that the transaction has no consideration to sustain it. Where the trust is complete and executed, as in this case, a consideration is not material. *Ex parte Pye*, 18 Ves. Jr. 148; *Stone v. Hackett*, 12 Gray, 227; *Perry, Trusts*, § 98.

The decree of the circuit court will be reversed, and the cause remanded for further proceedings consistent with this opinion.

SCOTT, C. J. Dissenting, as I do, from both the conclusion and reasoning in this case, I feel at liberty to state my views of the whole case. It is seen the bill in this case was brought in the superior court by Fannie H. Rexford, since deceased, against Maria Huntington, Julia Rexford, Fayette Rexford, Norman B. Rexford, C. Caroline Massey, Henry H.

Massey, and Ephraim H. Denison. The object of the bill was to set aside a deed, bill of sale, and a declaration of trust made by Heber H. Rexford, Jr., now deceased, in which complainant, who was then his wife, joined, in the execution to Henry H. Massey, as trustee for the grantors, and Ephraim H. Denison, as successor in trust. The real estate conveyed consisted of about five acres, and the personalty consisted mainly of life policies and other choses in action; the whole property, both real and personal, being of near the value of \$7,500. The bill of sale and declaration of trust, with the deed, were all executed on the eleventh day of February, 1882, and were all acknowledged, before a notary public, both by Heber H. Rexford and Fannie H. Rexford, his wife, the complainant in this bill. On the twelfth day of May next after the execution of these several papers, Heber H. Rexford died, leaving him surviving his widow, complainant, but no child, or descendants of any child. Neither of the instruments executed by the parties were placed on record until the next day after the death of the husband. The declaration of uses and purposes for which the deed and bill of sale were made to Massey and his successor in trust, and which was executed at the same time, and as a part of the same transaction, provided the trustee should have power to sell and deliver all or any portion of personal property mentioned in the bill of sale for the uses and purposes therein expressed, and should have power to lease the real estate, or incumber it for such amounts as the trustee might think necessary to carry out the trust therein declared, and further provided the proceeds of any such sales of the personal property, and any and all money arising from the leasing or incumbering of the real estate, should be held by the trustee named, or his successor in trust, upon the condition following: (1) To pay all necessary expenses of the trust; and (2) to pay to Heber H. Rexford, Jr., during his life, the sum of \$40 per month, as he might deem necessary for the comfortable maintenance and support of the said Heber H. Rexford, and Fannie H. Rexford, his wife; and, in the case of the death of the husband before his wife, the like sum was to be paid to her, at the same stated periods, during her life; and on the death of both husband and wife it was made the duty of the trustee, or his successor in trust, to pay over and deliver any of the trust funds or property that might then remain in his hands to the following named persons: To Maria B. Huntington, should she survive both donors, the sum of \$250, but, should she die first, then the \$250 were to be divided as other trust property; that is, one-fourth to Julia Rexford, one-fourth to Fayette D. Rexford, one-fourth to Norman B. Rexford, and the remaining fourth to C. Caroline Massey; and it was expressly provided the trustee should hold the legal title to such real estate so conveyed to him, subject to the other trust therein declared, in trust for the said Julia Rexford, Fayette Rexford, Norman B. Rexford, and C. Caroline Massey, share and share alike; and on the final distribution of the residue of the estate it was made the duty of the trustee to execute to the several parties named sufficient conveyances of such real estate, whereupon the trust created should cease and be determined.

Prior to her death, which occurred on the twenty-seventh day of October, 1882, Fannie H. Rexford made and published her last will and testament, in which she named Bessie H. Huntington as her sole devisee and legatee. The next day after the making of the will this bill was filed. After the death of the original complainant her will was duly admitted to probate, and since then this suit, by leave of court, has been prosecuted in and been maintained in the name of Bessie H. Huntington, the sole legatee named in the will. The answers of the several defendants were not under oath, and simply put in issue the principal allegations of the bill. On the hearing the court found the principal allegations of the bill were sufficiently proved, and rendered a decree setting aside the deed, bill of sale, and declaration of trust, so far as the same affected the rights of the original complainant, and giving to the present complainant the same share of the estate of Heber H. Rexford, Jr., deceased, that his widow would have taken under the statute had he died intestate, except as to the right of dower the widow might have had. It is as to this part of the decree that defendants have assigned error.

The transactions out of which this litigation arose are called in question mainly upon two points: (1) That of undue influence in procuring the signature of the wife to the deed, bill of sale, and declaration of trust, and that she was overreached and entrapped into the execution of the several papers; and, *second*, that the transaction was nothing more than a testamentary disposition of his property made by Heber S. Rexford, and therefore not binding on his widow after his death. On the other hand, it is maintained the deed, bill of sale, and declaration of trust were fairly and understandingly executed by the original complainant, without any improper practices being adopted to unduly influence her action, and that the transaction is an executed trust, and is therefore irrevocable by either party to it.

Construing the making of the deed, bill of sale, and declaration of trust together as simply a testamentary disposition of the property by the husband, and not as an executed trust, then it is not binding on his surviving widow; and, on its being set aside as to her, she would take as in the case of intestacy. This, in my opinion, may be done. Undoubtedly, the law is, where there is an executed trust, and nothing remains for the donors to do, it is irrevocable; but it is otherwise as to the mere testamentary disposition of property, either real or personal. The donor, it is understood, may at any time revoke it, and recall all he has done. In that respect, it is no more binding than a will, which, of course, is subject to change or revocation at all times, and the proposed beneficiary cannot complain. In this case, defendants, claiming the estate, paid no consideration. If they take at all, it is simply as donees of the bounty of their deceased kinsman as under a will, and not otherwise. In that respect it may be said both parties now claiming the property stand in the same relation to it. Neither of them have any equities in their favor arising out of any valuable consideration.

Much light will be shed on the subject of the inquiry necessary to be.

made, by ascertaining the exact condition of the parties at the time the several instruments were executed. The parties had been married about five years. They had had two children, both of whom had died in infancy; so that, at the date of these transactions, they were childless. Both of them were in very feeble health; being afflicted with consumption in its last or fatal stages. The witnesses say it was difficult to tell which of them was most feeble. It was apparent to all their friends, and perhaps to themselves, that neither one could live but a short time, and their fears proved to be true. Both of them were unable to do any labor. The husband, for some time before the execution of these papers, had been unable to speak otherwise than in a whisper. He had been advised by his physician, what he must have known himself, that he could live but a brief time. Shortly before the making of the deed and other papers, Heber, with his sister, Mrs. Massey, made a visit to their brother at Centralia. His wife was left or remained at home. While there, the subject of what disposition was to be made of the property seems to have been considered, and the advice of a lawyer taken. Immediately after their return to Blue Island, where the parties resided, Massey, at the request of his brother-in-law, Heber S. Rexford, had the deed and other papers prepared by a lawyer in Chicago for execution. Heber was himself too feeble to go into the city to give the matter any personal attention. It was managed for him by Massey, who was to be and was appointed trustee. Although the papers were all signed and acknowledged on the fourteenth day of February, 1882, yet they were not recorded until the next day after the death of the husband, which occurred on the twelfth day of May next thereafter. It is probable the papers, after they had been executed, remained in the hands of the trustee named; but how that may have been does not distinctly appear. It does not appear, however, he attempted to do anything towards the execution of the trust prior to the death of the trustee.

Equity, discarding unmeaning and useless forms, will look at the substance of the act done, and the intention with which it was done, and carry out that intention. No matter what form the transaction puts on, equity will penetrate it, and discover the true purpose of the parties to it, and will construe it accordingly. That ought to be done in this case. The trust declared in this case may have been made in the form of an executed trust, with a design to conceal the real intention of the party to make a testamentary disposition of his property. If so, the form adopted ought not to be permitted to stand in the way of a true construction; otherwise great injustice might be done simply by adopting a covering to conceal the real purpose the party intended to accomplish. That, of course, the law will not permit. The trust attempted to be declared in this case ought not to be permitted to stand simply because it may appear on the face of the instrument to be an executed trust. The circumstances ought to be examined; and, if it shall be ascertained it is simply a testamentary disposition of the property, it ought to be so declared without regard to the form in which it is expressed.



Applying these reasonable rules of construction, the case being considered admits of an easy solution. When the deed and bill of sale were executed, and the trust declared, it was under the belief the death of both parties would soon occur. The husband had been so advised, and it was a matter that had been talked over, and neither one had the slightest hope of living beyond a few months. Certainly, this arrangement was not made for the purpose of creating a trust for the benefit of either party for the brief period they expected to live. This is plain from the fact it does not appear the trustee was permitted to have any control or management of the property during the life-time of the husband. Indeed, as has been seen, the papers were not placed on record until the next day after his death. This would seem to indicate that the husband held control, not only of all his property, but of the papers themselves, so long as he lived. There was unseemly haste in making the conveyances a matter of record after his death. There was not and could have been no reasonable expectation his wife would live to derive any considerable benefit from the trust attempted to be created in her favor. That could not have been the object in placing the property in the hands of a trustee. What, then, was the purpose? Evidently it was the intention to cut off the interest the wife would have in the estate of her husband under the statute, and in that way save the property to *his* heirs, to the exclusion of *hers*. A most inadequate provision was made for the maintenance and support of one in such feeble condition, even for the brief time it was known she could live. The purpose to make a testamentary disposition of his property is most obvious from what occurred when he and his sister visited his brother at Centralia, just prior to the making of the papers supposed to have created the trust. Counsel was taken by the brother whom they were visiting, at the instance of his sick brother, and they were advised, if he made a will, his wife would not be bound by it if she survived him; that she could renounce it, and take under the statute. It was suggested, and so the advice run, it might be done by conveying the property in trust. The inquiry, no doubt, was how the husband might make a testamentary disposition of his property so as to most effectually preserve it to his heirs, and in that way prevent any portion of it from passing to his wife under the statute, in case she should survive him. That must have been the reason why the making of a will was abandoned and the other mode adopted. No doubt the plan adopted was matured in the family council before leaving Centralia, for it was executed as soon as practicable after decedent and his sister returned home. This view is greatly strengthened by the fact that, at the same time, arrangements were set on foot to surrender a life or benefit policy which the husband had directed should be paid to his wife, and take in its stead a new certificate payable to Massey on the death of the assured. It will be remembered that Massey had not then been named trustee. All this was done without the knowledge of the wife, and it does not appear that she was ever informed of it.

Conceding, then, as must be done, the evident purpose was simply to make a testamentary disposition of his property by the husband, his

wife was not bound to it after his death, notwithstanding she may have joined with him in the execution of the conveyances and in the trust declared. It was a mere shift or device employed to cut off all interest the wife might have in the estate of her husband. Such a scheme or device will meet with no favor. She was in extreme ill health, and it does not appear she was advised by her husband or any one else of the effect of the act she was doing in joining in the execution of the trust. It would have been highly proper to have furnished her with professional advice as to her rights, and as to the effect of the instrument she was called upon to sign. It is plain from her subsequent conduct she did not comprehend what she had done; certainly not the legal effect of her act. Unaided by friendly counsel, she was too feeble to resist any proposition that might be submitted to her by those interested in the scheme to be adopted. A voluntary disposition of property by the husband, no matter what form is adopted, made with an evident intention and purpose to deprive the wife of her interest in it, as the law defines that interest, will find no sanction in the law. It is such a legal fraud on her as the law will not tolerate. The scheme adopted was simply to make such testamentary disposition of the property by the husband that would deprive the wife of any share of his estate under the statute, and, as it does not appear she was sufficiently advised of the effect of her action in consenting to it, she is not bound by what her husband did. On account of her extremely feeble condition, arising from a mortal sickness, she could not be charged with negligence in not procuring legal advice for herself to enable her to resist what her dying husband, influenced, as he seems to have been, by his heirs, wished to have done. She had neither mental nor physical force to interpose such resistance, and she may have secured temporary rest by yielding to what it was desired she should do. One of two propositions is true: (1) The trust attempted to be declared was simply a testamentary disposition of the property of the husband, made in view of death, upon no consideration, and therefore not binding on his wife after his death; or (2) it was a voluntary alienation of his property, upon no valuable consideration, made with intent to deprive the wife of her share of her husband's estate under the statute, and was for that reason *mala fide*, and a fraud upon the law and upon the rights of the wife. In either case, the law is, so far as the wife is concerned, the husband is to be regarded as having died seized of the property, and the widow will take the same portion as in the intestacy. Although not entirely analogous, the reasoning in the following cases, in a measure, supports the views expressed: *Garnsey v. Mundy*, 24 N. J. Eq. 243; *Smith v. Smith*, 12 Cal. 217; *Thayer v. Thayer*, 14 Vt. 107.

As respected the benefit certificate in the Knights of Honor, which was renewed and made payable to Massey, it is claimed he would be entitled to the money under that certificate outside of the trust, and would have been if no trust had been created. The argument in support of this proposition is that decedent had a right to dispose of his own personal property in his life-time, without the consent of his wife. A satisfactory answer to the position taken, is that he neither sold it nor gave it to

Massey. It was intended he should hold the proceeds, as he did the other property attempted to be assigned in trust. Making the certificate payable to Massey was simply a means adopted to facilitate the collection, and nothing more. The husband may not dispose of his personal property by mere voluntary assignment, founded upon no valuable consideration, with intent to defeat his widow of her distributive share under the statute, any more than he may his real estate. There is no reason in law for making any distinction in that respect.

In my judgment, the decree of the lower court should be affirmed.

(117 Ill. 341)

FIELD v. LEITER.

(*Supreme Court of Illinois.* June 12, 1886.)

1. PARTITION—IMPROVEMENTS—COURT WILL NOT IMPROVE PROPERTY IN MASTER'S HANDS.

On a bill for partition where property is in the hands of a master for the purposes of partition, equity will not cause expensive improvements to be made, preliminary to the partition, against the protest of one of the owners. The limit to which a court of equity will go in making improvements is to make such improvements as are unavoidably necessary to the preservation of the property.

2. SAME—PARTITION ENTIRELY STATUTORY—OWELTY NOT AUTHORIZED.

SCOTT, C. J., in a concurring opinion, holds that procedure in partition in this state, whether by bill or petition, is entirely regulated by statute; that our courts of chancery do not retain the general chancery powers in partition that were held by the English court of chancery; and, in particular, that our courts have no power to award a monetary decree in owelty; but that, where equal division is impossible, a sale is required by the statute.

Appeal from Cook. Petition for rehearing. See 6 N. E. Rep. 877.

SCHOLFIELD, J. Conceding that it is competent, as a majority of the court do, on the authority of *Howey v. Goings*, 13 Ill. 95; *Dean v. O'Meara*, 47 Ill. 120; *Wilton v. Tazewell*, 86 Ill. 29; *Labadie v. Hewitt*, 85 Ill. 341; *Hill v. Reno*, 112 Ill. 154; and *Cooter v. Dearborn*, 4 N. E. Rep. 388, (opinion filed January term, 1886,)—for a court of equity to decree the payment of a sum as owelty to equalize the share on the partition of real estate, we cannot consent to recognize that such a court can cause expensive improvements to be made upon the property, preliminary to a partition, through the master in chancery, against the protest of one of the owners of the property. This decree not only directs the payment of \$4,000 as owelty after the partition; it decrees that the master shall, before the partition, let a contract for certain improvements to be made under the direction of the chancellor, to the amount of \$3,750, unless he can obtain a contract for a lower amount. If the evidence can fairly be said to preponderate at all in favor of the expediency of the improvements to be thus made, it is only barely so. A number of intelligent witnesses, including the defendant, express an opinion to the contrary.

Undoubtedly, the principle is well recognized that under some circumstances, as where property is in the hands of a receiver, a court of equity will direct the receiver to make repairs for the preservation of

the property, and, in extreme instances, where the interest of all parties unquestionably requires, it may be that it will direct him to make improvements for the more available and profitable employment and use of the property. But this is justifiable alone by the necessity of the situation. The principle is extremely dangerous as tending to subvert the rights of private property, and it ought not to be tolerated beyond the limits of absolute necessity. It does not comport with the rights of ownership, or the fundamental principles of personal liberty, that the owner shall be compelled to pay for improving property which his judgment or inclination does not urge him to improve, although all of his neighbors shall unite in opinion that the improvement will be advantageous to him. If the power exist, its limits must, to a large extent, vest in the discretion of the chancellor. The principle that authorizes these improvements will sanction other improvements of a different character, and larger in amount, and thus the owner might be improved into bankruptcy, and out of his property. One co-owner may perhaps rightfully insist that the other shall contribute for the preservation of joint property; but he certainly, upon no correct principle, can insist that he shall enter upon new improvements, to be paid for from joint property, or out of other funds belonging to him, against his judgment and inclination.

None of the cases referred to by the counsel for appellee go to the extent of this decree, in this respect. In *Smith v. Smith*, 10 Paige, 470, a sale had been ordered. The court held that under the evidence the property was susceptible of division, and in the opinion various ways of dividing the water-power are pointed out. No improvements were undertaken by the chancellor. In *Lister v. Lister*, 3 Younge & C. 540, a motion was made that the return of the commissioners might be suppressed, upon the ground, among others, that it directed the parties to make fences at their own expenses. The motion was overruled. The court itself did not undertake to make any improvements, nor did it hear evidence, and determine that improvements should be made, but confirmed merely the actions of its commissioners in determining that the parties themselves should make fences to protect their premises. The concluding language of ALDERSON, B., is:

"The object of the partition is that each may enjoy in severalty, and it seems to me that a direction to each to erect a fence to prevent the intrusion of his neighbor's cattle is quite reasonable, and is in truth necessary to enable each to enjoy the lands in severalty. So the decree is only that the parties themselves should do that which their interests would doubtless have prompted them to do without a decree."

*Cooper v. Cedar Rapids Water-power*, 42 Iowa, 398, was like *Smith v. Smith*, *supra*. The court ordered no improvements to be made under its supervision, but simply declared the mode by which the water-power should be divided. In *First National Bank of Ottumwa v. Taylor*, 44 Iowa, 343, the only controversy about the building of the partition wall was whether it should be extended above the roof. There is no decision or discussion of the right of a court of chancery, by virtue of its powers as

such, to make improvements, in case of partition, against the consent of one of the parties. These are the only cases cited in support of the action of the circuit court, and we are aware of none going any further in that direction.

We are of the opinion that the decree below cannot be sustained. It will therefore be reversed, and the cause remanded for further proceedings consistent with the views herein expressed.

SCOTT, C. J. I concur in the decision rendered in this case, and also in the views expressed by Mr. Justice SCHOLFIELD; but, as there are other considerations that I think better sustain the decision, I cannot forbear stating some of them. The question of most importance is as to the jurisdiction of the court to render the decree it did. In its decision it seems quite clear the court traveled out of its jurisdiction, as limited by the statutes of this state, whatever may have been the power of a court of chancery in England in matters of partition. The forms adopted in proceedings in partition of estates in chancery in England have never been adopted or followed in this state. Indeed, it would seem to be impracticable to do so. In most of the American states the mode of making partition has been regulated, in a large measure, by statutes. As will be seen further on, it has always been done under enabling statutes in this state.

The absurdity of claiming to make partition of estates in this state as was once done in England in courts of chancery will be apparent by ascertaining, as near as may be, what the practice was. Mr. Daniell, in his work on Chancery Practice, says, in case of partition of an estate by courts of chancery in England, if the titles of the parties were in any degree complicated, the difficulty which had occurred in the proceedings at law led to applications to courts of equity for partition, which were effected by first ascertaining the rights of the several persons interested, and then issuing the commission to make the partition required; and, upon the return of the commission, and the confirmation of that return by the court, partition was finally completed by mutual conveyances of the allotment to the several parties. Where the title of the parties was clear on the record, it seems the court would, at the original hearing, order commission of partition to issue, in the first instance, without any previous reference to the master. The author says the commissioners acted as a court. The parties or their solicitors were permitted to attend, and were also permitted to produce their deeds, and other evidence, as well written as oral, and to point out anything that might tend to give the commissioners full information on the subject, and to take every step necessary to discover the truth, and to enable the commissioners to make a proper return. The duties of the commissioners were definitely pointed out. They were directed to "go to, enter upon, and walk over the estate" to be partitioned. They were required to look into the bill and the answer, and the pleadings were made their guide as to the estate to be divided, and the manner in which it was to be done. Having, in that way, ascertained what estate was to be divided, they were next to

make a "fair partition, division, and allotment thereof into as many shares and proportions as the decree directs should be done." It seems the parties themselves were permitted to name the commissioners, and they were therefore regarded as "judges of their own choice," and it was for that reason it was said the principles applicable to arbitration were applicable to them. But for any gross error of judgment, however, the court would set aside their adjudication. It is not necessary, in making partition in chancery, every part of the estate should be divided. It was sufficient if each party had allotted to him his proper share of the whole. All the forms to be observed, and the manner of making the allotment, after a division was agreed upon, are fully stated by Mr. Daniell in his work on Chancery Practice in the section on "Partition." 2 Daniell, Ch. Pr. (1st Amer. Ed.) 1326. In some cases it was found it was impracticable to divide the property in equal shares, quantity and quality considered, and the practice was adopted, at an early day, of making a money compensation to the party receiving the less valuable parcel by way of securing equality of partition. The practice, perhaps, at first pertained to the division of estates between copartners, and afterwards it seems to have been extended by statute to the partition of estates between joint tenants and tenants in common. It is most probable the practice had its origin in the necessity arising from the want of power in the courts to order a sale of property. A statement of this doctrine is found in the early case of *Clarendon v. Hornby*, 1 P. Wms. 447, where it is said: "If there were three houses of different value to be divided among three, it would not be right to divide every house, for that would be to spoil every house, but some compensation is to be made, either by a sum of money, or rent, for owelty of partition to those that have houses of less value." This case stated by the chancellor for the application of the rule has been restated by most of the text writers on this subject, and is a case that illustrates the doctrine as well as any found in the books.

It is needless to pursue this investigation further, or to inquire whether a sum of money or rent was award for owelty of partition, under the practice that once prevailed in chancery in England, was made with or without consent of the parties, or only in particular cases coming within a definite rule, as enough has been said to make it certain no such practice has ever prevailed in this state. In some of the American states, owelty of partition is made by decreeing the payment of money to the party to whom the portion of the estate of least value is allotted; but in most, if not all, of the cases to which the attention of this court has been called, it was done either by consent of the parties capable of giving consent, or under provisions of enabling statute or Code on the subject. That is so in the following cases: *Smith v. Smith*, 10 Paige, 447; *Cox v. McMullin*, 14 Grat. 91; *Darlington's Appropriation*, 13 Pa. St. 430; *Wood v. Little*, 35 Me. 107; *King v. Reed*, 11 Gray, 490.

A statute of Massachusetts provided, where, on petition for partition of lands, "any messuage, tract of land, or other real estate shall be of greater value than either party's part or share in the estate to be divided, and

cannot at the same time be subdivided, and part thereof assigned to one, and part to another, without great inconvenience, the same may be settled or assigned to one of the parties; such party to whom the same shall be assigned paying such sum or sums of money to the party or parties as by means thereof have less than their share of the real estate, as the committee appointed to make partition shall award." And in *Codman v. Tinkham*, 15 Pick. 364, it was held the statute was not applicable where there was but one parcel of land which was held jointly, and for that reason approved the judgment of the court of common pleas, which rejected the report of commissioners by which they assigned to one the whole of the estate because it could not be divided without detriment, and awarded to the other so much money for his share in the land to be divided. It was for this reason, as there was no statute that authorized it to be done, the court considered the disposition made of the land as not authorized by law.

There is not now, and never was, any statute in this state that authorized the commissioners appointed to make the partition to give a sum of money to any one to whom a share less in value than he was in fact entitled to, by way of owelty of partition, and certainly it cannot be done by the court unless the court exercise the same powers in that regard as may have been done at one time by courts of chancery of England. If it should be conceded, which it is not, the courts of chancery in this state might properly exercise the same power in such matters as the English courts of chancery once had, it would be fatal to the present decree. The court did not conform, in this case, to the practice in such courts in any essential particular. No such formalities as the English courts observed were conformed to in this case, as is quite apparent from what has gone before.

But the decision may be placed on broader ground. Courts of chancery in this state have no power to award a money compensation to secure owelty of partition. The whole matter of making partition in this state, as it is in most of the states, is regulated by statute; and the courts, in such proceedings, whether at law or in chancery, must conform to the mode provided by statute, and may not proceed otherwise. All the other statutes in this state on this subject had relation to, and were intended no doubt to regulate, proceedings on petition for partition in the lower courts; and it was evidently intended the method provided should take the place of the common-law remedy by writ of partition. But it is not intended to confer on the law courts exclusive jurisdiction in that respect. As appears from numerous cases in this court, equity assumes to exercise a jurisdiction in matters of partition concurrently with the courts at law. In the early case of *Howey v. Goings*, 13 Ill. 95, it was held the jurisdiction of courts of equity in matters of partition was undoubted. In many cases prior to the act of 1861, which enlarged the jurisdiction of the law courts in such matters, the interposition of courts of chancery was indispensable to adjust conflicting rights and to do complete justice between the parties. But it is to be noted courts of chancery, in cases in the mere matter of making partition of the estate, fol-

low closely the statute, and no case is now recalled where there was any marked departure from the statutory mode. So closely do the courts of equity follow the statutory mode of making partition, it was said by this court, in *Nichols v. Mitchell*, 70 Ill. 258, "The mode of procedure in either court is so nearly alike that some difficulty is experienced in determining which forum the party has selected," and it was held, in this same case, the court would treat the proceedings as being at law or in chancery, as best sustained the jurisdiction of the court making the order for partition. It is not a matter of any consequence whether the proceedings were at law or in chancery, for the mode of making partition in either court was practically the same. Often courts of equity granted relief as to other matters connected with the partition of estates that courts at law had no jurisdiction to do. It was only in that way their proceedings in the matters of partition differed. Each court may have followed its own peculiar rules of procedure, but the conclusion reached, and the thing accomplished, that is, the partition of real estate, was the same, no matter in which form it was done.

The earliest act of the general assembly of this state in relation to partition was passed at its session in 1819. That act provided that where the property was so circumstanced a division could not be made without great prejudice to the owners, and the commissioners appointed to make partition so reported, it was made the duty of the court to order its sale, and the proceeds were to be divided according to the interests of the respective parties. The act of 1827 for the speedy assignment of dower and partition of real estate repealed the act of 1819, and provided that partition might be made by the circuit court on petition. It was to be done by the commissioners appointed by the court. Section 2 of the act of February 20, 1819, was substantially re-enacted as section 16 of the act of 1827, and provided where all lands, houses, or lots are so circumstanced that a division thereof cannot be made without manifest prejudice to the proprietors of the same, and the commissioners appointed by the court shall so report, the court shall thereupon give an order to the commissioners or other person or persons to sell such real property. It is made the imperative duty of the court, in all cases where the commissioners report a division cannot be made without manifest prejudice to the proprietors, to order a sale of the property. The substance of section 16 of the act of 1827 has been retained in all the revisions of the statute on the same subject, down to the present time. The section is almost, if not quite, literally transcribed into the Revision of 1845. The same mode of procedure subsequent to the report of the commissioners against the divisibility of the property is still provided for in the statute in relation to partition. The present as well as all former statutes of this state provides, when the whole or any part of the premises sought to be partitioned cannot be divided without manifest prejudice to the owners, and the commissioners appointed to divide the same shall so report, the court shall order the premises so not being susceptible of division to be sold. It will be noticed the language of the statute is not that the court may order the sale of the property in such



case, but that it shall do it. It is also to be noted the statute in force July, 1874, and under which the decisions in this case were had, provided partition may be compelled by bill in chancery, as heretofore, or by partition in the circuit court. Of course, if the proceedings were on petition for partition in a court of law, no one would insist partition could be made otherwise than as the statute directs. But is not this statute as obligatory on courts of equity as upon the courts at law in the mere matter of making partition? How was partition of estates heretofore compelled by a bill in chancery? The answer is obvious. It was done by following the mode provided by statute, and not otherwise; that is, no matter whether the proceeding was in a court of chancery by bill, or in a court at law on petition, the practice was from the first to appoint three commissioners to make partition of the estate among the owners; and, in case the commissioners reported it was impracticable to make such partition without manifest prejudice to the owner, the invariable practice was to follow the statute, and order a sale of the property, and divide the proceeds. The rule of procedure in this regard has been the same since the state government first went into effect, and it has not heretofore been departed from by any court, either of law or equity, in this state.

It is absurd to suppose that, when the general assembly declared partition might be compelled by bill in chancery, as "heretofore," it was meant it might be done as was once the practice in English courts of chancery. No such practice heretofore existed in this state at any time. On the contrary, as has been seen, the practice has always been, whether the proceedings were at chancery or at law, to appoint commissioners, as the statute declares shall be done, to make partition; and, on the report that partition could not be made without manifest prejudice to the owners, then to order a sale of the premises. The statute in that respect has heretofore been regarded as obligatory upon all courts having jurisdiction to order partition, and no reason is perceived why it does not control as to the method of making partition to the exclusion of all other modes. And certainly, when the legislature provided partition might be compelled by "bill in chancery as heretofore," it was meant it should be done as had been invariably the practice in accordance with the statute. Any other construction would be most unreasonable.

Although this question has never before been presented to this court so distinctly, perhaps, as in this case, still the principle that must control has been determined by the decision of this court in *Gooch v. Green*, 102 Ill. 507. The bill in that case was to impeach a decree rendered in a proceeding to partition certain land. Whether the proceedings in partition sought to be impeached were by bill in chancery or by petition at law does not appear; but from the fact it is constantly referred to as a bill to impeach a decree for fraud, it might be fairly inferred the original proceeding was by bill in chancery. How that may be matters little. It was distinctly held by this court that where a decree for partition found six-sevenths of the land in one party, and one-seventh in another, the commissioners appointed to divide the land had no authority to give

one party more than his share as found by the decree, and require him to pay therefor a certain sum of money to the party receiving less than his share of the property. This court based its decision on the distinct ground the commissioners had no authority, under the statute, to make such division of the land. Had it been understood a court of chancery had authority in this state to render any such decree independently of the statute, as the English courts of chancery may have had, undoubtedly this court would have treated the original proceeding in partition as being in chancery, in order to sustain the jurisdiction of the court to pronounce the decree it did, as was said in *Nichols v. Mitchell*, *supra*, would be the proper practice; but nothing of that kind was done, and it must have been determined neither a court of law or equity had any authority, by statute or otherwise, in this state, to make any such division of the property. Many cogent reasons might be suggested as sustaining the correctness of the decision in *Gooch v. Green*, *supra*, were it necessary to do so.

It will be remembered, from what has gone before, the general assembly, at its first session under the first constitution of the state, made provisions for the partition of estates, and since then the subject has often been before it for legislation. Had it been expected courts of equity would assume to award a partition otherwise than as in the manner directed by statute, or had it been expected such courts would assume jurisdiction to award owelty of partition under what might have been supposed to be general chancery power, undoubtedly the manner of doing it would have been regulated by statute, as is done in many other states of the Union. But nothing of this kind has ever been done. Besides these considerations, a sale of the property, where a division is found to be impracticable, accords best with our sense of right and equity and a due regard for public convenience and the right of owners.

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(114 Ill. 285)

LUCAN and others v. CADWALLADER and others.

(*Supreme Court of Illinois*. September 21, 1885.)

1. APPEAL—SUPREME COURT—EASEMENT NOT A FREEHOLD.

The construction and maintenance of a dam causing the water of a river to overflow complainant's land involves a claim to a mere easement in the land, and not a freehold, and a direct appeal to the supreme court will not lie.

2. SAME—ORDER BY CIRCUIT JUDGE—DISSOLVING INJUNCTION.

An order dissolving an interlocutory injunction by a circuit judge in vacation is not such an order that an appeal from it will lie.

Appeal from circuit court, Knox county.

*McKenzie & Calkins*, for appellants.

*Williams, Lawrence & Bancroft*, for appellees.

PER CURIAM. The appellants, who were plaintiffs below, filed a bill in the Knox circuit court against the appellees, to enjoin them from rebuilding a mill-dam across Spoon river, in Knox county. It appears from the bill itself that the original dam was built more than 30 years

ago; that its construction and maintenance caused the river to overflow the lands of complainants, rendering them unfit for cultivation, and also, as is alleged, injuriously affecting the health of the people of the neighborhood, including complainants and their families; that the dam, with the attending results, was maintained until in February, 1884, when it gave way, and the waters of the river receded into their natural channel, etc. A temporary injunction having been awarded, the defendants entered a motion to dissolve the same, and by stipulation of parties it was heard on affidavits, before the circuit judge, in vacation, resulting in an order dissolving the interlocutory injunction. From that order the complainants appealed to this court.

The appeal must be dismissed. The cause seems to have been brought here upon the hypothesis that a freehold is involved. This is a misapprehension. The defendants do not claim to have anything more than a mere easement in the lands of appellant, and it is well settled that does not constitute a freehold. But, even if this objection were not in the way, this appeal was prematurely brought.

The appellants will be permitted to withdraw the record, abstracts, and briefs, to make such use of them as they may be advised. Appeal dismissed.

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(114 Ill. 603)

SIMPSON and others v. SIMPSON and others.

(*Supreme Court of Illinois.* September 28, 1885.)

DESCENT—ADVANCEMENT—HOTCHPOT.

MULKEY, C. J. (*concurring.*) While I concur in all that is said in the opinion in this case,<sup>1</sup> I go further, and hold that notwithstanding the father of the grandchildren died before the intestate, the grandchildren must nevertheless take, if they take at all, *per stirpes*; and consequently their supposed rights are not and cannot be superior to those of the father, if he were living. As it is conceded if the father were now claiming instead of his children he would have no standing in court, it follows the situation of the latter is no better. The conclusion, then, to me, seems irresistible that the statute relating to the subject is merely declaratory of the common law, and that, in no view of the case, are the grandchildren entitled to participate in the proceeds of the estate.

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(102 N. Y. 372)

HAYNES v. RUDD.<sup>2</sup>

(*Court of Appeals of New York.* June 1, 1886.)

PROMISSORY NOTES—CONSIDERATION—COMPOUNDING FELONY.

Plaintiff seeks to recover the amount of a promissory note, given upon the settlement of a claim by defendant that plaintiff's son, while in the employ of defendants, had stolen his money, and alleged that the note was given to compound a felony, and was extorted from plaintiff by threats. The judge refused to charge, as requested by defendant, "that if the compounding of a

<sup>1</sup> 4 N. E. Rep. 187.

<sup>2</sup> Reversing 30 Hun, 237.

felony entered into, and formed a part of, the consideration of the note, the plaintiff could not recover;" and also, "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he could not be entitled to recover." *Held* error, and that if the consideration of the note was in any way affected by the compounding of a felony, or it entered into the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld.

Appeal from judgment general term supreme court, Fourth department, affirming appeal from judgment in favor of plaintiff entered on a verdict rendered at Wayne circuit.

*J. W. Collins*, for appellant, James H. Rudd.

*L. M. Norton*, for respondent, James B. Haynes.

MILLER, J. The plaintiff seeks to recover in this action the amount of a promissory note, given upon the settlement of a claim by defendant that plaintiff's son, who was in defendant's employ, had, at different times, stolen his money. The complainant alleged that the note was given in order to compound and settle a supposed felony or misdemeanor, and that the said note was extorted from the plaintiff and his wife by threats of public charges against the character of their son, and that the note was executed in fear of the same. On a former appeal to this court, in this action, it was held that where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder, for value, before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. In the opinion of the court, by FOLGER, C. J., the rule is laid down that if there was simply a compounding of felony, both plaintiff and defendant, on an equality, agreeing that the plaintiff should give his written promise to the defendant, and that, therefore, the defendant should give his oral promise to conceal the felony, and abstain from prosecuting it, and withhold the evidence of it, then they were *in pari delicto*, and the law will leave them where it finds them; and it is said that, "to give the plaintiff any claim to recover, he must show that he was in such plight from the force or threats of the defendant, as that he was in duress, and gave the note without being willing to, to escape from the predicament in which that force or those threats put him."

Upon the last trial, which is the subject of review on this appeal, the case appears to have been presented by the plaintiff on the theory that threats were used, and duress and undue influence exercised, by the defendant upon the plaintiff and his wife, by means of which the note was obtained, and independent of the question whether the note was executed for the purpose of compounding a felony, and that thus a case was established against the defendant. The plaintiff in this action insists that the facts in this case establish that the parties to this action did not stand *in pari delicto*; that the defendant took undue advantage of the plaintiff and his wife,—advantage of the circumstances in which the plaintiff stood, surrounded, as he was, by his family; that this operated as duress

and undue influence, to coerce, and, as the jury found, did coerce, the plaintiff's will, and destroyed the equality between the parties; and induced the plaintiff to give the note in question.

In none of the cases cited by the respondent's counsel to sustain the position contended for was the precise point presented whether the parties stood *in pari delicto*, where the compounding of a felony entered into, and constituted part of, the consideration of the contract, and they therefore are not decisive of the question. *Dunham v. Griswold*, 22 Wkly. Dig. 296; *Turley v. Edwards*, (Mo.) 1 West Rep. 450; *Foley v. Green*, 21 Cent. Law J. 175; *Williams v. Bayley*, 35 Law J. Ch. 717.

Whether the parties stood *in pari delicto* depends upon the fact whether the evidence proved that the note in question was given for compounding a felony. If the testimony established that such was the case, then both parties must be regarded as equally in fault, and the court will not lend its aid to either in enforcing a contract of such a character, because it is illegal and void. While fraud, duress, and undue influence, employed in procuring a contract for the payment of money, may vitiate and destroy the obligation created, and render it of no effect, and the party who has been compelled to pay money on account thereof may maintain an action to recover the same, such a right does not exist, and cannot be enforced, where the consideration of the contract thus made arises entirely upon, or is in any way affected by, the compounding of a felony. When this element enters into the contract, it becomes tainted with a corrupt consideration, and cannot be enforced. The correctness of this rule was recognized by the trial judge in his charge to the jury. He charged, among other things, as follows:

"Was the note a legal contract or an illegal contract? It was an illegal contract, and void between the parties, if it was given upon an agreement to suppress the evidence of a crime alleged to have been committed, equally as if it were given upon an agreement to suppress the evidence or refrain from prosecuting a crime which had been in fact committed."

He also charged:

"If he impressed upon the plaintiff the idea that he would thus refrain, and would conceal the crime, if he would give the note, but that he would not refrain if he did not give the note, it was an illegal contract."

He further charged, upon being requested, that, if the note was given simply to compound a felony, the plaintiff could not recover.

So far the charge of the judge was entirely correct, and the case was properly presented to the jury in this respect. The judge, however, was requested to charge as follows: "That if the compounding of a felony entered into, and formed a part of, the consideration of the note, the plaintiff could not recover," and also "that if the motive of the plaintiff in giving the note was in part for the purpose of compounding a felony, he would not be entitled to recover." Both of these requests were refused, and exceptions taken to the rulings of the judge. We think there was error in each of the refusals.

Within the rule already laid down, if the consideration of the note was in any way affected by the compounding of a felony, or it entered into

the same, or such a motive actuated the plaintiff in any respect, then the contract was illegal, and should not be upheld. In such a case, the contract was vicious and corrupt, and in violation of law, as much as if compounding a felony had been the entire consideration. The element of illegality constituted a part of the contract, thus vitiating the whole, and it could not be rejected because duress, undue influence, or threats were also blended with it. It cannot be said that these requests were covered by the charge which had already been made; for while such charge comprehended the principle that the note might be avoided if given for compounding a felony, the refusals to charge left it to be inferred that this element might constitute a portion of the consideration without affecting its validity. This was clearly wrong, and the defendant was entitled to the charge in accordance with the requests made, and the judge erred in refusing the same.

We cannot agree with the doctrine that if the plaintiff was influenced by the duress of the defendant, and at the same time both parties intended the compounding of a felony, that they were not *in pari delicto*. It is enough that the vice of compounding a felony was a part of the contract, operating upon the minds of both parties, and thus placing them upon an equality, to render the contract nugatory and of no effect.

For the errors of the judge in refusing to charge as requested, without considering the other questions raised, the judgment should be reversed, and a new trial granted, with costs to abide the event.

(All concur, except RUGER, C. J., not voting.)

(102 N. Y. 410)

**WILDS v. ST. LOUIS, A. & T. H. R. R.<sup>1</sup>**

(Court of Appeals of New York. June 1, 1886.)

**RAILROAD COMPANIES—MORTGAGE BY—CONSTRUCTION OF SINKING FUND CONTRACT.**

The defendant, in order to gradually pay a first mortgage, included in it certain provisions by which twice a year, out of the net earnings of the road, \$12,500 should be paid to trustees of the mortgage as a sinking fund for redemption of the bonds; this to be deposited in a trust company, and outstanding bonds bought so long as they were not higher than 110, but interest was to continue to be paid on such bonds by the company, and it added to the fund; but, if bonds could not be purchased at that price, "no further payments shall be payable to said sinking fund" until it could be so used. *Held* that, when said bonds rose above 110, the semi-annual payments of \$12,500 ceased, but the interest payments on the sinking fund must continue until the maturity of such bonds. RAPALLO, J., dissenting.

Appeal from order of general term supreme court, First department, affirming judgment for defendant.

*Thomas Thacher*, for appellant, Howard Payson Wilds.

*Adrian Van Sinderen*, for respondent, St. Louis, A. & T. H. R. R.

FINCH, J. The construction of a sinking fund contract, accompanying the execution of a first mortgage, and intended to provide for its ul-

<sup>1</sup> Affirming 83 Hun, 638.

time payment and discharge, is the question of law presented by this appeal. The St. Louis, Alton & Terre Haute Railroad Company bought its property subject to certain incumbrances which it assumed and agreed to pay, and which thus became legally, as they were in fact, the debts and obligations of the corporate purchaser. These consisted of bonds to the amount of \$2,200,000, drawing 7 per cent. interest, and secured by a first mortgage upon the railroad purchased; of a second mortgage upon the same property, under which bonds to the amount of \$2,800,000 have been issued, and are outstanding, also drawing 7 per cent. interest; and which second mortgage further secured, in a specified order of priority, income bonds payable out of surplus earnings to the amount of \$1,700,000, drawing interest at 7 per cent., and a preferred stock of the same amount entitled to a 7 per cent. dividend out of net earnings, the larger part of which stock has been issued and is now outstanding. This second mortgage and its group of protected obligations were more or less depressed in value by the shadow and threat of the large prior incumbrance, and likely to be floated upon the market at some serious sacrifice for that reason. Whatever could be done to provide for the payment and discharge of the first mortgage, and the ultimate removal of its lien, would tend to strengthen the subsequent securities, and permit their negotiation at prices so much higher as to compensate for such loss of interest as might accrue from the plan adopted. These considerations, and a desire to increase and strengthen the value of the common stock in the hands of its holders, led to the provisions in the first mortgage which organize and constitute a sinking fund. These are in substance that twice a year, out of any surplus of net earnings over and above expenses and fixed charges, the company should pay to the trustees of the first mortgage the sum of \$12,500 as a sinking fund for the redemption of the bonds it secured; that the trustees should at once deposit such sums in the United States Trust Company, of the city of New York, or in some other safe depository in that city; that with such money, and all accumulations of interest thereon, the trustees should buy the outstanding first mortgage bonds so long as they could be purchased at a rate not exceeding 10 per cent. above par, with the accrued interest, the disposition of which was thus described:

"The bonds so purchased shall be deposited with said trust company, and be immediately stamped or indorsed as belonging to said sinking fund; but shall remain in force, and the interest thereon shall continue to be paid by the said St. Louis, Alton & Terre Haute Railroad Company, and the amount of such interest shall be added to and applied as a part of the capital of the sinking fund hereby established, and be invested in the purchase of other bonds in the same manner as the semi-annual payments of twelve thousand and five hundred dollars herein provided for."

To meet the emergency of an inability to buy the bonds at or below the prescribed rate the mortgage stipulated that, in such event, "the said money shall remain at interest until bonds can be purchased at public or private sale at such rate; and no further payments shall be payable to the said sinking fund till the money so remaining in the said fund can

be used in purchasing said bonds at such rate or under, when such payments of twelve thousand and five hundred dollars semi-annually shall be resumed."

The emergency thus contemplated actually arose. The price of the bonds went above the permitted purchase rate after \$636,000 of them had been bought and placed in the sinking fund. The semi-annual payments of \$12,500 were thereupon discontinued; but, the company intending to continue the payment of interest to the trustees upon the bonds held by the sinking fund, a preferred stockholder objected, and brought this action to prevent such payment.

Two clauses of the sinking fund article, if literally read, clash, and need to be reconciled. The purpose to keep the bonds purchased valid and living obligations against the company, so far as the payment of interest is concerned, until their maturity, is clearly and strongly expressed. Conceding even that the bonds themselves, immediately upon their purchase, ceased to constitute any part of the corporate debt, and were practically extinguished, and that the provision for interest payments was only a mode of measuring and determining the amount of prescribed contributions to the sinking fund, those contributions, at least, are directed to be made so long as interest accrues upon the bonds treated as valid obligations. They are to "remain in force" for the purpose of interest payments; and those, whether deemed payable as interest strictly, or as contributions to the sinking fund, are payable until the bonds mature; and a default in the bonds outstanding as obligations, or in the payments due to the sinking fund by the terms of the mortgage, may be followed by proceedings in foreclosure under the provisions applicable in case of such default. The duty of continued payment of interest is thus entirely plain until confronted with the latter clause, which directs, in case the bonds appreciate beyond 110, and purchases cease, that "no further payments shall be payable to the said sinking fund" until the permitted purchases can be resumed. The payment of interest upon the purchased bonds is as payment into the sinking fund, and so comes a collision between a command to pay interest until the bonds mature, and one to cease payments before that if the bonds rise above the prescribed value. The natural and obvious solution of the difficulty is suggested by the instrument itself, and is that the payments referred to in the latter clause are the semi-annual payments of \$12,500. The payments to be stopped are identical with those to be resumed, as indicated by the words "such payments;" and since those to be resumed were expressly declared to be the \$12,500, it follows that those, and those only, were the payments to be discontinued.

This construction is fortified by another circumstance. While the bonds were below the maximum of purchase, both the interest payment and the gross payment were to be made. If, when the bonds reached 110, both payments were to cease, then, upon the appellant's construction, when they dropped below that value, only one is to be resumed; and the interest payments, once stopped, are ended forever, and cease to be due when the precise circumstances again exist which made them



at first payable. The principal argument against this construction is that it involves waste, because, while bonds cannot be purchased, and are drawing 7 per cent., the money on deposit in the trust company will draw but 2 per cent. There are two sufficient answers to this contention. When the plan was adopted, nobody foresaw or sought to provide against so great a reduction in the rates of interest as has since occurred, and when the contract was made the possible loss from difference of interest was not deemed important. But a further answer is found in the suggestion of the learned judge at special term, and cannot be better stated than in his own words: that "the safety of the money paid into a sinking fund is of more importance than the amount of interest it might earn." It would seem as if that lesson might have been readily learned from the financial history of the past, and have exerted a predominant influence upon the sinking fund devised. Railroad mortgages are seldom made to be paid. If the company is successful, they are often renewed, and the money which might have been used for their discharge is largely spent in heavy salaries, increasing expenses, and questionable extensions of the line. If the company is unsuccessful, the end is foreclosure and wreck. But where a mortgage is made to be paid, and the credit and market value of subsequent securities depends upon it, a plan like that devised in the present case is wise and prudent, even if it involves some loss of interest. The normal operation of this sinking fund, if the bonds had kept below 110, would have redeemed them all at maturity. If it fails of complete success, it is due to a partial suspension of its operation, but that should extend no further than the fair construction of the mortgage requires.

We think the courts below decided correctly that the interest payments to the sinking fund must continue until the maturity of the mortgage. The judgment should be affirmed, with costs.

(All concur, except RAPALLO, J., dissenting, and MILLER, J., not voting.)

(102 N. Y. 336)

UNION NAT. BANK OF RAHWAY, N. J., v. UNDERHILL, impleaded, etc.<sup>1</sup>

(*Court of Appeals of New York.* June 1, 1886.)

1. PARTNERSHIP—FIRM NOT LIABLE ON PARTNERSHIP NOTE GIVEN IN INDIVIDUAL TRANSACTION OF PARTNER.

Where one partner has a transaction with a third person, which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the matter.

2. SAME—CASHING CHECK.

Defendant, Cheney, when procuring plaintiff to cash his personal check, said to the president: "My partner has, or should have, the money for this to-day; but he has not got it, or cannot get it, and we want this amount." Held, that this gave the plaintiff no right to suppose that the money which was given upon Cheney's check was for the benefit of the firm, and such remark did not authorize an inference that money subsequently obtained by Cheney on his own checks was procured for the firm.

<sup>1</sup>Affirming 19 Wkly. Dig. 404; 33 Hun, 660.

**3. SAME—PROMISSORY NOTE—INDIVIDUAL TRANSACTION OF PARTNER.**

Firm is not liable on partnership note given in individual transaction of partner, not apparently or really within the scope of the partnership.

**4. SAME—EVIDENCE.**

Declarations of the partner who signed, made to the indorser, and not communicated to plaintiff, are not competent or material, as against the remaining partner, when they were made in a transaction, both apparently and really, without the scope of the partnership business.

Appeal from general term supreme court, First department, affirming judgment for defendant.

*Robert S. Green*, for appellant, Union Nat. Bank of Rahway, N. J.

*Hamilton Odell*, for respondent, Howard M. Underhill, pleaded, etc.

**EARL, J.** The plaintiff commenced this action against the defendants Cheney and Underhill, to recover against them upon three promissory notes, dated July 27, 1877, payable to the order of B. A. Vail, and made by Jesse S. Cheney & Co., a firm composed of the two defendants. The three notes amounted to about \$5,700, and were, at or about their date, indorsed by Vail, and delivered to the plaintiff. The defendant Underhill alone interposed an answer, in which he alleges that these notes were made by Cheney without his knowledge or consent, and delivered to the bank in payment of Cheney's individual debt, and that the plaintiff knew this. After hearing the evidence, the court sustained Underhill's defense, and directed a verdict in his favor, and the main question for our determination is whether there was any evidence which required the submission of the case to the jury.

We think it was clearly established that these notes were made by Cheney in the name of the firm, without the knowledge or consent of his partner, and they were delivered to plaintiff for the purpose of paying the individual debt of Cheney; that the plaintiff knew that Cheney was using his partnership paper to pay his individual debt, and it was bound to know that he had no right to use it for that purpose without the consent of his partner; and was chargeable with knowledge that the notes were wrongfully made and issued. Each member of a firm is the general agent of the firm in relation to all the business of the firm, and can bind the firm in what he says and does in such business; but when one partner has a transaction with a third person which is neither apparently nor really within the scope of the partnership business, the partnership is not bound by his declarations or acts in the transaction. He cannot, by his declarations, make that a partnership transaction which does not appear to be such, and which is apparently and really an individual transaction. In such a case the third person has notice that the transaction is outside of the partnership business, and he cannot rely upon the partnership credit. *Byles*, Bills, (7th Ed.) 48; *Pars. Partn.* (2d Ed.) 116; *Rogers v. Batchelor*, 12 Pet. 221; *Mecutchen v. Kennady*, 27 N. J. Law, 230; *Wilson v. Williams*, 14 Wend. 146; *Thorn v. Smith*, 21 Wend. 365; *Kemays v. Richards*, 11 Barb. 312; *Elliott v. Dudley*, 19 Barb. 326; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125.

In *Byles on Bills* it is said: "The taking a joint security for a separate debt raises a presumption that the creditors who took it knew that it was given without the concurrence of the other partner."

In *Parsons on Partnership* it is said that "whenever a party receives from any partner, in payment for a debt due from that partner only, whether the debt be created at the time, or before existing, or by way of settlement of, or security for, a debt, or indebtedness, an obligation of the firm, in any form, the presumption of the law is that the partner gives this, and the creditor receives it, in fraud of the partnership, and has consequently no demand upon them."

In *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank* it is said that "each of the partners is the agent of the partnership as to all matters within the scope of the partnership business, and can bind the firm by making, indorsing, and accepting bills and notes in such business; but he has no more authority than a mere stranger to execute such paper in his own business, or for the accommodation of others. If he gives the partnership note or acceptance for his own debt, it is void in the hands of any party having knowledge of the consideration for which it is given."

Cheney, for some time prior to the giving of these notes, had been dealing with the plaintiff. He drew checks on the East River Bank of New York, and procured them to be cashed by the plaintiff, and these checks, for the security of the bank, were indorsed by Vail. At one of the times when he procured the plaintiff to cash a check he said to its president: "My partner has, or should have, the money for this to-day; but he has not got it, or cannot get it, and we want this amount." It is now claimed on the part of the plaintiff that this gave it the right to suppose that the money which was given to Cheney upon his check was for the benefit of the partnership, and hence that the check was in the partnership business. Subsequently other checks were drawn by Cheney, and cashed by the plaintiff, and paid by the bank upon which they were drawn. Finally, a check for upwards of \$5,000 was drawn by Cheney, indorsed by Vail, and cashed by the plaintiff, which was protested for non-payment, and these notes were given to take up that check.

We do not think that what was said by Cheney to the plaintiff's president, under the circumstances, authorized an inference that he was procuring the money for the firm, or in its business. All of the checks were his individual checks, and not the firm checks, and the bank had no reason to infer that he was drawing his individual checks in the firm business, or to procure money on the firm account or firm credit. The money was loaned on his individual check, and on the credit of Cheney and the indorser, and not on the credit of the firm. It was in form and in fact Cheney's check, and the president of the bank testified that he cashed the check on the responsibility of Vail, the indorser. We do not think that it is a just inference, from the language said to have been used by Cheney, that the checks were made in the business of the firm. But the declaration of Cheney, made in a transaction which was really as well as apparently his individual transaction, outside of the firm

business, could not make evidence against the firm or his partner. In *Hickman v. Reineking*, 6 Blackf. 387, where A., being in partnership with B., collected a sum of money in his individual capacity for C., and afterwards executed to the latter a note in the name of the firm for the amount, and a suit was commenced against the firm on the note, the plaintiff offered to prove that A., during the existence of the firm, had declared that the money had been used by him and his partner in the partnership business, and it was held that the evidence was inadmissible. In *Thorn v. Smith*, *supra*, it was held that it was not competent for one partner, by his declarations, even during the existence of the partnership, to change what, on the face of the transaction, appeared to be his individual debt, into a debt against the firm.

During the progress of the trial Vail, called as a witness for the plaintiff, was asked this question: "Did you ever have any conversation with Mr. Cheney in reference to his partnership, in connection with indorsing checks on paper?" Counsel for Underhill objected to the question as incompetent, as against him, and the objection was sustained, and counsel for plaintiff excepted. Then this question was asked: "Was any representation made by Mr. Cheney to you that any of this money which was to be raised on checks indorsed by you was for the purpose of the business of the house?" Underhill's counsel objected to this question as incompetent, as against him, and the objection was sustained, and plaintiff excepted. It is now claimed that the rejection of this evidence was error. We do not think that what Cheney said to Vail, not communicated to the plaintiff, was competent or material. The declarations sought to be proved were made when Cheney was engaged in a transaction, both apparently and really, without the scope of the partnership business, and hence, for reasons already stated, were incompetent, as against Underhill.

The plaintiff did not take these notes as assignee of Vail, or from Vail, in such a sense that it can stand in his shoes; but the notes were made and delivered to Vail, and by him delivered, for Cheney, to the bank, to satisfy Cheney's debt to the bank, and they had no inception until their delivery to the bank. The mere fact that Cheney could not testify that some small portion of the money obtained by him of the plaintiff was not used for the firm was of no importance. The debt was in form the debt of Cheney, and if plaintiff claimed that it, or any part of it, was created for the benefit of the firm, it was incumbent upon it to prove that. The mere inability of Cheney to testify that no part of the money was used for the firm proved nothing.

We are therefore of the opinion that the judgment should be affirmed, with costs.

(All concur.)

(102 N. Y. 471)

PEOPLE *ex rel.* HARVEY v. LOEW.

(Court of Appeals of New York. June 1, 1886.)

CONST. N. Y. ART. 3, § 18—LOCAL AND SPECIAL LEGISLATION—LAWS 1867, CH. 489, AS AMENDED 1885, CH. 554, UNCONSTITUTIONAL.

The legislature, by chapter 489, Laws 1867, as amended by chapter 554, Laws 1885, gave Harvey the right to build an experimental elevated road, and, as a reward for his labors, granted to him the 5 per cent. of the earnings of the Greenwich Elevated road, which had been originally appropriated to the use of the city as compensation for use of the street. *Held*, that the said acts were unconstitutional, and in conflict with section 18, art. 3, of the constitution, which forbids any local bill "granting to any corporation, association, or individual the right to lay down railroad tracks."

*S. Hand*, for appellant, the People, etc.

*D. J. Dean*, for respondent, Edward V. Loew.

FINCH, J. The legislation upon which the claim of the relator is founded, discloses very questionable and peculiar characteristics. He is authorized to build an experimental section of elevated railway, not less than one-quarter of a mile in length, upon some duly-authorized street of the city, with a view of inventing or discovering improvements in the system, which, if adopted, will make the existing structures less offensive or inconvenient. The section is to be, not a model, but an actual operating railway, and yet is to be such wholly for experimental purposes,—not transporting passengers, or open for public use, but subject to the continuous changes and trials born of new ideas, and made to test their effectiveness and value. The length of this experimental section beyond one-quarter of a mile is in the discretion of the relator. He may, if he chooses, extend it to the exterior bounds of the city. Its size, character, and mode of construction are, in like manner, largely in his discretion, and he may thus obstruct an avenue of travel, or take away the property rights of abutters without any provision for their compensation. No time is limited for its continuance. So long as the relator is alive to invent and experiment he may test his ideas upon the structure built, or remodel or change it, unless the legislature shall put an end to the enterprise, or the relator determine that his improvement is complete. The law does not say to whom the improvements shall belong, nor even that they shall be introduced on any existing or future elevated railway; and the result of the whole enterprise, as planned by the statute, will only be that the city and the state will learn that some things in mechanical engineering can or cannot be successfully accomplished. Of course, the relator did not propose to thus educate himself and the city—himself by experiments, and the city by results—at his own expense, or without compensation; and the mode of accomplishing that is as unusual and peculiar as the enterprise to be paid for.

Under an act passed in 1867 (chapter 489) the West Side & Yonkers Patent Railway Company was authorized to build an elevated railway in Greenwich street, and did so construct it, and was required to pay 5 per cent. of its net income into the treasury of the city of New York as

compensation for the use of the streets. By a supplemental act passed the next year (Chapter 865, Laws 1868) this fund was required to be kept separate from other city funds, and to be applied by the commissioners appointed under the original act to the improvement of the occupied streets "by preserving or transplanting shade trees, or by other embellishments or improvements of awnings or sidewalk structures;" and this payment was declared to be "the legal compensation in full for the use and occupancy of the streets by said railway," and to constitute "an agreement in the nature of a contract between said city and constructing company." But in 1885 this fund thus belonging to the city under what was called a contract, and devoted to the improvement of its streets, was diverted to Charles T. Harvey, engineer, for building his "illustrative section." The whole sum then on deposit with the comptroller was about \$168,000; and one-third of this was directed to be paid to Harvey "forthwith," "for the purpose of defraying the expenses of experiments as to said motive power now in progress, and for making surveys and other preparations for building said section." A "like amount" was to be paid "as the work upon said section progresses,"—a stipulation quite significant,—and then, when the section is complete, and certified by the governor, state engineer, and mayor to have "demonstrated or developed material improvements in the methods of constructing or operating elevated railroads," all sums "remaining in or accruing to said fund" are to be paid over to Harvey, who, after having thus completed his section and its improvements, is nevertheless to continue experimenting with a view to "attaining the highest possible perfection;" the annual 5 per cent. to continue to be paid to him to aid his struggle towards that perfection "until the legislature shall otherwise direct." There is no provision in the act for an audit of the engineer's accounts; nothing which determines what proportion shall be compensation, and what expense, and he would be strangely disinterested if the latter did not dwindle to increase the former. It is true that he gave a bond, but that was conditioned only that he would faithfully perform his duties, or, in other words, faithfully experiment.

That this arrangement was in fact an appropriation of the money of the city to the private benefit of the relator, at least so far as the portion now claimed to be payable is concerned, and that the appearance of a public purpose thrown about it is colorable merely, is contended by the city, and has much of probability to support it. The first one-third of the money is payable forthwith, cash down; another third as the work progresses. The engineer is left at liberty to absorb the first third absolutely; to put it in his purse, and keep it as his own. He may then begin experiments and pay for them, and take his own compensation out of the second third "as the work progresses," for that is the provision of the law; and so there may be nothing which the city or the state has a legal right to demand of the engineer as the consideration of the first payment. The engineer can begin no construction until upon some "duly-authorized street." The city cannot give the authority in and of itself. Laws 1860, c. 10; Laws 1884. The legislature has not

done so, and may never, and the relator will not be in default, and may rest quietly with the \$56,000 in his possession, content with the situation. It is true that the law speaks of experiments "now in progress." But these were Harvey's experiments. No one directed him to make them. Neither the city nor the state, so far as the record shows, owed him anything for that, or was under the slightest legal or equitable obligation to bear their expense, or compensate him therefor. And as to the "surveys" and preparations, he is left at liberty to treat them as part of the "work," as they in fact are, and draw their expense from the second \$56,000. The consideration for the first payment is not easily evolved from the terms of the law, and that a gift was intended in the nature of a reimbursement for losses sustained seems to be disclosed by the document handed up after the argument, and it may very well be that the first payment of \$56,000 was purposely placed in the power of the relator, upon a merely colorable consideration, in order to give him a gratuity to that extent. But since the possible facts, if we knew them all, might change the aspect of the case in this respect, it is better to rest our conclusion upon a less debatable foundation.

The enactment violates section 18 of article 3 of the constitution, which prohibits the passing of a local or private bill "granting to any corporation, association, or individual the right to lay down railroad tracks." The relator, or, if he be treated as a mere agent, the municipality itself, is authorized by a bill which is certainly "local," if not "private," to build an elevated railroad in some street of the city. It is not a sufficient answer to say that the track thus to be "laid down" is merely experimental and temporary, for the language of the fundamental law is purposely very broad, and draws no such distinction. But this track, although experimental, is not temporary. As we have seen, it is permanent and durable, having no limitation except the future will of the legislature. It will be a railroad not less than a quarter of a mile long, and may be made much longer, and serve, under the guise of an experiment, to fasten, in the end, a new road upon the city. That this is not an idle supposition is indicated by the appellant's supplemental brief. After speaking of one possible interpretation of the law, he mentions another "which may validly carry with it the process of duly authorizing certain streets to be used for these railroad purposes, through the medium of a constructing corporation, as intended by the legislature and the memorialist." The relator, perhaps, intended to organize a new corporation to help build his "illustrative section," and then own and run it, although the statute is innocent of any such expressed purpose. Wherever the road runs, it must necessarily take either the fee of private owners, or the property of abutters; for in all respects it is to be an elevated road. The act of 1885 describes it as "a new illustrative section of said form of railway;" and, going back to the act of 1867 to discover that form, we find it to be an elevated track on each side of the streets, supported by iron columns not less than 14 feet above the level of the pavement. No provision is made for compensation to abutting owners or owners of the fee.

For these reasons, without considering others which have been suggested, we are of the opinion that the act under which the relator claims is invalid. The judgment must be affirmed, with costs.

(All concur.)

(102 N. Y. 400)

ENGEL v. FISCHER.<sup>1</sup>

(*Court of Appeals of New York.* June 1, 1886.)

1. STATUTE OF LIMITATIONS—ABSENCE FROM STATE—CONCEALMENT.

Where the debtor is continually in the state for more than six years after the cause of action accrues, the statute of limitations will operate, even though he conceals his abode from his creditor, who is thus unable to discover and serve him with process, and even if he changes his name for the purpose of eluding his creditor.

2. SAME—CODE CIVIL PROC. N. Y. § 401.

Such a case is not covered by the exception of the Code of Civil Procedure, § 401, relating to deduction of time for absence from the state.

Appeal from general term superior court of New York, reversing judgment entered at trial term, upon dismissal of the complaint by a single judge without a jury.

*C. E. Rushmore*, for appellant, I. H. Fischer.

*B. Lewins*, for respondent, Charles Engel.

EARL, J. This action was commenced against the defendant as acceptor of a bill of exchange payable three months after date, drawn on the first day of May, 1873, at Vienna, Austria, for 3,600 gulden, equivalent in our money to \$1,512. The defense interposed is that the cause of action was barred by the statute of limitations. The facts are these: The defendant resided in Austria, where he accepted the bill, and soon thereafter he absconded, and in July came to the city of New York, and there he has ever since resided. On reaching New York, for the purpose of concealing himself from his creditors, he assumed the name of Marcus L. Fischer, and thereafter bore that name, and hid himself thereunder. The plaintiff discovered him in the city of New York in April, 1882, and there at his store demanded of him the payment of the draft, which was refused, and then in the same month this action was commenced.

While the plaintiff concedes that more than six years had elapsed from the time the cause of action accrued against the defendant, he claims the benefit of the exception contained in section 401 of the Code, which is as follows:

"If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor after his return into the state. If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action."

This section does not aid the plaintiff, because the defendant was not without the state when the cause of action accrued, and he never there-

<sup>1</sup> Reversing 51 Super. Ct. 71.



after departed from the state. While the defendant bore an assumed name, he was physically, at all times, within this state, and there was no hiding or concealment of his person except as he assumed and bore the fictitious name. It passes my comprehension how, by any process of reasoning or metaphysics, such a person, continually present in the state for nearly 10 years, can be said never to have come here, and to have been continually absent from the state. It is quite probable that the defendant perpetrated a fraud upon the plaintiff by concealing his residence from him, and that the statute is resorted to by him to defeat a just claim; yet the statute must have its operation. Its plain language cannot be perverted to remedy the hardship of any particular case. It is a benign statute, and the legislature has written in it all the exceptions which sound policy dictated to it. It may frequently operate to defeat just claims, and be used by dishonest debtors to escape the payment of honest debts. A cause of action may be barred before it is known to the claimant. The debtor may purposely conceal it, and yet the bar of the statute must inexorably be applied. A debtor who has always resided within the state may abscond from his home, and conceal himself within the state from his creditors, and yet no one will claim that such debtors are to be regarded as without the state, or that such concealment will defeat the running of the statute. The law gives a creditor six years' continued presence of his debtor within the state after the cause of action has accrued, and that period has been deemed ample to enable the creditor to find his debtor, and to put the machinery of the law in force against him. It would lead to great inconvenience, and leave the bench and bar without any certain rule, if, in every case where a debtor has resided and continually been within this state for six years after a cause of action against him accrued, and the statute of limitations is interposed as a bar to an action to enforce the same, it could be a matter of inquiry and litigation, upon disputed evidence, whether the debtor, during any portion of the time, concealed himself fraudulently or otherwise, and whether the creditor used due diligence to find him.

There are some cases in which what is now the first clause of the section above quoted was under consideration, and it became necessary for the courts to determine what was a return or coming into the state so as to set the statute running, wherein it was decided that the return must be open and notorious, and under such circumstances that the creditor could with reasonable diligence find his debtor and serve him with process. *Little v. Blunt*, 16 Pick. 359; *Hill v. Bellows*, 15 Vt. 727; *Hysinger v. Baltzell*, 3 Gill & J. 158; *Didier v. Davison*, 2 Barb. Ch. 477; *Ford v. Babcock*, 2 Sandf. 518; *Cole v. Jessup*, 10 N. Y. 96; *Dorr v. Swarthout*, 1 Blatchf. 179; 3 Pars. Cont. (6th Ed.) 96; Angell, Lim. (2d Ed.) 216. A debtor might return to the state clandestinely, for a few hours, in the night-time, or on Sunday, or he might be in the state on his progress through it; and a return of such a character which might be concealed from and unknown to the creditor, and which would afford him no opportunity by the use of reasonable diligence to serve his debtor with

process, is held not to be a return to the state within the meaning of the statute. But it has never before this case, so far as I can discover, been decided that, where the debtor was continually in the state for more than six years after the cause of action accrued, he was deemed to have been without the state, and thus the running of the statute defeated because he concealed his abode, and thus the creditor was unable to discover him and serve him with process.

The case of *Sleight v. Kane*, 1 Johns. Cas. 76, is not an authority for the plaintiff. There the defendant was held to be without the state while he was in a place which had been conquered and was held by the British troops, and which was neither *de facto*, nor, I am inclined to believe, *de jure*, a part of the state, nor subject to the jurisdiction of the state courts. In *Poillon v. Lawrence*, 77 N. Y. 208, it was held that a discharge in bankruptcy was void as to a creditor from whom notice of the bankruptcy proceedings was purposely and fraudulently omitted, by conducting the same in a name assumed by the debtor, which was entirely different from that under which the debt was contracted; and that case has no bearing upon this.

We are therefore constrained to hold that the order of the general term should be reversed, and the judgment of the trial term affirmed, with costs.

(All concur.)

(102 N. Y. 464)

MARKET NAT. BANK OF N. Y. *v.* PACIFIC NAT. BANK OF BOSTON.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. ATTACHMENT—RESTITUTION—N. Y. CODE CIVIL PROC. § 1292.

The "court" referred to in section 1292, Code Civil Proc., is the court which sets aside the judgment; and where a motion is made at special term to set aside an attachment, and denied, on which judgment was entered against the defendant and execution satisfied, but on appeal the general term reversed the order denying the motion, and that decision is affirmed, the motion for restitution was properly made at the general term.

2. SAME—DELAY.

There is no provision or rule of law which requires this motion to be made sooner than it was, or its denial on account of delay.

3. SAME—MOTION BY ATTORNEY.

The motion was made by an attorney appearing for the defendant, and in the notice he asked to have restitution made to the receiver. *Held* no error.

4. SAME—PENDING ACTION.

The pendency of actions against other parties for the same money did not preclude the defendant from making this motion.

Appeal from judgment general term supreme court, First department, reversing orders vacating attachment.

*Abram Wakeman*, for appellant, Market Nat. Bank of N. Y.

*Elihu Root*, for respondent, Pacific Nat. Bank of Boston.

EARL, J. The plaintiff attached the property of the defendant. A motion was made at special term to set aside the attachment, which was

<sup>1</sup> Affirming 27 Hun, 465.

denied. Judgment having been entered against the defendant, execution thereon was issued, and the plaintiff collected and received thereon, out of the attached property, upwards of \$26,000. The defendant appealed to the general term from the order of the special term refusing to vacate the attachment, and there the order of the special term was reversed, and the attachment, judgment, and the levy under the attachment were vacated and set aside. The plaintiff appealed from the order of the general term to this court, and here that order was affirmed, and the case was then remitted to the supreme court, and an order was entered at the special term on the first day of December, 1883, making the order of this court the order of the supreme court. In January, 1885, the defendant moved at the general term of the supreme court for restitution of the money collected by the plaintiff of it, and the motion was granted, and the plaintiff then brought this appeal to this court.

Section 1292 of the Code provides:

"When a judgment is set aside for any cause upon motion, the court may direct and enforce restitution in like manner, with like effect, and subject to the same conditions as when a judgment is reversed upon appeal."

The court meant in this section is the court which sets aside the judgment, and hence this motion for restitution was properly made at the general term; and the section is authority for the restitution ordered in this case.

There is no provision or rule of law which required this motion to be made sooner, or its denial on account of the delay. The court could, in the exercise of its discretion, have denied the motion on account of the delay, and left the defendant to its action to recover back the money. But we do not discover that the plaintiff suffered any harm by the delay, or that the court abused its discretion, and we have no power, therefore, to review it.

The objection that the receiver of the defendant could not make the motion is misconceived. The motion was made by an attorney appearing for the defendant, and in the notice of motion he asked to have restitution made by payment to the receiver; so that the motion is really made on behalf of both the defendant and its receiver, and the order of the general term awarded restitution to the defendant, but that the payment in restitution should be made to the receiver. This is the form of order asked for by defendant's attorney, and the plaintiff has no occasion to find fault with it in that respect.

It appears that the receiver of the defendant had commenced an action in the circuit court of the United States to recover the same money against the National Park Bank, from whose possession the plaintiff took it by the attachment and judgment in its favor, and also another action in the same court against the plaintiff to recover the same money. The pendency of those actions did not preclude the defendant from making this motion, and it was within the discretion of the court to determine whether, notwithstanding their pendency, this motion should be entertained and granted; and when it granted it on condition that those actions should be discontinued and the taxable costs therein paid by the

receiver, it sufficiently protected the rights of the plaintiff. We see nothing in the terms upon which the order was granted of which the plaintiff can justly complain. We are therefore of opinion that the order should be affirmed, with costs.

(All concur.)

(102 N. Y. 995)

MINGAY and others v. HANSON and others.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

MUNICIPAL CORPORATIONS—VILLAGES—SARATOGA SPRINGS.

This action was by tax-payers of Saratoga Springs to restrain the defendants, as water commissioners of the village, from carrying out a contract made with the Holly Manufacturing Company, and from paying the amount agreed upon, and to have the contract declared void. *Held*, that the water commissioners had authority to make such expenditure, under Laws 1868, c. 537, 1871, c. 763, repealing Laws 1866, c. 220, § 61, as to them.

Appeal from general term of the supreme court Third department, affirming judgment dismissing plaintiffs' complaint.

*Matthew Hale* and *John R. Putnam*, for appellants, James Mingay and others.

*Ezek Cowen* and *C. S. Lester*, for respondents, Henry B. Hanson and others.

EARL, J. The restrictions contained in the charter of the village of Saratoga Springs (Laws 1866, c. 220, § 61) against the expenditure of money and the creation of a village debt were repealed, as to the water commissioners of the village, by subsequent legislation, (Laws 1868, c. 557; Laws 1872, c. 763;) and hence the debt and expenditure complained of in this case were legal, and unassailable by the plaintiffs.

The reasons for our conclusions are so well stated in the opinions delivered at special and general terms, in the case of *People v. Leary*, 17 Wkly. Dig. 116, that it is not required that they should be restated here.

The judgment should be affirmed, with costs.

(All concur.)

(102 N. Y. 366)

POPE and others v. PORTER and others.<sup>2</sup>

(Court of Appeals of New York. June 1, 1886.)

CONTRACT—WHEN DIVISIBLE.

A contract of sale was made by brokers in the following words: "Sold to the following named parties Scotch pig-iron, to arrive as specified below: \* \* \* 500 tons of Coltness pig-iron, at 86 per ton, for shipment, to be due here in April next; 500 tons of Caulder pig-iron, at 84 per ton, for shipment, to be due here in March next,—payable, on arrival here, by four-months note, indorsed by the above-named parties, with interest added at 6 per cent." *Held*, not divisible, and failure to deliver the first lot would excuse the buyer from receiving the second.

<sup>1</sup>See 17 Wkly. Dig. 116.

<sup>2</sup>Reversing 32 Han, 240; *mem.* See 19 Wkly. Dig. 103.

Appeal from judgment of general term supreme court, First department, reversing judgment for plaintiffs, and ordering new trial unless plaintiffs stipulate to reduce judgment by amount of first lot of iron.

*Geo. F. Comstock*, for appellants, *George A. Porter* and others.

*Wm. F. Nelis*, for respondents, *Thomas J. Pope* and others.

FINCH, J. The material terms of the contract between the parties, as written in the broker's memorandum, are as follows:

"Sold to the following named parties Scotch pig-iron, to arrive as specified below: \* \* \* 500 tons of Coltness pig-iron, at 36 per ton, for shipment, to be due here in April next; 500 tons of Caulder pig-iron, at 34 per ton, for shipment, to be due here in March next,—payable, on arrival here, by four-months note, indorsed by the above-named parties, with interest added at 6 per cent."

A broker often, in the haste of business and in the effort at brevity, will draw ambiguous contracts, and the one before us is an instance and example of such want of care and accuracy. Whether it is an entire contract, or divisible into two separate and independent agreements; whether it sold specific iron to be shipped at a precise time, or merely iron of the stipulated brand; and whether payment was to be made in installments by a four-months note at each arrival, or by one note when all the iron had arrived,—were some of the questions which the memorandum left open for dispute. In the litigation which ensued, the vendors recovered of the vendees for a refusal to accept both lots of the iron. On appeal, the general term decided that there could be no recovery for the Caulder iron, upon the ground that the plaintiffs were themselves in default, but that the contract was divisible, and a recovery could be had for the Coltness iron, as to which they were not in default. The judgment was therefore reversed, unless the plaintiffs should stipulate to deduct from their recovery the amount awarded on account of the Caulder iron, in which event the judgment as modified should be affirmed. The plaintiffs stipulated, and contented themselves with the modified judgment. From that moment the adjudication as to the Caulder iron became indisputable so long as the general term judgment should stand; and upon this appeal devolves upon the respondents, who seek to sustain that judgment, the duty of demonstrating that it can be correct consistently with the default adjudged by the same judgment as to the Caulder iron. By their stipulation the plaintiffs assented to the decision against them, in order to retain the balance in their favor, and, for the purposes of this appeal, must be held to concede that there was default as to the Caulder iron. Whether the consequent right of withdrawal from the contract extended to all the iron, and to the entire contract in all its parts, or was limited simply to the Caulder iron, is thus the only question presented for our consideration.

The contract, in its first sentence, certifies the sale of "Scotch pig-iron, to arrive." It specifies later the quantity and brands and dates of arrival, but it remains one entire contract for the sale of 1,000 tons of the iron, half of one brand and half of the other, one portion to arrive

in March and one in April. The purchasers were individuals, one representing a particular corporation, and the others a different one, each of which needed the iron in some proportions for their manufacturing purposes. The parties might have bought separately, each taking a smaller quantity and according to their several needs; but they chose, as they had a right to do, to combine in a single purchase of the entire quantity needed by both. Payment was to be made by note at four months, upon the arrival of the iron. If this means upon the final arrival of all the iron to be paid for by a single note, then there is no question that complete delivery of the whole purchase was a condition precedent to the right to demand payment. But the respondents insist that a note was to be given upon each arrival, and therefore that both delivery and payment were to be in installments, and so the contract was in its nature divisible, and performance of any component part entitled the vendor to compensation for that part. If the construction of payment due upon each arrival be correct, the contract was "divisible" in the sense in which that word is applied to cases of a particular character, and depending upon peculiar circumstances. If the plaintiffs had shipped the 500 tons of Caulder iron for arrival in March, and it had been delivered to the defendants, who had accepted it, they would have been bound to pay for that iron, irrespective of a possible or actual default thereafter as to the Coltness iron. But this is because of a part delivery on one side, and a part acceptance on the other, which is in accordance with the contract, and permitted by its terms. That doctrine, however, does not at all reach or cover a case like the one before us.

Here there is a breach of the contract at the beginning,—a failure to perform at the outset,—and that breach justifies a rescission by the vendee. But a rescission of what? Obviously of the entire contract. It must be that or nothing, since there are not two independent and separate contracts, one of which may be broken without peril to the other; but there is a single contract, which may be rescinded at the moment of a breach, so far as it remains wholly unperformed on both sides. The cases which seem to have misled the court below are founded upon peculiar equities growing out of the form of contract. They contemplate and require a performance in separable parts or divisions; and where the vendor delivers an agreed proportion, which the vendee accepts, and payment therefor becomes immediately due, the right to recover is at once complete, and is not forfeited by a later default. The contract in such case is called divisible or distributive, and the language is not objectionable if correctly understood and applied. The right of rescission or of abandonment, where such a contract has been wholly performed on one side as to one of its separable parts, and that performance accepted on the other, is lost, and cannot be regained, for the right to the payment reserved has fully accrued, and does not depend upon further conditions. Practically, by the divisible form of the contract and the joint act of the parties in delivery and acceptance, the earlier stipulation is cut off and separated from the later, but nothing of the kind is possible where the vendor is in default at the outset. The vendee is not compelled to accept a part performance in the

inverse order of his contract, but only according to its terms; and where, at its initial point, the vendor is in default, the right to rescind or abandon belongs to the vendee, and necessarily and justly must apply to the whole contract remaining unperformed; otherwise the one contract is split into two, each independent of the other. Substantially this doctrine has been recently decided. *Norrington v. Wright*, 115 U. S. 188; S. C. 6 Sup. Ct. Rep. 12. The reasoning of that case seems to us accurate and decisive, and we follow it without hesitation.

The order for a new trial, which we think it our duty to make, will leave open the questions of fact as to plaintiff's default.

The judgment should be reversed, and a new trial granted; costs to abide the event.

(All concur.)

(102 N. Y. 441)

FANNING v. D. M. OSBORNE & Co. and another.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

**WAYS—RAILROADS IN STREETS—IF USED BY INDIVIDUAL FOR PRIVATE PURPOSE EXCLUSIVELY, A NUISANCE.**

Defendants, under a contract with a street railroad corporation, took a branch road abandoned by it, having flat rails, and reconstructed it with Trails, and used it exclusively for carrying their machines, etc., to their factory. Held, that the construction and maintenance by an individual of a railroad upon the highway for private purposes constitutes a nuisance for which any person sustaining special injury may bring action, and the contract with the railroad furnished no defense to such suit, as it was an attempt by the railroad to transfer its franchise to an individual for the purpose of enabling him to operate the road exclusively for the purpose of his private business.

Appeal from judgment of general term, Fifth department, affirming an interlocutory judgment entered upon a decision rendered at the Cayuga special term upon a trial by the court without a jury.

*H. V. Howland* and *D. Wright*, for appellants, D. M. Osborne & Co. and another.

*S. E. Payne*, for respondent, Gurdon S. Fanning.

**ANDREWS, J.** The defendant D. M. Osborne & Co., a manufacturing corporation, from 1875 to the commencement of this action maintained and operated a street railroad in the city of Auburn, from a point near the New York Central Railroad, and thence, through Garden and other streets in said city, to its manufacturing establishment on Mechanic street, exclusively for the transportation of machines manufactured by the corporation, and for other freighting purposes connected with its business, by means of ordinary freight cars owned by the corporation, which from 1875 to 1879 were drawn by horses, and afterwards by a dummy engine also provided and owned by it. The D. M. Osborne & Co. corporation succeeded to the business of the firm of D. M. Osborne & Co. in 1875. The firm of D. M. Osborne & Co., under a contract entered into between the individual defendant, David M. Osborne, with

<sup>1</sup> Affirming 84 Hun, 121, as to D. M. Osborne & Co., but reversing it as to David M. Osborne.

the East Genesee Street & Seward Avenue Railway, a street railway corporation organized in 1871, which contract is dated May 29, 1873, reconstructed the railroad track between the points mentioned, and relaid it with T rails, and from 1873 to 1875 the firm used the railroad for the same purposes for which it was subsequently used by the corporation defendant.

It is upon the evidence indisputable that the railroad, as used from 1873, had no semblance of a public enterprise, and was in no sense a common carrier of freight or passengers. The East Genesee & Seward Avenue Railway, in 1871, under its charter, (Laws 1871, c. 527,) having obtained the consent of the local authorities, as required by the act, constructed its main line, about two miles in length, and also a branch road laid with strap or flat rail on the line now operated by D. M. Osborne & Co. But after a few months it abandoned the use of the branch for the carriage of freight and passengers, and it remained unused until the firm of D. M. Osborne & Co. reconstructed it under the agreement of May 29, 1873.

The plaintiff is the owner of premises on Garden street, by deed dated July 21, 1868, which bounds the granted premises on the north by the "south line of Garden street." The plaintiff's title is derived through intermediate grantors from the original owners of great lot 47, which lot includes plaintiff's premises and all of Garden street, with other lands. Garden street has been used as a public highway for more than 50 years. It is described in a deed from one Dill, the original owner of lot 47, dated September 28, 1811, as the "road leading to Jehuel Clark's mill." It is not claimed that the public or the city of Auburn owns the fee of the street. The presumption, in the absence of evidence, is that the public has acquired an easement only for highway uses in the land embraced in the street, and that the fee remains in the original owner. It is proved by the evidence, and it is found by the trial judge, that the use of the railroad through Garden street has greatly obstructed the street, and rendered it unsafe and dangerous for teams and vehicles of the plaintiff and others using the same, and has impaired and injured plaintiff's right and interest in and to the street, and greatly injured his business, and depreciated the value of his property. The facts found show a special injury sustained by the plaintiff from the operation of the railroad, which justifies the interference of equity, unless it is made to appear that the defendant corporation has a legal right to maintain a railroad on Garden street for its private convenience.

We deem it unnecessary in this case to determine whether the authority conferred on the East Genesee Street & Seward Avenue Railway Company by its original charter, or by act, chapter 444 of the Laws of 1879, amending its charter so as to permit the company to operate the branch road in question by steam-power, could be exercised by the company itself except upon the condition of making compensation to the owners of property abutting on the street for any injury thereto. The act does not require compensation to be made, and the determination of that question would require an examination of the powers of the legislature



to authorize the construction of a horse or steam surface street railroad in a street or highway the fee of which remained in the original owner, as against a purchaser from such owner of a lot abutting on the street or highway, and whose premises, by the terms of his deed, are bounded thereon. The case of *Williams v. New York Cent. R. Co.*, 16 N. Y. 97, established the principle that a dedication of land for street purposes does not authorize the legislature to permit the construction of a steam railroad thereon without making compensation to the owner of the fee, on the ground that such use imposes a burden upon the land not contemplated by the original dedication.

The plaintiff is not the owner of the fee of Garden street in front of his premises. But it is claimed that he acquired, by his conveyance from Dill, a private easement therein, superadded to his right, in common with the public, to the use of the street, which private easement, it is insisted, is a property right which is invaded by the construction and maintenance of a railroad in the street, and that the franchise to maintain and operate a railroad thereon could not be granted except on the condition of making compensation. It may be true that the plaintiff acquired by his conveyance, as against his remote grantor, the owner of the fee, a right of way appurtenant to his lot over the land embraced in Garden street, which would survive the discontinuance of Garden street as a public highway. Whether, assuming this to be so, the construction and operation of a street railroad in the street would be a taking of the plaintiff's property, for which, under the constitution, he would be entitled to compensation, or whether he stands in the shoes of his grantor, Dill, and may insist that such a use of the street is not within the purpose of the original dedication, are questions which it is unnecessary in this case to determine for reasons which will now be stated. The right to construct and operate a street railway is a franchise which must have its source in the sovereign power. The legislative power over the subject is also subject to the limitation that the franchise must be granted for public, and not for private, purposes, or at least public considerations must enter into every valid grant of a right to appropriate a public street for railroad uses. The construction and maintenance of a street railway by any individual, or association of individuals, without legislative authority, would constitute a public nuisance, and subject the persons maintaining it not only to indictment, but also to a private action in favor of any person sustaining special injury.

It is not pretended that D. M. Osborne & Co. is a railroad corporation, or that it is operating the railroad in question under any specific legislative authority. It bases its right solely on the contract of May 26, 1873, between D. M. Osborne and the East Genesee Street & Seward Avenue Railway Company, and upon the claim that it has succeeded to the rights of D. M. Osborne thereunder. We are of opinion that the contract furnishes no defense to this action. It was a scarcely undisguised attempt by the railroad company to transfer to an individual, or to the firm for which he was acting, its franchise as common carrier, over the part of its route specified in its contract, with a view and for the

purpose of enabling the grantee to operate the road thereon, as private property, and exclusively for the purpose of his private business. It is true that the contract does not purport in terms to vest in D. M. Osborne an exclusive right to use the branch. It provides that the right granted shall be exercised so as not to interfere with the running of necessary passenger cars, and, in one of its clauses, recognizes a continuing right in the company to run freight cars on the track. But in fact the company, before the contract was made, had abandoned the use of this part of its road, and has never since used it, but it has been exclusively used and appropriated for the business of D. M. Osborne & Co. By the terms of the contract the grantee was exempted from the payment to the railroad company of any charge for trackage or other compensation for the use of the road. The firm of D. M. Osborne & Co. reconstructed the road, and relaid the track with heavy rail, and since the date of the contract, up to 1875, it paid the whole expense of maintenance, and since that year the expense has been borne by the corporation defendant. The facts show that the railroad company, prior to May 26, 1873, ceased to operate the branch, and that since that time it has been operated as the private road, first, of the firm of D. M. Osborne & Co., and afterwards of the corporation of D. M. Osborne & Co., under color of a contract with the railroad company.

We think the contract was void as against public policy; and, assuming that the corporation defendant has succeeded to all the rights of D. M. Osborne, or the firm of D. M. Osborne & Co., nevertheless the contract constitutes no defense to the action. It is plainly contrary to public policy that a franchise granted for public purposes should be used as a mere cover for a private enterprise. The defendant corporation is in the situation of assuming to maintain and operate a street railroad without legal authority, to the injury of the plaintiff; and the judgment below, enjoining and restraining such use, was proper.

The point that the East Genesee Street & Seward Avenue Railway Company is a necessary party is not well founded. That company has no interest in this litigation. Its rights, if any, are not affected by the judgment. It was divested of its franchise and property, except as to the branch in question, by a sale under foreclosure in 1880, on its insolvency; and as to its naked franchise to operate the branch, which seems not to have been embraced in the purchase, its use was abandoned prior to 1873.

The exception taken by the individual defendant, David M. Osborne, to the judgment against him, seems unanswerable. The wrong charged in the complaint is confined to the acts of the defendants since April 29, 1875, the date of the incorporation of D. M. Osborne & Co. It is averred, in general terms, that the defendants wrongfully maintained the road, etc. There is no proof showing any act done by the individual defendant since that time. It appears that he was president of the corporation of D. M. Osborne & Co., but it is not shown that he advised or approved, either in his individual capacity or as trustee, of the acts of the corporation. The point that he was not shown to have personally

intermeddled in the matter was specifically taken, and upon the case as presented we think the judgment against him individually is erroneous. The judgment should therefore be reversed as to him, and affirmed as to the corporation.

(All concur.)

(106 Ind. 567)

LYON v. LENON and others.

(*Supreme Court of Indiana. June 8, 1886.*)

1. SALE—BAILEMENT—WHEN RECEIVER OF GRAIN BECOMES OWNER AND NOT BAILEE.

Where grain is received by a dealer under a contract, express or implied, to pay the person delivering it the market price whenever he demands it, and such grain is mixed with other of like quality in bins, from which shipments are made daily, the dealer, in the absence of anything to the contrary, becomes the owner of the grain, and is liable to pay for it whenever called upon.

2. SAME—INSTRUCTIONS.

Instructions as to what constitutes a sale in such case approved.

3. SAME—TEST FOR DETERMINING.

The test for determining whether such a transaction is a sale or a bailment is: Can the depositor, by his contract, compel a delivery of grain, or has the dealer an option to pay for it either in grain or money? In the former case it is a bailment; in the latter, a sale.

4. CUSTOM AND USAGE—CONTRACT—AMBIGUOUS—EVIDENCE OF USAGE TO EXPLAIN.

Where an ambiguous contract is made in the course of a particular business, evidence of the known usage and ordinary course of such business is admissible.

Appeal from Carroll circuit court.  
Applegate & Pollard, for appellant.  
Nelson & Odell, for appellee.

MITCHELL, J. This was a suit in replevin to recover the possession of 570 bushels of wheat. The facts, as developed by the evidence, are as follows: In 1882, and prior thereto, Lenon was the owner of a grain-house and elevator at Delphi, Indiana. He testified that he was not a warehouseman, and that he never stored wheat for hire. In July, 1882, the plaintiff delivered to Lenon at his elevator, in different lots, the quantity of wheat above mentioned, and received, upon the delivery of each lot, a receipt, signed by the latter's agent, of the following tenor:

John Lenon.

"No. 1.

DELPHI, IND., July 24, 1882.

"Received of Harry Lyon (53) fifty-three bushels, fifty lbs., wheat.

"Not transferable without notice.

"J. V. McCain."

There is no evidence of any contract or understanding, outside of the receipt itself, except such as is afforded by the course of business between the parties. Lenon testified that his manner of dealing with the plaintiff, as with others, was that the latter would deliver wheat at the elevator, and take receipts therefor such as that set out. Whenever receipts were presented by the holder, Lenon would pay the market

price of wheat at the date of presentation, and take them up. It was also shown that, when presentation of the receipt was deferred beyond 30 or 60 days, a small sum, as for storage, was charged, and a charge was also made for insurance. All wheat of the same grade was put into a common mass when received, as the plaintiff knew, and was shipped out indiscriminately. An effort was, however, made to keep on hand an amount equal to the outstanding receipts. This was done, not for the purpose of returning wheat to those who held receipts, but as a matter of precaution on the part of Lenon in case of fluctuations in the market. While receipts were thus held for 570 bushels of wheat delivered by the plaintiff, Lenon became financially embarrassed, and made an assignment, under the statute, for the benefit of his creditors. He had on hand at the time a quantity of wheat more than sufficient to have returned the amount due the plaintiff, but far short of the amount represented by all his outstanding receipts. The plaintiff offered to pay the storage and insurance, and demanded wheat of the assignee equal in quantity to that represented by his receipts. The case was tried by a jury, the trial resulting in a general verdict and judgment for the defendant.

The only question for consideration is, did the receipts and the attending circumstances constitute the transaction a contract of sale, or was it a bailment? Upon its face the writing furnishes no suggestion whether the wheat was received in store, or upon a contract of sale. Resort was therefore properly had to extrinsic evidence. The general and known course of dealing of Lenon was properly considered. The case is distinguishable from *Schindler v. Westover*, 99 Ind. 395, and *Rice v. Nixon*, 97 Ind. 97. In the cases cited it appeared on the face of the receipts that the wheat was left in store. In this nothing appears except the receipt and the general course of business.

There was evidence from which the jury may have found that Lenon's business was not that of a warehouseman. He so testified. They may have found that he was engaged in purchasing and shipping grain; that the wheat for which the receipts were given, was delivered upon the understanding, implied from the known course of Lenon's business, that it was in no event to be kept for him; or that either the wheat delivered, or other wheat of like quality, was to be returned on demand, but that it would be shipped and sold at Lenon's pleasure, on his own account; and that the plaintiff was entitled, upon presentation of his receipts, to demand the market price of wheat at the date of such presentation, and nothing more. Wheat delivered under a state of facts such as we have assumed the jury may have found, would be a delivery in pursuance of a sale. In such a transaction there would be no element of bailment. A contract of bailment contemplates the return of the goods bailed, or, growing out of the necessities of commerce, where grain is delivered in store, other grain of like quality and grade may be returned in its stead. We recognize the doctrine that, if wheat is delivered in pursuance of a contract of bailment, the mere fact that it is mixed with a mass of like quality, with the knowledge of the depositor or bailor, does not convert

that into a sale which was originally a bailment. *Nelson v. Brown*, 44 Iowa, 455; *Nelson v. Brown*, 53 Iowa, 555; S. C. 5 N. W. Rep. 719; *Sexton v. Graham*, 53 Iowa, 181; S. C. 4 N. W. Rep. 1090.

Upon the facts in this case there was no bailment to begin with. Where grain is received by a dealer, under a contract, either express or implied, to pay the person delivering it the market price whenever he chooses to demand it, and such grain is mixed with other of like quality, in bins, from which shipments are being made daily, there being no understanding that the owner shall have the right to demand either his own, or a like quantity of other grain in return, the dealer becomes the owner of the grain, and is liable to pay for it whenever called upon. As, in such a case, the contract, from the beginning, furnishes the criterion by which the price is to be fixed, it is not invalid. *McConnell v. Hughes*, 29 Wis. 537; *Richardson v. Olmstead*, 74 Ill. 213. We cannot say the verdict was not sustained by the evidence.

Turning now to the instructions of which the appellant complains.

Especial objection is made to the fourth, in which the jury were told to inquire what agreement, if any, was made concerning the disposition of the wheat, and were further directed that, if they should find that the wheat was deposited with an agreement that it should be returned to the plaintiff, then it would remain his property; but, if there was a sale of the wheat at the time it was delivered, then it could not be recovered. We can perceive no error in this charge. It is said the court had no right to leave it to the jury to say what the agreement was, because there was no evidence that any agreement, either of sale or of bailment, was made. This assumption, in its breadth, cannot be maintained. While it may be said there is no direct evidence one way or the other, it was nevertheless the duty of the jury, from the facts and circumstances before them, to determine, under the rules of law as given them by the court, whether the wheat was delivered under a contract of sale or of bailment. There was evidence which enabled them to do that.

In the sixth instruction they were told that if Lenon was engaged in buying and selling grain, and received the plaintiff's wheat, and with his consent mixed it with other wheat in his warehouse, and gave receipts for it, showing the number of bushels received, and, with his consent, shipped and sold his wheat without any agreement to hold a like quantity in store to be delivered to the plaintiff on demand, then the transaction was a sale. This was a substantially correct statement of the law. If, from the circumstances, an agreement could have been inferred that the plaintiff's wheat might be sold without keeping either that or any other to replace it on demand, we are unable to conceive how it could have been deemed a bailment. Where wheat is received under the circumstances supposed, if the dealer has the right, at his pleasure, either to ship and sell the same on his own account, and pay the market price on demand, or retain and redeliver the wheat, or other wheat in the place of it, the transaction is a sale. It is only when the bailor retains the right, from the beginning, to elect whether he will demand the redelivery of his property, or other of like quality and grade, that the

contract will be construed to be one of bailment. If he surrenders to the other the right of election, it will be considered a sale, with an option on the part of the purchaser to pay either in money or property as stipulated. The distinction is: Can the depositor, by his contract, compel a delivery of wheat, whether the dealer is willing or not? If he can, the transaction is a bailment. If the dealer has the option to pay for it in money or other wheat it is a sale. *Johnston v. Browne*, 37 Iowa, 200; *Chase v. Washburn*, 1 Ohio St. 244. The instruction given is fairly within the principles above stated. What has been said sufficiently indicates that the other instructions complained of were unexceptionable.

That the court admitted the testimony of certain witnesses showing the general method pursued by Lenon in receiving and paying for wheat, is the subject of an objection. The appellant introduced evidence similar in character; and, upon the principle of the cases of *Lowe v. Ryan*, 94 Ind. 450, and *Gaff v. Greer*, 88 Ind. 122, which, in effect, hold that a party will not be heard to object to evidence introduced by his adversary to meet evidence of like character introduced by himself, he is not now in a position to ask a reversal, even if the evidence had been improperly admitted. The evidence was, however, competent. While it is true that usage in a particular trade or business cannot control an express contract, it is nevertheless presumable, where a contract is ambiguous, that it was made with reference to the known usage or ordinary course of a particular business. In such a case it is competent to show what the known and ordinary course of a particular business is, with a view of raising a presumption that the transaction in question was according to the ordinary course of the business to which it related. *Reissner v. Oxley*, 80 Ind. 580; *Jaqua v. Witham*, *infra*, (present term); *Lornergan v. Stewart*, 55 Ill. 44.

Finding no error, the judgment is affirmed, with costs.

(106 Ind. 545)

#### JACUA v. WITHAM & ANDERSON Co.

(*Supreme Court of Indiana*. June 1, 1896.)

#### 1. PLEADING—AMBIGUOUS AND ABBREVIATED TERMS IN CONTRACT SUEB ON—EXTRINSIC AVERMENTS.

In declaring upon a writing containing abbreviated and incomplete terms, extrinsic averments may be used to explain what would otherwise be unintelligible.

#### 2. EVIDENCE—CONTRACT MAY BE EXPLAINED BY PAROL, WHEN.

When the construction of a contract containing incomplete and peculiar terms is doubtful, evidence tending to explain the sense in which the parties were in the habit of using the particular words and phrases, or to show the construction given by them to similar contracts, is admissible; but a party cannot testify as to his intention in using them.

Appeal from Jay circuit court.

*Taylor, Smith & Bailey*, for appellant.

*Theo. Shockney and Haddington & Lafollette*, for appellee.

NIBLACK, J. Complaint by the Witham & Anderson Company, a corporation organized and existing under the laws of this state, against

Alonzo L. Jaqua, in two paragraphs. The first paragraph was for lumber, doors, and brackets sold and delivered to Jaqua, the defendant, at his alleged instance and request. The second paragraph charged that on or about the sixteenth day of October, 1883, the defendant addressed an inquiry to the plaintiff, in figures, words, signs, and abbreviations as follows:

"PORTLAND, IND.

"GENTLEMEN: Could you furnish the following: 40 Brack. 3x5, 8 mem; 86 Brack, 12x18, 8 mem? At what price, and how soon?

"Respectfully,  
"October 16, 1883."

A. L. JAQUA.

—That by the usages and customs of the business of manufacturing, buying, and selling dressed lumber and brackets, the abbreviation "brack." is held and intended to mean, and does mean, "bracket;" that the character "x" is a substitute for and means "by;" that the abbreviation "mem." stands for the word "member;" that the word "ply" signifies "thickness;" that "brackets" are always quoted and sold as a single bracket, and not by the lot, hundred, or dozen, unless so designated; that in response to the above inquiry the plaintiff answered the defendant in a communication thus:

"UNION CITY, IND., October 18, 1883.

"SIR: Your brackets 3x5 will cost you 2.50, and your 12x18 will cost you 33½. Can make at once.

"Respectfully,

THE WITHAM & ANDERSON CO."

—That "2.50," when following the number and size of bracket, means \$2.50 each; that "33½," when following in like manner, means 33½ cents each bracket; that, in reply to the communication lastly above set out, the defendant, by the name and style of A. L. Jaqua, made the following order:

"PORTLAND, IND.

"GENTLEMEN: Send me at once 42 brackets 3x5, 8 ply; 52 brackets 12x16, 8 ply. Send via Redkey to Portland. How soon can you ship?"

"Respectfully,

A. L. JAQUA."

—That, by the usages and customs of the dressed lumber trade, the "3x5," contained in the foregoing order, meant either 3 feet by 5 feet, or 3 inches by 5 inches, and that the "12x16" meant either 12 feet by 16 feet, or 12 inches by 16 inches; but that when "3x5" brackets were followed by "2.50," it meant 3 feet by 5 feet brackets, at \$2.50 each; and that when the "12x16" brackets were followed by "33½," it meant 12 inch by 16 inch brackets, at 33½ cents each; that, in compliance with the order above set out, the plaintiff, in November 1883, shipped to the defendant 42 brackets 3 feet by 5 feet, 3 ply, at \$2.50 each, and 52 brackets, 12 inches by 16 inches, 3 ply, at 33½ each,—all said brackets being of the aggregate value of \$121.33; that the defendant had failed and refused, and still fails and refuses, to pay for such brackets. Wherefore, judgment was demanded. Demurrers to both paragraphs of the complaint were severally overruled, after which, and issue joined,

there was a trial by the court, and a finding and judgment for the plaintiff.

It is first sought to be maintained that the circuit court erred in overruling the demurrer to the second paragraph of the complaint, upon the ground that the inquiry, answer, and reply set out in that paragraph were too imperfect, indefinite, and uncertain to form a contract between the parties, or to serve as memorandums in writing to bind either one of the parties, and that their defects in that respect were of a character which could not be, and hence were not, cured by the extrinsic averments of the paragraph.

It was held in the case of *Barton v. Anderson*, 104 Ind. 578, S. C. 4 N. E. Rep. 420, that, where a writing is in short and incomplete terms, parol evidence is admissible to explain that which is *per se* unintelligible; such explanation not being inconsistent with the written terms. The rule of evidence thus stated is well supported by authority, and is applicable to all abbreviations and characters used by parties in the course of their business, and which have a conventional meaning, independently of any general usage or understanding. Greenl. Ev. § 282; Whart. Ev. § 1003; Best, Ev. 232. This rule is still more plainly applicable to abbreviations and characters which have meanings attached to them by common consent or general usage. Best, Ev. 262. As parol evidence may be introduced to explain abbreviated and incomplete terms in a written instrument, it necessarily results that, in counting or declaring upon a writing containing such terms, extrinsic averments may be used to make that intelligible which is *per se* unintelligible, consequently the demurrer to the second paragraph of the complaint was correctly overruled.

At the trial some correspondence between the parties, not relating to the particular articles of property in controversy, but containing similar abbreviations and characters to those used in the communications set out as above in the second paragraph of the complaint, was read in evidence to show the meaning which the defendant had previously placed upon the same abbreviations and characters, and that is also complained of as having been an erroneous proceeding. When, however, the construction which ought to be placed upon a transaction between parties is involved in some doubt or uncertainty, evidence tending to show the construction which the parties have themselves given to similar transactions is admissible. So, also, is evidence tending to explain the sense in which the parties were in the habit of using particular words and phrases. Greenl. Ev. § 283; 2 Whart. Ev. §§ 954, 962; *Reissner v. Oxley*, 80 Ind. 580. In that view, the correspondence complained of was properly admitted in evidence.

The defendant offered himself as a witness to prove what his intention was in the use of the abbreviations and characters contained in his order for brackets set out in the second paragraph of the complaint, and which had been previously read in evidence, but the court refused to permit the proposed proof to be made, allowing the defendant only to testify as to his understanding as to the conventional meaning of the abbreviations



and characters in question. There was no error in excluding the proffered evidence as stated. The question was not what may have been the intention of the defendant in the premises, but what was the real meaning of the terms employed by him, when considered in the light of the circumstances under which they were so employed.

Other questions were preserved upon the admissibility of certain items of evidence, but they are all practically disposed of adversely to the defendant below by our rulings upon the sufficiency of the second paragraph of the complaint.

The judgment is affirmed, with costs.

(106 Ind. 592)

PRESBYTERIAN ASSUR. FUND v. ALLEN.

(*Supreme Court of Indiana*. June 5, 1886.)

1. LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATIONS.

A certificate issued by a mutual benefit association is, in legal effect, a contract of insurance, and in most respects governed by the rules which apply to policies of insurance.

2. SAME—WARRANTIES—STATEMENTS NOT MADE PART OF POLICY.

Written statements not referred to in a certificate of membership in a mutual benefit association are not warranties.

3. SAME—CHANGE OF BENEFICIARIES.

The general rule is that, where not forbidden by the charter or by-laws, a member of a mutual benefit association may change the beneficiaries named in the certificate; but, where the charter provides who shall be the beneficiaries in the event that those named in the policy cannot receive the insurance, the parties cannot make any other persons beneficiaries except those designated in the charter.

4. SAME—CONSTRUCTION OF SECTION 8848, REV. ST. 1881.

Section 8848, Rev. St. 1881, applies only to corporations organized under the laws of Indiana.

Appeal from Floyd circuit court.

A. Dowling, for appellant.

John H. Stotsenburg, for appellee.

ELLIOTT, J. The appellant is a mutual benefit association incorporated by the legislature of Kentucky. Its object, as the charter declares, is "to create and provide a beneficiary fund for the families or relations of deceased members, or for the benefit of members in sickness." The appellee's complaint is based upon a certificate of membership procured from the corporation by William G. Allen in his life-time. The certificate, although issued by a mutual benefit association, is, in legal contemplation, a policy of insurance, and is in most respects governed by the general rules of law which apply to insurance contracts. *Bauer v. Samson Lodge*, 102 Ind. 262; *S. C. 1 N. E. Rep. 571*; *Elkhart, etc., Ass'n v. Houghton*, 98 Ind. 149; *Supreme Lodge v. Schmidt*, Id. 374. There are, as we shall hereafter see, some essential differences between such contracts as that evidenced by this certificate and ordinary contracts of insurance; but these differences do not affect the questions arising on the pleadings, which first require our attention.

Statements made by the insured in his application for insurance are not deemed warranties, unless they are incorporated in the policy, or in

some appropriate method referred to in that instrument. *Com., etc., Co. v. Monninger*, 18 Ind. 352; *Mutual Ben., etc., Co. v. Miller*, 39 Ind. 475; 3 Kent, Comm. 373; May, Ins. § 156; Bliss, Ins. § 34. The statements by the insured in his application are not set forth in the policy, nor in any way is reference made to them, and they cannot be considered warranties. The second paragraph of appellant's answer is based on the erroneous theory that they were warranties; and, as this theory is untenable, the answer is bad.

The provision in the policy issued by the appellant respecting the designation of the beneficiaries is, in substance, that a sum not exceeding \$2,000 shall be paid "to such person or persons as he, the insured, may designate by will, or upon the books of this corporation." The insured, in his application, directed that the amount of the insurance should be paid to his sons, Oscar and William Allen; but subsequently the insured, with the consent of the appellant, but without the consent of the original beneficiaries, designated on its books Mary E. Allen, whom he had married, as the beneficiary. The charter of the association, granted by the legislature of Kentucky, provides, among other things, that "upon the decease of any member of this association the fund to which this family is entitled shall be paid as may be designated in the application for membership. This being changed by death, or otherwise impossible, it shall go—*First*, to the widow and infant children; *second*, to his mother and sister; *third*, to his father and brothers; *fourth*, to his grandchildren; *fifth*, to his legal heirs." The appellant contends that the designation of the beneficiaries in the application so fixed their rights that they could not be changed without their consent. If this were an ordinary policy of insurance, issued by an ordinary insurance company, this contention would prevail. *Hutson v. Merrifield*, 51 Ind. 24; *Pence v. Makepeace*, 65 Ind. 345; *Godfrey v. Wilson*, 70 Ind. 50; *Wilburn v. Wilburn*, 83 Ind. 55; *Harley v. Heist*, 86 Ind. 196; *Damron v. Penn., etc., Ins. Co.*, 99 Ind. 478; *Penn., etc., Ins. Co. v. Wiler*, 100 Ind. 92; *Chapin v. Fellowes*, 36 Conn. 132; S. C. 4 Amer. Rep. 49; *Glanz v. Gloeckler*, 104 Ill. 573; *Manhattan Life Ins. Co. v. Smith*, 5 N. E. Rep. 417; Bliss, Ins. (2d Ed.) 540. These cases are representatives of a large class, declaring that in ordinary cases of life insurance the beneficiary designated cannot be changed without his consent. There is much diversity of opinion upon the question as to the applicability of this principle to policies like the one before us, issued by associations of the class to which appellant belongs. *McClure v. Johnson*, 56 Iowa, 620; S. C. 10 N. W. Rep. 217; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Durian v. Central Verein, etc.*, 7 Daly, 168; *Richmond v. Johnson*, 28 Minn. 447; S. C. 11 Ins. Law J. 215, and 10 N. W. Rep. 596; *Swift v. Railway Passenger & T. C. Ben. Ass'n*, 96 Ill. 309; *Ballou v. Gile*, 50 Wis. 614; S. C. 7 N. W. Rep. 561; *Masonic Mut. Life Ins. Co. v. McAuley*, 10 Wash. Law Rep. 724; *Kentucky Mut. Life Ins. Co. v. Miller*, 13 Bush, 489; *Catholic Ben. Ass'n v. Priest*, 46 Mich. 429; S. C. 9 N. W. Rep. 481; *Expressmen's Aid Soc. v. Fenn*, 9 Mo. App. 412; *Maryland, etc., Soc. v. Clendinen*, 44 Md. 429; S. C. 22 Amer. Rep. 52. The weight of authority, as will appear from an examination of the cases

cited, is in favor of the general doctrine that beneficiaries may be changed in cases where policies like the one before us are issued by such associations as the present, and that in this respect such policies are not governed by the general rule which governs ordinary insurance contracts. But, granting that this is the general rule, still it cannot prevail if the charter of the association prohibits a change in the beneficiary first agreed upon and designated. It is firmly settled that a contract must be made in the mode prescribed by the corporate charter, and must be one authorized by it. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Leonard v. American Ins. Co.*, 97 Ind. 299; *Ashbury, etc., Co., v. Riche*, L. R. 7 H. L. 653; *Head v. Providence Ins. Co.*, 2 Cranch, 127. Of the provisions of the charter and by-laws of the corporation all who become members are chargeable with knowledge. *Bauer v. Samson Lodge*, *supra*.

Whatever may be the rule where the charter does not provide a mode of exercising corporate power, it is quite clear that where the charter does prescribe the mode it must be followed, even though it requires a procedure different from the one prescribed by a general rule of law. Hence it is here of controlling importance to rightly ascertain and decide whether the mode of exercising the corporate power is prescribed, and whether the mode prescribed inhibits the changing of beneficiaries after they have been once designated. The provisions of the charter, as we read them, do prohibit a change of beneficiaries by the act of the insured and insurer, for they declare that the benefit shall be paid as may be designated in the application; and that, "this being changed by death, or otherwise becomes impossible, it shall go" in the mode which is specifically provided. We can see no way to avoid the conclusion that this charter provision requires the benefit to be paid to the person named in the application, or those specified in case of the death of those persons, or of some occurrence making it impossible to pay to them. Not only does the charter in direct terms declare that the benefit shall be paid to the persons thus named, but it also declares that, if it becomes impossible to pay it to them, it shall go in the manner specified in the charter. The effect of these provisions is that the beneficiaries named must receive the money due on the policy, or it must be disposed of as provided by the charter creating the association. The provision respecting the mode of disposing of the benefit deprives the insured and the insurer of any right to change the contract, as it leaves only two possible classes of beneficiaries, those named in the application, and those specified in the charter, as entitled to take in case the designation in the application "is changed by death," or "otherwise becomes impossible." The meaning that must be given the provisions of the charter is that the only change that can be made is such as is caused by death, or some other occurrence making it impossible to pay to the beneficiaries designated in the application; for all authority to make a change by their own acts is taken from the insured and the insurer. The only change that can occur is such as is caused by death, or some event making it impossible to pay the benefit to the beneficiaries originally named. The change cannot arise out of the voluntary act of the insured and insurer, but must be

made necessary by some such event as makes it impossible to pay the beneficiaries named in the application for membership. In our opinion, there is no escape from the conclusion that there are only two classes of persons to whom the benefit can be rightfully paid, and these are the beneficiaries named in the application, and those specified by the charter as entitled to it in the event that it becomes impossible to pay the beneficiaries originally designated.

In speaking of a question similar to that before us, the court of appeals of Kentucky said:

"The company and Miller could decide the question whether he should become a member, and, having done so, from that moment the rights of the beneficiaries attached, subject to be defeated by his failure to comply with the terms of his membership, but upon no other contingency whatever. If, therefore, the stipulation to pay Miller's heirs should be construed to have been intended to secure the fund payable on account of his membership to his administrator or his creditors, such stipulation could not prevail over the unequivocal provisions of the charter that it shall be paid over to his widow and children."

Discussing the same subject, the supreme court of Massachusetts said:

"The class of persons to be benefited is designated, and the corporation has no authority to create a fund for other persons than the class named." *Supreme Council, etc., v. Perry*, 5 N. E. Rep. 634.

We have carefully examined such cases bearing upon this question as we have been able to find, and in none of them, except those referred to as sustaining the view we have expressed, do we find any discussion of a charter provision such as the one contained in the act incorporating the appellant. In the cases which hold that the beneficiary may be changed there is either a statutory provision permitting it to be done, or else no provision upon the subject. We have also studied with great care the provisions of appellant's charter, but have been unable to find any provision that modifies the section quoted by us.

Counsel for the appellee refer us to a by-law of the association setting forth the form of the certificate that shall be issued to members; but if we were to grant that the form of the certificate thus prescribed sustained appellee's contention that the beneficiaries may be changed, still it would do her no good, for a by-law which is inconsistent with the charter of the corporation is utterly void. This familiar principle is thus expressed in a case closely resembling the present: "If the plaintiff corporation undertook to make by-laws in contravention of the statute, they were *ultra vires* and of no effect." *Hicks v. Perry*, 5 N. E. Rep. 634, see page 638.

We are referred to our own statute, and informed that it authorizes a change of beneficiaries. Rev. St. 3848. The infirmity in the argument built upon this statute is that the statute itself, in direct terms, restricts its operation to corporations "organized and incorporated under the laws of this state."

Upon the facts proved the law is with the appellant, for they clearly show that the right of action is in the beneficiaries named in the application, and not in the appellee.

Judgment reversed, with instructions to grant appellant a new trial.

(302 N. Y. 454)

HICKEY v. MORRELL.<sup>1</sup>*(Court of Appeals of New York. June 1, 1886.)*WAREHOUSEMAN—FALSE REPRESENTATIONS AS TO SECURITY OF BUILDING—  
“FIRE-PROOF.”

Where a warehouseman, in a circular soliciting patrons, states that the exterior of his building is “fire-proof,” and that “no expense has been spared in supplying protection against the spread of fire,” etc., he states a fact, and not a mere opinion; and, if part of the portion described as fire-proof is of wood, it is a false statement, if made by defendant with knowledge of the component parts of his building, and with intent to deceive, and the warehouseman will be liable to one who was induced by the statement to deliver property to be stored in the building, and thereby incurred loss. EARL, J., dissenting.

Appeal from general term New York common pleas, affirming judgment of trial term.

*Mr. Hale*, for appellant, Teresa H. Hickey.

*Mr. Bowers*, for respondent, John H. Morrell.

DANFORTH, J. As to the character of this action the parties are agreed. It was for “falsely and fraudulently,” and “with an intent to deceive and defraud the plaintiff,” representing, among other things, that the defendant’s warehouse was “fire-proof on the exterior,” whereby the plaintiff was induced to deliver to him, to be stored therein, certain property of value, which, while there, was destroyed by fire communicated from the outside “to the wooden cornice and wooden window-frames” of the warehouse, and thence to the property in question. The answer admitted that defendant was proprietor of the warehouse; that it and the articles described in the complaint were destroyed by fire; but denied the other matters above referred to as making out a cause of action, and set up that “the property was received and stored by him as a warehouseman, and in no other capacity, and under the special contract that the goods were stored at the owner’s risk of fire.”

There was no controversy as to the evidence. The question was determined upon that introduced by the plaintiff, and in view of the law as it stood at the time of the bailment. The appellant refers to the statute (Laws 1871, c. 742, § 8) “in relation to storage, and other purposes;” imposing liabilities upon persons for any fire resulting from their willful and culpable negligence, and, among other things, requires the closing of iron shutters “at the completion of the business of each day, by the occupant of the building having use or control of the same;” but the complaint contains no allegation of negligence, and so the action could not stand on that ground either at common law or by statute. Another statute, also referred to, relating to buildings in the city of New York, (Laws 1871, c. 625, § 16,) is of some importance in its bearing upon the point chiefly pressed upon us, and as likely to have been in contemplation of both parties. It is there provided that buildings of a certain description—within which the storehouse in question comes—shall have doors

<sup>1</sup> Reversing decision in general term, New York common pleas. See 19 N. Y. Wkly. Dig. 476.

and blinds and shutters made of fire-proof metal on every window and opening above the first story.

The plaintiff's testimony went to show that she was induced to store her goods with the defendant by representations contained in a circular issued by him, the object of which was to call "the special attention of persons having valuable articles, merchandise, or other property for storage to his new first-class storage warehouse, in the erection of which," it is said, among other things, "no expense has been spared in supplying light, ventilation, and protection against the spread of fire; the exterior being fire-proof, and the interior being divided off by heavy brick walls, iron doors, and railings, appropriate and convenient in every way for the various kinds of articles to be stored."

The learned counsel for the appellant argues that the only statements of facts in the paragraph quoted, are those which relate to the interior as divided by heavy brick walls, iron doors, and railings; that as to those the defendant had knowledge; and concedes that their non-existence would make him guilty of a misrepresentation. This is a very narrow view of the subject, and could prevail, if at all, only by conceding that the defendant purposely avoided mention of those things which, if stated, would make his solicitations less attractive, and display him as the owner of a building combustible on the outside, and so of little security to its contents if they happened to be of the same character.

We think the appellant's ground of complaint a just one. It was proven that in fact the window-frames in the warehouse were of wood; that at the outside of the windows there were no shutters; that the cornices were of wood, covered with tin. The fire occurred in the evening. It originated in other buildings across the street, and from them communicated to the wooden window-frames on the defendant's building. An architect and a builder, examined as experts, testified that a building constructed, as was the one in question, "with wooden window-frames and sashes, and no outside shutters," could not be deemed fire-proof, and that in October, 1881, it was practical to erect a storage warehouse which would be fire-proof on the exterior. At the close of the plaintiff's evidence she was nonsuited, upon the ground that the statement in the circular, as to the character of the exterior of the building, was a mere expression of an opinion, and not the statement of a fact. Upon the same ground the judgment was affirmed at the general term.

In such a circular, obviously intended as an advertisement, high coloring and exaggeration as to the advantages offered must be expected and allowed for; but, when the author descends to matters of description and affirmation, no misstatement of any material fact can be permitted, except at the risk of making compensation to whoever, in reliance upon it, suffers injury. Here the allegation is that the exterior of the building is fire-proof. It necessarily refers to the quality of the material out of which it is constructed, or which forms its exposed surface. To say of any article it is fire-proof conveys no other idea than that the material out of which it is formed is incombustible. That statement, as regards certain well-known substances usually employed in the construction of

buildings, while it might in some final sense be deemed the expression of an opinion, could in practical affairs be properly regarded only as a representation of a fact. To say of a building that it is fire-proof excludes the idea that it is of wood, and necessarily implies that it is of some substance fitted for the erection of fire-proof buildings. To say of a certain portion of a building it is fire-proof, suggests a comparison between that portion and other parts of the building not so characterized, and warrants the conclusion that it is of a different material. In regard to such a matter of common knowledge, the statement is more than the expression of opinion. No one would have any reason to suspect that any two persons could differ in regard to it. But when we look at the words accompanying this statement, viz., "No expense has been spared in supplying protection against the spread of fire," all possibility of doubt seems removed. This danger is pointed out as the one thing which, more than another, the owner had in view and guarded against; and the rest of the sentence shows with what result, viz., "the exterior being fire-proof," and the interior divided off by heavy brick walls, iron doors, and railings. Thus the expenditure of money is said to have been limited only by the accomplishment of the desired object, and the statement of the material used is connected with the representation as to the quality of the exterior. No one reading of inside walls and railings of incombustible material, and of an exterior fire-proof, could suppose that a precaution against fire made necessary by statute had been omitted, or that a builder who called attention to such matters as an inducement to patronage could have regarded wooden window-frames as in any sense fire-proof. The language of the circular is very emphatic. In effect, it says the buildings, as a whole, have been erected at an immense cost, from which assertion alone, in view of the business to which they were devoted, one would expect strength and adaptation of materials, and skill in construction, affording security, at least, against all the ordinary dangers to which property might be exposed when put in store. But this general statement is followed by the declaration that no expense has been spared in supplying "protection against the spread of fire;" and this assurance is made prominent by the display of capital letters, and justified by the explanation which relates to an existing state of things, viz., "the exterior being fire-proof," and still further emphasized by the more moderate and qualified statement as to the interior. That is not said to be fire-proof, but only "divided off by heavy brick walls and iron doors and railings;" describing, at the same time, its arrangement, and the substance of its walls and partitions.

As to this, therefore, the statement would be true, although the floors, lintels, stairs, landings, ties, joists, ceilings, and other parts were of wood, but no such discrimination is suggested as to the exterior. The strength of the walls might, indeed, be impaired by the necessary openings for doors and windows, but for the purpose of preventing mischief by fire, or, as the defendant put it, "the spread of fire," the exterior is pronounced fire-proof. Had he only said of the exterior, as he did of the interior, "the wall is of brick," the intending customer would have been

put to an inquiry as to the window-frames and doors. He said much more. We think, therefore, that the defendant must be regarded as stating a fact, and not as expressing a mere opinion, when he described the exterior, that is, the whole exterior, of his buildings as fire-proof. Such statement is not to be classed with those relating to value, or prospective profits, or prospects of business, or assertions in regard to a speculative matter, concerning any of which men may differ. It relates to something accomplished; to an existing fact, as distinguished from one yet to come into existence. It was made after calling to mind the use to which the buildings were to be put, the fact that the attention of the builder had been especially directed to "protection against the spread of fire," which could be effected only by the use of proper materials; and the statement was made with knowledge that such materials had not been used.

Nor is it like the safe case cited by the respondent, — *Walker v. Milner*, 4 Fost. & F. 745. There the action was upon a warranty that "the safe in question was thief-proof;" "that nothing can break into it." It was broken into. There was no suggestion of fraud or deceit, and the jury were required to discriminate between what was represented and what was warranted, and, unless satisfied there was a warranty, to find for the defendant. The safe-maker's prospectus was put in evidence. It stated that the safes would insure the safety of valuable property contained in them. The court said: "The words cited from the circular could hardly be understood in the sense of a warranty or assurance of perfect safety, but only as importing a representation of a high degree of strength." They were promissory merely. Then plaintiff's counsel referred to a later prospectus, in which the safes in question were only spoken of "as of the strongest security," and relied on this as implying a withdrawal of the previous warranty. But COCKBURN, J., observed that, "assuming later prospectuses to have been issued after the burglary, it was only dictated by common honesty; for, after it had been found by actual experience that the safe was not absolutely secure against all possible attempts, it would have been fraudulent to continue previous description." In the case at bar the plaintiff alleges fraud. A jury might find that an exterior of a city building partly of wood, although to no greater extent than the one in question was not fire-proof within the meaning and intent of the circular. They might also find that when the circular was issued this fact was known to the defendant; and then the doctrine suggested by COCKBURN, J., in the case cited, would have some application.

Nor do the other cases referred to seem to support respondent's contention. They exclude the idea of fraud, and relate to matters of mere opinion; as, whether a certain valve will consume smoke and save fuel, (*Prideaux v. Bunnett*, 1 C. B. [N. S.] 613;) whether certain pictures were the work of the old masters, or copies, (*Jendwine v. Slade*, 2 Esp. 572;) whether land was of the value certified to, (*Gordon v. Buller*, 105 U. S. 558.) But in none of them is it denied that, if the person making the statement or expressing the opinion had at the time knowledge of its falsity, the action would lie. It is certainly well settled upon principles



of natural justice that, for every fraud or deceit which results in consequential damage to a party, he may have an action.

Here the complaint states, not only a false representation, with a fraudulent intent, but that the falsehood was conscious and willful; that by it the plaintiff was induced to deliver her property to be stored in the building, and thereby incurred loss. The evidence may be so viewed as to sustain these allegations. The learned counsel for the respondent has stated, in the broadest and most unqualified terms, as a proposition not to be disputed, "that no man is liable for the expression of his opinion or judgment." But this is true only when the opinion stands by itself and is intended to be taken as distinct from anything else; and, where the proposition is found in the books, it is so restricted. Thus it is said: "Matters of opinion, stated merely as such, will not, in general, form the ground to a legal charge of fraud." Leake, Cont. 355; giving many instances, and also exceptions to the rule. Statements of value have been held insufficient to sustain an action, where, as is said, they were "mere matters of opinion," (*Simar v. Canaday*, 53 N. Y. 306;) but at the same time it is shown that under certain circumstances they are to be regarded as affirmations of fact, and then, if false, an action can be maintained upon them. The same rule applies where A. desiring credit for B, for a certain amount, the latter asks C. as to the solvency of A., and he replies, "He is good; as good as any man in the country for that sum." No doubt this involves opinion; but it is held that if the recommendation was made in bad faith, and with knowledge that A. was insolvent, C. would be liable. *Upton v. Vail*, 6 Johns. 181. And so as to every representation concerning a matter of fact, by which one man is induced to change his position, to his injury, or the benefit of another, it may be so expressed as to bind the person making it to its truth, whether it take the form of an opinion or not, or it may appear that it was not intended to be acted upon. In the latter case no obligation is incurred.

In the circular issued by the defendant there are many words of commendation, which, however strong, could not be relied upon as the basis of contract. The ones at first referred to are of that character. They relate to the present, and describe a portion of the building in its existing state as "being fire-proof." This is not a matter of opinion, for it defines a state or condition, and, if part of that portion was of wood, may properly be regarded as a "false statement of a fact." Whether the defendant knew the component parts of his own buildings, and, if so, whether the statement was made with intent to deceive, and whether it was an inducement to the contract, the learned counsel for the respondent has fully argued. At present it is unnecessary to discuss those questions; for it seems to us they are, as the case stands, properly for the jury; and upon the only point which appears to have been considered by the court below we are obliged to differ from them.

That the issues may be more fully tried the judgment should be reversed, and a new trial granted, with costs to abide the event.

(All concur, except ANDREWS and MILLER, JJ., not voting, and EARL, J., dissenting.)

(106 Ind. 433)

**IKERD and others v. BEAVERS.***(Supreme Court of Indiana. May 25, 1886.)***1. STATUTE OF FRAUDS—AGREEMENT TO CONVEY LAND IN CONSIDERATION OF SUPPORT.**

A verbal agreement by one to convey certain real estate to others within a reasonable time, if they would move upon it and support and care for him during his life-time, will not be specifically enforced.

**2. FRAUD—CONTRACT—WHEN BURDEN IS ON PARTY TO SHOW ABSENCE OF.**

Where a contract has been procured from one who is in a situation of distress or necessity, by another who stands in a relation of confidence or has some advantage over him, the burden is upon the party procuring the contract to show the absence of undue influence, or that it was the free and voluntary act of the other.

**3. EQUITY—CASES OF EQUITABLE JURISDICTION—VERDICT OF JURY TREATED AS ADVISORY—WHEN NO REVERSAL.**

Where, in a case of equitable jurisdiction, a jury is called to inform the court as to the facts, and, without objection, the court has the jury return a general verdict, but treats it as advisory merely and makes his own finding, there is no reversible error.

Appeal from Fountain circuit court.

*McCabe & McCabe*, for appellants.

*Thos. F. Davidson*, for appellee.

MITCHELL, J. This suit involved the right to 80 acres of land in Warren county. The complaint was in three paragraphs. The material facts found in the first paragraph are that in April, 1882, Henry J. Beavers, being seized of the land in dispute, conveyed it by deed for a valuable consideration to Mary J. Ikerd. It charges that afterwards Beavers obtained possession of the deed which had been previously delivered to Mrs. Ikerd, and without her consent he destroyed it, and refused to execute another in its stead, but unjustly asserted that he was the owner of the land. The prayer is that the plaintiff's title be quieted. The second paragraph is to all intents and purposes the same in legal effect as the first. A demurrer was sustained to the third paragraph, and this ruling presents one of the chief grounds of contention here. The material facts in this paragraph are presented in the following summary: In December, 1881, Ikerd and wife owned and resided upon a farm in Lawrence county. The plaintiff, an uncle of Mrs. Ikerd, proposed to them that if they would sell their farm, move onto the 80-acre tract now in dispute, belonging to him, and upon which he resided in Warren county, and take care of and support him thereon during his life-time, he would within a reasonable time convey it to Mrs. Ikerd. The plaintiffs accepted the proposition thus made, sold their farm, took possession of the defendant's, and entered upon the performance of their contract. They fully kept and performed their part of the agreement for the period of one year, when the defendant repudiated the contract, abandoned the house, and refused to permit its further performance. Plaintiffs, it is averred, still continue in possession, and have invited the defendant to return, and are ready and willing to carry out their part of the contract, which the defendant wholly repudiates. They ask that the

court compel the defendant to execute a deed according to the agreement, and they offer to permit the land to be charged with his support. The inquiry is, do the facts thus presented make a case for specific performance?

It is essential to the jurisdiction of a court of equity to enforce the performance of a contract that certain qualities should be found inherent in the contract itself. Besides being complete and definite, it must belong to a class capable of being specifically enforced, and be of a nature that the court can decree its complete performance against both parties without adding to its terms. The contract must be fair, just, and equal in its provisions, and the circumstances must be such at the time the court is called upon to act that to enforce it would not operate to the oppression of the person against whom its enforcement is asked. Moreover it must appear that the plaintiff has no adequate remedy at law, and that to refuse to perform the contract would be a fraud upon him. With respect to its essential elements, the qualities of completeness, certainty, and fairness, the contract set out in the complaint does not present the requisites warranting a decree for specific performance. Courts can only proceed in cases like this when the parties have themselves agreed upon all the material and necessary details of their bargain. If any of these are omitted, or left obscure and undefined so as to leave the intention of the parties uncertain respecting the substantial terms of the contract, the case is not one for specific performance.

Turning to the contract as the plaintiffs allege it, we find the extent of the agreement in respect to its most essential feature was that the plaintiffs should "take care of and support the defendant during his life on said farm." Whether the defendant was to choose or direct the manner in which he was to be supported, whether he was to be taken into the plaintiff's family and furnished with apartments there, or should be boarded and lodged by himself, with many other details, are all left to conjecture and unprovided for. In respect to these most important matters the contract is wholly incomplete and indefinite. Without supplying all its essential details no court could so frame its decree as to afford any adequate protection to the defendant, nor can a judgment be entered which would be a final determination of the rights of all the parties. Moreover the contract is unfair in that it makes no provision for security to the defendant, and leaves the quality of the support to be furnished and the manner of furnishing it wholly in the discretion of the plaintiffs.

The plaintiffs claim that payment was to be made to them by the conveyance of the farm practically in advance. Any agreement for support for which an adequate consideration is to be or has been paid which leaves the person to be supported wholly dependent upon and subject to the dictation of the person who engages to furnish the support is, unless under some special and extraordinary circumstances, an unfair and unequal agreement. Unless such an agreement has been substantially and fully performed by both parties it ought not, in any case where compensation can be made, to be enforced. Such an agreement cannot be said to be so fair, just, and equal in its terms as to be the subject of favor in

a court of conscience. *Modisett v. Johnson*, 2 Blackf. 431. Parties in such a case should be remitted to their rights at law.

The contract before us, it should be observed, too, is one of a class the specific performance of which will not be decreed. It is one which involves personal service of such a character that in order to its proper execution relations of peculiar confidence and esteem, if not affection, should prevail between the parties concerned. To undertake to enforce such a contract between parties mutually distrustful of each other would be productive of nothing but confusion and mischief. Fry, Spec. Perf. 44; Pom. Cont. par. 310.

Speaking for this court at a very early period in its history, HOLMAN, J., said:

"A covenant for service, if performed at all, must be performed under the eye of the master, and might, as in the case before us, require a number of years. Such a performance, if enforced by law, would produce a state of servitude as degrading and demoralizing in its consequences as a state of absolute slavery." *Case of Mary Clark*, 1 Blackf. 122.

The same might be said of a case where one was compelled to be the involuntary recipient of the services or support of another under a contract such as is here exhibited. That the services were to be performed under the guise of administering support, might not in any degree mitigate the condition of the recipient, nor render his situation less irritating than if subjected to a species of slavery. Whatever it may have been formerly in other states, it was always the rule here, and is now well settled everywhere, that specific performance of a contract involving personal service, special ability, or peculiar confidence, will not be enforced.

Without delaying further at this point it is only needful to say that the jurisdiction invoked in this case is manifestly impracticable. As well might the court be asked to regulate the domestic affairs of a family by its decree as to undertake the supervision of a contract such as that exhibited. Unless a contract can be specifically enforced as to both parties, a court will not interfere. Being unable to execute the contract against the plaintiffs, nothing remained for the court in this instance except to decline to compel the execution of a deed in their favor. So far as the agreement remains unperformed the appellee cannot be compelled to perform it. The appellants must be left to their remedy at law. That an adequate remedy is available to them affords an additional reason why a court of equity will refuse to enforce the contract. Among others, the following authorities illustrate the rules relating to the enforcement of agreements of the general character under consideration: *Blanchard v. Detroit, etc., R. Co.*, 31 Mich. 43; *Buck v. Smith*, 29 Mich. 166; *Marble Co. v. Ripley*, 10 Wall. 339; *Cooper v. Pena*, 21 Cal. 404; *Port Clinton R. Co. v. Cleveland, etc., R. Co.*, 13 Ohio St. 544; *Johnson v. Shrewsbury, etc., R. Co.*, 3 De Gex, M. & G. 914; *Blackett v. Bates*, L. R. 1 Ch. 117; Pom. Eq. Jur. par. 1405.

Without enlarging or stopping to notice in further detail the other reasons urged in the voluminous briefs in support of and against the view

that the contract should have been specifically enforced, or that the demurrer should have been overruled, it is enough to say the court committed no error in sustaining the demurrer to the third paragraph of the complaint.

The next error complained of is that predicated upon the demurrer to the second and third paragraphs of the answer. The answers are severally to the first and second paragraphs of the complaint which charge that the defendant executed a deed, of which he afterwards obtained possession without plaintiffs' consent. They present one question. The facts alleged in substance are that if the defendant signed any deed at all conveying the land to the plaintiffs it was under the following circumstances: Some time in April, 1882, Ikerd and wife came to live with the appellee, they occupying his house. While living in their family, soon after they moved, the appellee was taken violently and dangerously sick. During his prostration and while he was in a state of great physical and mental weakness the plaintiffs importuned him to make them a deed for his farm. They caused a deed to be prepared, and while he was so physically and mentally weak as to be unable to resist their importunities, or to understand fully what the paper was that had been prepared for his signature, they procured him to sign the deed in question, without any consideration whatever. He was at the time 68 or 69 years old, sick, and without any one to whom he could look for care or attention, and wholly dependent on the plaintiffs. In addition to the foregoing the third paragraph contains the averment that during his sickness the plaintiffs wholly neglected the defendant, refused to furnish him medical attention and assistance, when he was in absolute need thereof, and that by reason of their neglect of him he was compelled to take up his abode elsewhere. The objection urged against these answers are that they fail to show that the alleged deed was executed against the will of the appellee, and that no acts of the plaintiffs are charged except importunity, entreaty, persuasion, and advice. Such acts it is said do not constitute such undue influence or fraud as will avoid a deed. We do not concur in this view of the case. The grantor was an aged, infirm man, physically and mentally prostrated. He was in a state of helpless dependence upon the plaintiffs, whose only claim to his bounty was that they had agreed to afford him the physical necessities of life in consideration of the conveyance which they allege he made. A conveyance procured from one in that condition, by the entreaty, importunity, and persuasion of persons who are in the situation of advantage over him which the plaintiffs occupied, should not be re-established by a court of equity.

Where a contract has been procured from one who is in a situation of distress and necessity by another who stands in a relation of confidence, or who is in a situation of advantage over such person, the burden is on him who procures the benefits of such a contract to show among other things that it was made in the exercise of the free and voluntary choice of the other. Story, Eq. Jur. par. 239; 1 Redf. Wills, p. 515; *Tracey v. Sackett*, 1 Ohio St. 54. While it is true it is not necessary in order

to maintain the validity of a deed that there should have been an adequate consideration, or indeed that there should have been any consideration at all, yet from the inadequacy of consideration, the sickness, age, and mental depression of the defendant, and his helpless and dependent condition, as it related to the plaintiffs, an inference of undue influence arises which it is incumbent on them to repel. *McCormick v. Malin*, 5 Blackf. 508-523; *Marshall v. Billingsly*, 7 Ind. 250; *McLean v. Equitable Life, etc.*, 100 Ind. 127; *Allore v. Jewell*, 94 U. S. 506; *Harding v. Handy*, 11 Wheat. 125; *Moore v. Moore*, 56 Cal. 89; *Waddell v. Lanier*, 62 Ala. 347; *Harris v. Wamsley*, 41 Iowa, 671.

The previous contract in consummation of which the deed was made was, as we have seen, not of a character to justify the plaintiffs in obtaining the deed by importunity and persuasion, considering the relations of the parties at the time. It seems hardly necessary to add, this being a suit in a court of equity to compel the execution of a deed and to quiet title, it is only required that we consider whether the answers present such a state of facts as would render it inequitable to grant the relief prayed. No question of tender, demand, or of placing parties *in statu quo* arise on the answers. The demurrers to both paragraphs were properly overruled.

The ruling of the court in overruling the appellant's motion for a new trial is made the basis of much discussion on both sides. It is conceded on all hands that the case was of equitable cognizance exclusively. The *nisi prius* court so regarded it, and made a not altogether successful attempt to try it as such. The record recites that at the proper time the cause was, on the plaintiff's motion, submitted to the court for trial, but that the court, of its own motion, "and for its information as to the facts in the case, called a jury, and caused them to be sworn to well and truly try the issues in said cause," etc., to which action of the court the plaintiffs at the time excepted. The record shows further that the jury heard the evidence, the arguments of counsel, and instructions of the court, and after due deliberation returned a general verdict for the defendant. Upon the return of the verdict, the plaintiffs moved the court for a finding in their favor. The defendant made a like motion. The court overruled the plaintiffs' motion, and sustained the defendant's. Thereupon the plaintiffs filed a motion for a new trial, which the court overruled. Following the ruling on the motion for a new trial, the record proceeds: "And now the court, being sufficiently advised, finds for the defendant." It is contended that the court erred in that, after calling the jury for its own information as to the facts, it failed to frame and submit proper questions for the jury to answer, but permitted them to consider the whole case, and return a general verdict. While the course pursued is not to be commended, in the absence of a motion or request to the court to submit special questions, it was not such error as should reverse the case. The court having advised the parties that the jury was only called for its information as to the facts, the parties having without objection permitted the jury to retire without requesting the court to submit special questions, and having moved the court to make a finding after the jury

had advised the court as to the facts, by a general verdict, it must be held that the irregularity of the court, in failing to frame special questions of its own motion, was waived.

The case is not controlled by the decision in *Lake Erie, etc., Co. v. Griffin*, 92 Ind. 487. In that case the court refused to treat the cause as of equitable jurisdiction, submitted it to a jury generally, and overruled an express request to frame and submit questions of fact.

In *Evans v. Nealis*, 87 Ind. 262, this court, in speaking of *Hendricks v. Frank*, 86 Ind. 278, said: "If the court, instead of rendering judgment upon the verdict, had only treated it as advisory, and made its own findings, \* \* \* there would have been no error in thus submitting the facts to the jury, there being no conclusiveness in the verdict." Within the rule above announced the action of the court was not erroneous. Where the court in a case of equitable jurisdiction over objection submits the issues to a jury as in a law case, and renders judgment upon the verdict without making its own finding, it is error. *Lake v. Lake*, 99 Ind. 339, and cases cited. Where, however, as in this case, the issues are submitted to the court, and a jury is called to inform the court as to the facts merely, if without objection the court takes the advice of a jury by means of a general verdict, making its own finding, treating such verdict as advisory merely, it is not reversible error. *Farmers' Bank, etc., v. Butterfield*, 100 Ind. 229; *Evans v. Nealis*, *supra*.

As the motion for a new trial, the overruling of which is assigned as error here, was made before the court made its finding, it presents no question for our consideration. *Pence v. Garrison*, 93 Ind. 345; *Ketcham v. Brazil, etc., Co.*, 88 Ind. 515. As upon an examination of the questions presented we have found no error, the judgment is affirmed, with costs.

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(107 Ind. 37)

WOOD and others v. BEASLEY, Guardian, etc., and others.

(*Supreme Court of Indiana. June 8, 1886.*)

**WILL—CONSTRUCTION—LIMITATION OF WIDOW'S ESTATE—HEIRS.**

The clause of the will in controversy reads as follows: "I devise to my beloved wife the farm we now live on in Sullivan county, to have and to hold so long as she remains my widow, after which the real estate shall be equally divided among my heirs." *Held*, that the devise limited the widow's estate to the period of her widowhood, and that she did not take as an heir of her deceased husband, or in fee.

Appeal from Sullivan circuit court.

*John C. Briggs* and *W. C. Hultz*, for appellants.

*Hays & Hays* and *Beasley & Williams*, for appellees.

ELLIOTT, J. The question presented by the ruling on the demurrer addressed by the appellees to the second paragraph of the appellants' cross-complaint is as to the proper construction of the following clause of the will of John Foxworthy, deceased:

"I give and devise to my beloved wife, Mary E. Foxworthy, the farm on which we now live in Sullivan county, Indiana, to have and to hold so long

as she remains my widow, after which said real estate shall be equally divided among my heirs."

We regard the construction put upon the will by the trial court as correct, for it seems to us that the will limits the estate of the appellant to the term of her widowhood. It is now settled law that a husband may, by limitation, restrict the estate of his surviving wife so that it shall terminate when she marries. *Hibbitts v. Jack*, 97 Ind. 570; *O'Harrow v. Whitney*, 85 Ind. 140; *Tate v. McLain*, 74 Ind. 493; *Brown v. Harmon*, 73 Ind. 412; *Stillwell v. Knapper*, 69 Ind. 558; *Coon v. Bean*, Id. 476; *Harmon v. Brown*, 58 Ind. 207.

It is contended by appellant's counsel that the word "heirs" controls the will so far as to carry to the widow an estate in fee upon the termination of her widowhood. We think otherwise. Our construction of the will is that the testator intended to devise his wife the limited estate specifically described, and nothing more. It would be a strained and unnatural construction that would make the will class with the heirs one who is expressly and clearly designated as the widow, and to whom a restricted estate is specifically devised. The word "heirs" may be and often is controlled by the words with which it is associated, and it is so here. *Ridgeway v. Lanphear*, 99 Ind. 251; *Shimer v. Mann*, Id. 190; *Fountain Co., etc., Co. v. Beckleheimer*, 102 Ind. 76; S. C. 1 N. E. Rep. 202, and 52 Amer. Rep. 645; *Hadlock v. Gray*, 104 Ind. 596; S. C. 4 N. E. Rep. 167. The question was presented in all material respects in *Brown v. Harmon*, 73 Ind. 412, as it is here; and it was there held, as we now hold, that a widow to whom such a limited estate as that created by the will before us is devised cannot claim as an heir upon its termination.

The third paragraph of the cross-complaint is founded upon an antinuptial contract and a deed executed pursuant to it. The appellees, after having unsuccessfully demurred to this paragraph, answered, and to that answer a demurrer was overruled; and on that ruling error is now assigned. Counsel for appellant say:

"This paragraph of the cross-complaint was drawn upon the theory that the antenuptial contract and conveyance were valid, and that the deed conveyed a life estate to the widow; but upon more mature deliberation we are of the opinion that the contract and deed were absolutely void."

Upon this concession the cross-complaint is utterly bad, for, unless the contract on which it was founded is valid, it is entirely without foundation. As the appellant's counsel concede that the cross-complaint is without foundation, it is unnecessary to pass upon the sufficiency of the answer, as a bad answer is good enough for a bad cross-complaint. Judgment affirmed.



(119 Ill. 101)

HOWE and others v. SOUTH PARK COM'RS and others.

LAWRENCE v. SAME.

SMITH v. SAME.

FRAZIER and others v. HOWE and others.

(*Supreme Court of Illinois. May 14, 1886.*)

1. EQUITY — ERRORS PRIOR TO DECREE NOT ASSIGNABLE IN BILL TO IMPEACH FOR FRAUD.

In a bill to impeach a decree as obtained by fraudulent and perjured testimony, and to vacate such decree, errors committed in the course of proceedings prior to the decree cannot be asserted as grounds for vacation.

2. SAME — CROSS-BILL — RELIEF TO DEFENDANTS AGAINST CO-DEFENDANTS OBTAINABLE ONLY BY.

A cross-bill is not maintainable by a defendant against a complainant admitting by his bill the right of the defendant to the relief sought by the cross-bill. But where a defendant seeks relief against a co-defendant, *e. g.*, where he seeks to establish his title against an independent title set up by the co-defendant, he must do it by a cross-bill.

3. APPEAL — COMPLAINANT NOT APPEALING CANNOT ASSIGN ERRORS IN CO-COMPLAINANT.

One of several complainants against whom judgment has been rendered, who prays no appeal, cannot be heard to assign errors on the record of an appeal by a co-complainant, without leave of court; and this, if granted at all, may be upon terms. The errors so assigned in this case without leave are dismissed without review.

4. EXECUTION — SALE — DEED — RELATION OF TITLE BY, TO DATE OF SALE.

A sheriff's deed, when made to the purchaser at a judicial sale, has the effect of making the title conferred thereby relate back to and confirm the title in the purchaser as of the date of the sale, if the judgment or decree upon which it is founded is valid and binding on the parties in interest.

5. BANKRUPTCY — SUIT BY ASSIGNEE IN — STATUTE OF LIMITATIONS — TITLE DERIVED FROM SALE ON JUDGMENT PRIOR TO BANKRUPTCY.

Under section 5057 of the Revised Statutes of the United States, "no suit, either at law or equity, shall be maintainable in any cause between an assignee in bankruptcy and a person claiming an adverse interest touching any property, or right of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." In this case the complainants acquired title by a judicial sale under a judgment against the bankrupt rendered prior to his being adjudged a bankrupt. Unless the assignee undertook to recover the interest so acquired within two years from the time it accrued, the claim of the bankrupt and the assignee would be barred; which was the result in this case.

6. EQUITY — LACHES — CLAIM TO LAND HELD BARRED.

A claim to land asserted by suit after the lapse of some 24 years as to one defendant, and of over 32 years as to another, during which time the property was several times bought and sold, is held to bar the complainant from the relief sought in the absence of any proof showing that the relief could not have been sought earlier.

Appeal from appellate court, Cook county.

The facts in these cases are set forth at length in the opinion of the court (per BREESE, J.) in the case of *Harris v. Cornell*, 80 Ill. 54, which is given in full herewith:

The bill of complaint set out in this record was exhibited on the chancery side of the circuit court of Cook county, at the February term, 1871, by John P. Harris and three others, complainants, claiming to be heirs at law of one

Benjamin Harris, deceased, and against Paul Cornell, Elisha C. Fellows, and others, the scope of which will appear from the allegations therein. It appears the parties to the bill make claim of title to the premises through the same person, namely, one Mark Noble, Jr. The title of Benjamin Harris, the ancestor of complainants, comes through regular conveyances from the patentee of the land, one Jonathan Smith, who first conveyed it, by deed of May 20, 1836, to one Robert M. Draper, who, on the seventeenth June of the same year, conveyed it by deed to Mark Noble, Jr., by a misdescription. By deed, containing the same misdescription, dated October 6, 1836, Noble and wife conveyed the land to Benjamin Harris, which deed was not recorded until August 1, 1837. One Jefferson Gardner, at the July term, 1837, of the municipal court of the city of Chicago, recovered a judgment against Noble for \$252.68½, on which no execution issued or other proceedings had until February 5, 1840, on which day a *fi. fa.* issued out of the clerk's office of said court, under which the sheriff, on the twenty-seventh November, 1840, sold the land to Gardner, but issued to the purchaser no certificate therefor, or, if issued, the same was lost or mislaid. In September, 1847, Gardner and wife executed a deed to Nathan W. Watson, by the same erroneous description of this land, who, on May 10, 1849, executed a deed, with the same wrong description, to one Charles B. Phillips. Phillips, on the twenty-eighth June, 1849, executed a deed, with the same wrong description, to Electa Watson, who, having intermarried with one Garnsey, on the tenth of August, 1853, executed a deed for an undivided half of the tract, with a correct description thereof, to the defendant Paul Cornell, and on the eleventh May, 1854, she, with her husband, executed a deed for the other undivided half, with a correct description, to the defendant Elisha C. Fellows. By this it appears appellants' title is derived wholly through deeds from the patentee; appellees Cornell and Fellows, through and under the judgment obtained by Gardner against Noble.

In August, 1854, Cornell and Fellows impleaded, by bill in chancery in the Cook circuit court, Draper, Mark Noble, Jr., Benjamin Harris, and others named therein, to reform these deeds misdescribing the land, and to establish their title to the same, and to require the sheriff to execute a deed under the sale to Gardner. At the June term, 1855, a decree passed, reforming the deeds, and finding that Gardner had never received a certificate on the sale of the land by the sheriff, nor a deed for the same, and that he was entitled to a deed, and ordering the sheriff to execute such deed, to be delivered to complainants Cornell and Fellows, to be by them recorded in the proper office for the benefit of all parties interested in the premises. It was further ordered that these complainants, as the grantees of Electa Garnsey, late Watson, stand seized of the premises; that the deeds with erroneous descriptions be reformed, etc. In pursuance of this decree, the sheriff, on the eighteenth October, 1855, executed a deed to Jefferson Gardner.

It is further alleged in the bill now before us that Gardner well knew that he derived, by his purchase, no legal or valid title to the land, and that his said several grantees well knew the illegality and invalidity of Gardner's claim; and that Cornell and Fellows, before their purchase, well knew of the illegality of the sale by the sheriff to Gardner, and that they confederated and planned to defraud complainants of their title, right, and interest to the same, and they aver that they had no knowledge of these proceedings by Cornell and Fellows until a short time before filing their bill of complaint, averring that their father, Benjamin Harris, at the time of filing the bill by Cornell and Fellows, and for many years previous, was absent from this State, and had no knowledge of any attempt by any one to divest him of his right and title; that he had been residing in the state of Iowa many years previously, and died there in August, 1868. It is further alleged that no ex-

ecution issued on the judgment of Gardner against Noble in sufficient time to make the same a lien upon this land, and that it had ceased to be a lien when the same issued, more than a year and a day having elapsed, and that the said execution was issued out of the municipal court after the same had been abolished by law, and was therefore void. It is also averred that the amount bid by Gardner for the land was but \$30, while the same was worth many thousand dollars. The Cornell and Fellows decree is also challenged on the ground that material evidence introduced in the case by them was false, and obtained by perjury; a witness having sworn on the hearing that no deed from Noble to Harris for this land was of record in the recorder's office when in fact there was such a record in Book S of Deeds, at page 315, made August 1, 1837, and that the decree finding there was no such deed was untrue and erroneous. It is also alleged that no process was served upon Benjamin Harris, and none of the defendants answered the bill.

By an amendment to the bill it is alleged that Benjamin Harris, after August 19, 1841, filed his petition in the district court of the United States for the then district of Illinois, to be adjudicated a bankrupt, under an act of congress of that year to establish a uniform system of bankruptcy throughout the United States,—the petition alleging he was a bankrupt, and to which was a schedule of his indebtedness, and duly verified; that the court adjudicated him to be a bankrupt, and appointed Cyrus J. Miller his assignee, whereby all the property of Harris was vested in Miller, as such assignee; concluding with an averment that all these things were done while the bankrupt act was in force, but precise dates cannot be stated by reason of the destruction of the records by fire; that, at the time Cornell and Fellows filed their bill, Miller had the legal title to this land, and resided in this state, but was not made a party to the bill, and was never notified of the pendency of that suit,—claiming, by reason of failing to make Miller a party, the decree and sheriff's deed are void. It is then averred that by several acts of the general assembly of this state certain actions founded on promissory notes, bills of exchange, book-accounts, or simple contracts, were barred after five years from the time the cause of action accrued; averring that all the debts of the bankrupt, Harris, were of this nature, and the causes of action on all his indebtedness accrued more than five years prior to filing this bill of complaint, and thereby all of said indebtedness was barred, and ceased to be a lien on the bankrupt's estate, whereby the assignee became a mere naked trustee of this property for the heirs of Harris, and that they have a right to demand and have a conveyance of the land from the assignee. The benefit of another statute of limitations barring all actions on bonds, or other evidences of indebtedness in writing, after 10 years, is invoked; averring that causes of action on all the indebtedness of the bankrupt accrued more than 10 years, and were extinguished thereby; and claiming the assignee thereafter became a mere naked trustee for the heirs of the bankrupt, and liable to convey the premises to them on request. It is then alleged that about 30 years have elapsed since the title of the assignee in bankruptcy to the land accrued, and none of his creditors have proved their debts against him, or asserted any claim to the bankrupt estate, or to its proceeds; claiming that, after such a lapse of time, they cannot make proof of their debts; alleging that thereby the debts are paid and discharged, and the assignee has become a mere trustee of the premises for the heirs of the bankrupt, and is bound to convey the same to them on request.

The prayer of the original and amended bill was that so much of said decree as finds that Benjamin Harris has no title or interest of record in said 59.75 acres in said N. W.  $\frac{1}{4}$  section 13, 38, 14, prior to said bill of complaint of said Paul Cornell and Elisha C. Fellows, and that said Cornell and Fellows stand seized of said land, be set aside; that said deed of the sheriff of Cook

county, or so much thereof as relates to said land last above described, be declared void, and be stricken from the records of the recorder's office of Cook county; that the execution issued February 5, 1840, upon said judgment in favor of Jefferson Gardner, against said Mark Noble, Jr., be declared void, or that complainants' title to said 59.75 acres be declared not to be impaired thereby, and that the cloud upon their said title to said land, caused by the levy of said execution, and the sale thereunder, be removed, and complainants' right and title thereto be declared; that said Miller may be decreed to hold the premises received by him as assignee in bankruptcy, in trust for the heirs of said Benjamin Harris, and be required to convey four-tenths thereof to said John P. Harris, Benjamin P. Harris, Chauncey W. Harris, and Mary J. Smith; and that partition may be had so as to set off to said last-named four persons their shares in severalty, and that they may be let into possession thereof.

At the April term, 1871, the default of Doe and other defendants was entered. The defendants in real interest demurred generally to the bill. The demurrers were sustained, and the bill dismissed for want of equity, and complainants appeal.

It was omitted to be stated in the proper place that in the bill filed by Cornell and Fellows it was alleged that on the thirteenth of August, 1838, Harris and wife made a mortgage of one undivided 59 acres of said section to one Gholson Kercheval, to secure the payment of \$2,000, on certain terms and conditions specified in a certain bond executed at the same time; averring that, when Harris executed the mortgage, he had no title of record, or interest in the land described in it. And in the report of the master in chancery, to whom the case was referred, it is found that Harris, at the time of the execution of the mortgage, or at any time prior to the commencement of that suit, had no right, title, or interest in the premises, so far as appeared by the records in the office of the recorder of Cook county; and the court, by its decree, declared this mortgage, so far as it might purport to be a lien on the premises, was null and void, and the premises released therefrom. The record of this cause is made an exhibit in appellants' bill, and its accuracy not questioned.

The questions raised by the demurrer are interesting, and have been argued elaborately and with great ability, but it seems to us the case can be disposed of without considering all of them.

It is alleged in appellants' bill of complaint that the *fl. fa.* which issued on the judgment recovered by Gardner against Noble in the municipal court of the city of Chicago, bearing date February 5, 1840, and on which the land in question was sold to Gardner, was issued after that court had been abolished by law. A demurrer in chancery is always to the merits, and in bar of the relief sought, and proceeds upon the ground that, admitting the facts to be true as stated in the bill, still the complainant is not entitled to the relief he seeks. It admits all the facts which are well pleaded, but not any matters of law which may be suggested in the bill, or which may be inferred from the facts or conclusions upon them which the complainant may have reached. *Stow v. Russell*, 36 Ill. 18.

It cannot be questioned, the fact that the *fl. fa.* issued after the abolishment of the court is well stated, and the demurrer admits the fact. The legal consequences must be, the writ was void, in virtue of which no valid sale could be made. The sale in question was made under this writ to Gardner on the ninth of March, 1840. The court was abolished by act of the general assembly approved February 15, 1839.

It was held in *Newkirk v. Chapron*, 17 Ill. 344, that the act was absolute and unqualified, abolished the jurisdiction of the municipal court, and transferred the whole to the circuit court, from which thereafter executions could

issue, and from that court alone. The sale, therefore, under the execution so issuing from the municipal court, was a nullity. To the same effect is *Lee v. Newkirk*, 18 Ill. 550.

It is urged, however, by appellees, that the fact is proved by the Cornell and Fellows decree that the execution issued from the circuit court. It is so alleged in their bill, but the fact is not so found, either by the master in his report, or by the court in the decree, and it is admitted by this demurrer that it, in fact, issued from the municipal court; it being so alleged in appellants' bill of complaint. It is argued, however, by appellees, if the fact be so, and that the sale to Gardner under this writ was absolutely void, and that by operation of law the legal title to the land vested in Harris, as assignee, appellants' case would not be aided, so long as this Cornell and Fellows decree stands. Counsel must mean Miller, as he was the assignee of Harris; he (Harris) not claiming, at any time, as assignee of any one. On this proposition lies the difficulty.

The object of the bill of complaint of appellants, among others, is to impeach this decree as having been obtained by fraud and by perjured testimony. The bill on which the decree was based, was filed by the complainants therein as holders, by regular conveyance, of the title of Gardner, acquired by him under this sale, and, in order to compel the execution of a deed by the sheriff on Gardner's certificate of sale; and to induce the court to decree as prayed, complainants falsely alleged in their bill that the execution on which the sale was made to Gardner issued from the circuit court. No defense was made to the bill. Harris himself was a non-resident, and had been for years, and had no other notice of the proceeding than such as is effected by publication. All the defendants were defaulted, and a reference made to the master to take proofs of the matters alleged in the bill. Among the proofs taken by the master was the testimony of one Julius Mulvey, a witness produced by complainants, who testified he had carefully examined the records of the title to the land in controversy, and, so far as record thereof can be found in the recorder's office of Cook county, that there is no record in that office of any conveyance of this land to Benjamin Harris, or any right or interest in Harris in the premises. This testimony was taken by the master on the twelfth day of June, 1855, in presence of complainants, and on which the master in chancery reported to the court that said Benjamin Harris had no title of record to the said parcel of land, and that his mortgage to Kercheval should be declared null and void as to the parties holding the title of record. The court decreed in all things in substantial conformity with the master's report; there being no person present to except to it. This false testimony, added to the false allegation in their bill, secured the decree in their favor.

We say the testimony of Mulvey was false, for the fact is not denied that a deed of conveyance for these premises from Noble to Harris was on record in the recorder's office of Cook county on the first day of August, 1837, nearly 20 years before he testified, and was on record at the time he testified. But it is said Harris was a party to these proceedings, and it was in his power to prevent the decree by proper proofs on his part, and it is now too late for him or his heirs to contest this decree. Here is the important point in the case. The rule is well settled that a party to a decree in chancery, or to a judgment at law, is concluded by the decree or judgment. Another rule is that all parties whose interests may be affected, and those only, can be parties to judicial proceedings at law or in chancery. In this sense, was Harris a party to these proceedings? We are inclined to the opinion he was not; and, if not, his heirs or privies are not affected by it.

It is admitted by the pleadings that in 1841, while the bankrupt act of that year was in force, some 14 years before the Cornell and Fellows bill was filed, Harris had been adjudicated a bankrupt, and one Cyrus F. Miller appointed

his assignee, in whom all Harris' estate, real and personal, vested by operation of that law. From that day thenceforth Harris was as a dead man, so far as property rights were concerned; another owner appearing in the person of his legal representative, his assignee, Miller. Harris being dead to all possessions, he had not the capacity to be a party to any proceeding touching the same. He could not bring an action for any interest he may have had in property prior to the adjudication and the appointment of an assignee, nor could he be made a party to defend such property. This being so, Harris was not, in legal contemplation, a party to the Cornell and Fellows proceedings and decree. The bankrupt act, *propria vigore*, divested the bankrupt of all his property rights, and vested them in the assignee, who thenceforth held the absolute title to it; and no principle is better settled than this: that a party holding the legal title to property which is made the subject of judicial investigation is a necessary and an indispensable party to such proceedings. If he is not, no decree which may be passed affecting such property can bind him. No citations of authority are necessary on this point. It is so self-evident as to require neither argument nor authority to sustain it.

It is urged by appellees that Harris could have taken advantage of this defect in the Cornell proceedings, at the proper time, by plea or otherwise; but, as he was not a party to the proceedings, for the reasons we have given nothing can be urged against him for non-action on his part.

It is somewhat singular, and worthy of note and comment, that the party having the legal title to this land was a resident within the jurisdiction of the court at the time the bill of Cornell and Fellows was filed, and amenable to the process of the court, and he was not made a party, while Harris, who had no interest, and was non-resident, was made a party. It is no answer to say Miller's rights, as assignee, were unknown to the complainants, for the records of the district court in which the adjudication in bankruptcy was had, and by which Miller's rights arose, were open, public records, and notice to all the world.

We have said by this adjudication the title of Harris to this land became vested in Miller; but it is denied that Harris had title at any time. Here dates are of importance. Noble's deed to Harris bears date October 6, 1836. On that day Harris had all the title Noble had, and his title is not disputed, for appellees claim through and under Noble. How was Harris deprived of that title? It is answered, before he recorded his deed from Noble, which he did not do until August 1, 1837, Gardner obtained a judgment against Noble on the seventh of July preceding. This judgment would be a lien for seven years, had Gardner sued out an execution within one year after the rendition of the judgment. This he did not do, and did not sue out his execution until the fifth day of February, 1840, nearly three years thereafter. In the interval, on August 1, 1837, Harris placed his deed on record, and he became vested with a legal recorded title. By not suing out the execution within the year Gardner lost his lien, and Harris' title became impregnable. This principle is fully established in *Fitts v. Davis*, 42 Ill. 391, and again affirmed in *Eames v. Germania Turn Verein*, 74 Ill. 54, (decided at September term, 1874.) As between Harris and Gardner, the title of Harris was paramount. His deed was on record August 1, 1837. These are the facts as they appear in the record; yet, in 1855, when Cornell and Fellows exhibited their bill of complaint, they alleged therein that the execution on Gardner's judgment was issued from the circuit court of Cook county, and, after reference to the master to take proofs, a witness was produced by them, who testified he had examined the records of Cook county, and no deed was on record conveying any interest in this land from Noble to Harris, when, in truth and in fact, it had been on the records nearly 18 years, and was then on record. It was on this allegation and this false testimony the court passed the decree. Can there

be any doubt the court was imposed upon? Can it be supposed the court would have passed such a decree had it known the writ was issued out of the office of a defunct court? and would it have held Harris had no title if it had been informed his deed was on record, and had been nearly 18 years? It is not possible. It seems to us the case is fully within the principles of *McConnel v. Gibson*, 12 Ill. 128.

There is another fact of which the court was not advised in the Cornell and Fellows proceedings, and it was important; that is, that Harris had been adjudicated a bankrupt, and his estate, of which this tract of land was part, had vested in an assignee, and that assignee not a party to the proceedings. This bill seeks to impeach the Cornell and Fellows decree for fraud, and the facts constituting the fraud being admitted by the defendants, and well stated in the bill, the court should not have dismissed the bill, but retained it for an answer. It may be, all these charges can be satisfactorily explained; but, as the case now stands, they are admitted to be true, and, being true, appellants are entitled to a decree.

But is said, in argument, they have been guilty of laches; they have delayed too long now to gain the favorable ear of a court of equity. That question is usually presented by answer, and will not be discussed now. It may be remarked, however, that Cornell and Fellows did not take any steps to perfect their title until nearly or quite 13 years had elapsed after Gardner's purchase at sheriff's sale, and there is no allegation or proof on either side that actual possession has been taken of the premises, or any expenditure of money thereon in improvements or otherwise. There are no such facts alleged in the Cornell and Fellows bill.

We will barely remark, on the other point, that Miller is now, the debts of the bankrupt being outlawed, a naked trustee for appellants; that this principle seems to have been settled by this court at the September term, 1871, in the case of *Hardin v. Osborne*, 60 Ill. 93, where it was held, the purposes of the trust having been accomplished, the owner of the trust became, by operation of law, reinvested with the legal title, and could sue in ejectment.

We have not designed to go fully into the merits of all the questions raised in argument, but only so far as to determine the bill is a proper one for an answer.

The decree will be reversed, and the cause remanded for such further proceedings as may be consistent with this opinion.

*John Woodbridge*, for appellants.

*Charles H. Lawrence*, pro se.

*Sleeper & Whilon*, for appellees.

*Dent, Black & Cratty Bros.*, for appellee James Stinson.

*Melville W. Fuller*, for South Park Com'rs.

*Bisbee, Ahrens & Decker*, for appellee Charles W. Slivens.

*Joseph N. Barker and Lynden Evans*, for appellants in reply.

SCOTT, J. The appeals taken by the several parties are all upon the same record, and have been submitted together to be considered as one case. The original bill was filed February 11, 1871, by a part of the heirs of Benjamin Harris, who died intestate in Iowa in 1863, and who, it is alleged, was the owner of the land in controversy. To that bill the South Park commissioners, James Stinson, and others were made defendants. Some of the defendants to the original bill were defaulted, and others demurred, but before the cause came to a hearing the files

were destroyed by fire, October 9, 1871. Subsequently the files were restored by leave of court. The original bill was framed with a view to impeach a decree obtained by Cornell and Fellows, confirming in a remote grantee of theirs what is called the Gardner title to the premises, on account of the fraud of complainants in obtaining it. The other heirs of Benjamin Harris do not seem to have been made parties to the original bill, nor did the bill, as originally framed, ask for a partition of the estate. But an amendment filed October 9, 1872, among other things, made the other heirs defendants, and asked that the shares of the property to which complainants might be entitled should be set apart to them. It does not appear that the other heirs were brought into court at that time by summons, publication, or otherwise. The South Park commissioners, James Stinson, Charles H. Lawrence, and perhaps other defendants, filed separate demurrers to the original bill as amended, which was sustained by the court, and the bill dismissed for want of equity. The decision of the circuit court sustaining the demurrers to the original bill was afterwards reversed in this court, and the case is reported as *Harris v. Cornell*, 80 Ill. 54. The opinion then delivered contains a very full statement of the contents of the original bill, and reference is made to the opinion for a history of the case, which is so full as to make it unnecessary to further state the facts.

On the *remittitur* from this court being filed, the defendants claiming the property adversely to complainants answered to the bill, and all of them except Lawrence claimed to hold their respective interests in the premises under a sheriff's sale made on an execution issued on a judgment in favor of Jefferson Gardner against Mark Noble, Jr., as the same was afterwards confirmed on a bill filed by Cornell and Fellows against Mark Noble, Jr., Benjamin Harris, and others, which title they allege came to them, or some of them, by a regular chain of conveyances from Gardner, who was the purchaser of the property at the sheriff's sale.

As the answers are not under oath, they are not important, except in so far as they set up statutes of limitations, and the laches of the parties claiming title adversely to them, as a bar to any relief. Lawrence, one of the defendants, who claims the whole property as a grantee of the assignee in bankruptcy of Benjamin Harris, and perhaps as grantee of a prior assignee under a voluntary assignment made for the benefit of creditors, in or against all the other parties, after filing his answer to the original bill, filed a cross-bill, in which, in substance, he asked to have his title established, and that of his adversaries canceled. It was not until October, 1883, that the other heirs of Benjamin Harris were brought into court by publication, although they had been named defendants by an amendment to the original bill made in 1872. About the same time, Edward Howe, one of the parties assigning error on this record, was made defendant to the bill as a grantee of some of the alleged heirs of Benjamin Harris, deceased. Later on, perhaps in March, 1883, May A. Frazier, W. C. Clark, Mary C. Clark, and Lora A. McCrary, all of whom assign errors on this record, were substituted as defendants in the place of Joseph James Harris, one of the alleged heirs of Benjamin Harris, as the



grantee of his interest in the property. All of the parties lately made defendants answered the original bill of complainants, and also the cross-bill of Lawrence.

The amendment made to the original bill in September, 1883, stated the alleged interest of complainants, and such of defendants as were grantees of the other heirs of Benjamin Harris, deceased, and for the first time asked for a partition of the lands among all of the heirs, or their grantees. The last amendment made to the original bill, and also to the cross-bill of Lawrence, allege some infirmities in the judgment of *Gardner v. Noble* not stated in the original bill, and which for that reason do not appear in the first opinion of this court, where the history of the case is given.

It is alleged the municipal court in which the judgment was rendered had no jurisdiction of the person of defendant in that case, on account of the insufficient service of the summons, and therefore the judgment was absolutely void. Other grounds for relief were stated; but it will not be necessary to state them in the view that is to be taken of the case.

Without making any detailed statement of the titles claimed by the respective parties, it will be seen they all claim the title that was in Mark Noble, Jr., prior to July, 1837. It is conceded the title that was vested in Jonathan Smith by patent from the government passed to Mark Noble, Jr., by a regular chain of conveyances. There was a misdescription of the property to be conveyed in some of the deeds made, but that is not a matter important to be considered now. On the sixth of October, 1836, Mark Noble, Jr., and wife, conveyed the land to Benjamin Harris. It is under that deed that complainants and their grantees claim title to the property. But Harris did not record his deed until August 1, 1837. In the mean time, on the seventh day of July, 1837, Jefferson Gardner recovered a judgment in the municipal court of Chicago against Mark Noble, Jr., for \$251.56, and costs of suit. One or more executions on that judgment were issued out of that court directed to the high constable of Chicago, and perhaps something was made on one of them. The first execution was issued within less than one year after the judgment was rendered. That court seems to have had concurrent jurisdiction with the circuit court of Cook county in all matters arising in that county. The act of the legislature that abolished the municipal court provided that thereafter all executions to be issued on judgments remaining of record in that court should be issued by the clerk of the circuit court of the county of Cook. Afterwards, on the fifth of January, 1840, an execution was issued by the clerk of the circuit court on the judgment in *Gardner v. Noble*, directed to the sheriff of Cook to be executed. There is no dispute as to the fact this execution was attested in the name of the clerk of the circuit court; but whether it had attached the seal of the circuit court, or the seal of the municipal court, is a matter of contention. It was on this execution the property was sold, and was bought by Gardner, the plaintiff in execution. Afterwards Gardner conveyed, by his deed, his interest in the property, so that his equitable title which he acquired under the sheriff's sale to him, passed to Pauy

Cornell and Elisha C. Fellows. At the time Cornell and Fellows obtained their title to the property no deed had been made by the sheriff to Gardner.

Afterwards, in 1854, Cornell and Fellows filed their bill to have Gardner's title obtained at the sheriff's sale confirmed, and to require the sheriff to make a deed to Gardner for the land sold to him. Benjamin Harris was made a defendant to that bill with Mark Noble, Jr., and others. A decree passed in favor of complainants, in substance confirming the validity of Gardner's purchase, and directing the sheriff to execute to him a deed for the property, which he did, as directed by the decree of the court. It is under the Gardner title that the South Park commissioners and Stinson deraign their respective titles, which they insist are the paramount titles, and should prevail. Whether the South Park commissioners have acquired the title to the entire tract of land in controversy, or whether Stinson or others own a part of it, is not made a question in this case, and as to which, of course, no opinion is expressed.

Going back in the history of the case, it is seen that in 1848 Benjamin Harris, on his own petition, was adjudged a bankrupt in the United States circuit court for the Southern district of Illinois, and Cyrus F. Miller was appointed assignee, who, after being duly qualified, entered upon the discharge of the duties of the trust. In 1844, the assignee, by general description, conveyed the interests in the assets of the bankrupt that had come to him to Anson S. Miller. That sale was approved May 15, 1847. On the fifth of April, 1847, Anson S. Miller, by the same indefinite description, conveyed all he had acquired under the assignee's deed to Benjamin Harris and Daniel King. That title, whatever it was, has since come to Lawrence, complainant in the cross-bill, by deed from Morris Neustadt dated July 10, 1871. Back of all this it seems that in 1839 Benjamin Harris made a voluntary assignment of all his property for the benefit of his creditors to Jacob Early. What the assignee under that assignment may have done, if anything, does not appear.

In 1871, Jacob Early conveyed whatever interest he had in the land in controversy to Morris Neustadt by deed dated May 13, 1871, and on the nineteenth day of that month Neustadt conveyed the same interest to the complainant in the cross-bill. It is the title derived from one or both of these sources that Lawrence insists is the better title, and the one that should be sustained. The cause was submitted for decision at the June term, 1885, of the circuit court on the pleadings of the parties, and the evidence introduced to sustain their respective titles, and a decree was entered shortly thereafter, dismissing both the original bill and the cross-bill for want of equity. The only one of the complainants in the original bill that appealed from the decision of the circuit court dismissing their bill was Justus B. Smith. Since then, at the September term, 1885, on his own motion, his appeal was dismissed by this court. At the same term of court one of defendants entered a motion to dismiss the appeal taken by defendant Edward Howe from the decision of the circuit court to this court, and also to dismiss the appeal taken by the

other defendants, Mary A. Frazier, William C. Clark, Mary C. Clark, and Lora A. McCrary. That motion was reserved for consideration until the final decision should be rendered, and the cause was then, by consent of parties, transferred from the Northern grand division to the Central grand division, where the cause was taken for decision.

The motion to dismiss the appeals mentioned has now been considered, and the conclusion reached is it should be allowed. As before stated, Edward Howe claims title to an undivided interest in the property in controversy under conveyances from some of the heirs of Benjamin Harris. He neither claims nor insists upon any other title. It appears he was not made a defendant until 1883, and filed no answer until the twenty-fourth day of March, 1885. In his answer then filed he admits most of the allegations of complainants' original and amended bills, and insists upon the same infirmities in the judgment of *Gardner v. Noble*, and in the execution issued thereon, and asks for a partition of the estate. At the same time he also answered the cross-bill of Lawrence.

The other defendants, Mary A. Frazier, W. C. Clark, Mary C. Clark, and Lora A. McCrary, whose appeal is embraced in the motion to dismiss, were substituted as defendants instead of Joseph James Harris on March 31, 1885, and filed their answer to the original and cross bill. Neither of these parties filed any cross-bill. It is further to be observed that the original bill was framed with no other view than to impeach for fraud the decree obtained by Cornell and Fellows confirming the Gardner title in him for the benefit of the holders of his title. Afterwards the bill was amended so as to ask a partition of the estate between the heirs of Harris and their grantees. It is obvious the principal object of the original bill, even as amended, was to have the Cornell and Fellows decree set aside and declared to have no effect. So long as that decree stood, it was an effectual bar to any partition of the estate, either between the heirs or their grantees. It was around this central fact the whole controversy hinged. If that decree could be set aside, it would follow, as a matter of course, if application was made in apt time for that purpose, that partition would be made among the parties owning it. It was not a question whether partition should be made. It was from the beginning, and is now, the principal question, whose title is superior and must prevail? There is not now, and never was, any controversy between the heirs, or their grantees, concerning the question of partition in case they should be successful in removing the adverse title. The contention, from the outset to the present time, has been between the parties claiming the Harris title, and those claiming the Gardner title. Both the complainants and defendants claiming the Harris title were assailing the Gardner title held by defendants. It is seen the complainants have all ceased to make any further contest as to the validity of the Gardner title, that has stood in the way as an insurmountable objection to any partition of the estate, unless it is Chauncey W. Harris; and, as to the errors assigned by him, they will be noticed further on.

It is sought to continue the contest between the grantees of the Harris heirs and the South Park commissioners and other defendants holding

the adverse title deraigned through Gardner, by assigning errors on the original bill against them. This cannot be done. Neither of these defendants whose appeal is embraced in the motion to dismiss ever filed any cross-bill for relief in their favor, as against the parties claiming the adverse title. It seems the only parties now insisting upon the Harris title are these defendants assigning error on the original bill against themselves. The only party that appeared to have any further interest in the property was Justus B. Smith, who has since dismissed his own appeal, and who, with the other complainants, now acquiesce in the decision of the circuit court in dismissing the original bill. There is really nothing left for these defendants to appeal from since the original bill has been dismissed. There is absolutely no bill pending against the defendants holding the adverse title derived from or through Gardner. These defendants appealing have no cross-bill upon which they can obtain any relief whatever against the effect of the Cornell and Fellows decree, and while that stands all relief as to them is forever barred. So far as they are concerned, there is no bill pending in their favor upon which any relief could be obtained against the other defendants.

If the original bill asked no further or other relief than to set aside and impeach the decree confirming the title to the property in Gardner under his purchase at the sheriff's sale, it would hardly be insisted these defendants could appeal from a decision dismissing the original bill. But it is said that as the original bill as amended asked for partition, that rendered it unnecessary for these defendants to file any cross-bill. Undoubtedly, the rule is as counsel state it, that on a bill for partition, where the defendants claim the same relief for themselves as is sought by the original bill, no cross-bill is necessary. Whatever relief the defendants may be entitled to against the *complainants* in a bill for partition may be obtained by them on answer. In such case a cross-bill would be improper, for the rule is, when defendants ask only the same relief as complainants do, a cross-bill asking no other relief would be dismissed on motion. But that is not this case.

Here these defendants appealing neither desired nor asked any relief as against the original complainants, and, of course, as to them, no cross-bill was necessary. What they now seek is affirmative relief against their *co-defendants* holding an adverse and independent title. That they have not asked for by any cross-bill, and without such a bill no relief could, in any event, be granted to them. The case now stands in this way: The original bill that asked to have the adverse title of defendants set aside has been dismissed out of court, and all of complainants having any interest in the subject of that bill have acquiesced in that decision. These defendants have no cross-bill asking any relief against their *co-defendants* as to the adverse title held by them. There is therefore nothing from which these defendants could appeal. Clearly, they cannot hold the original bill against themselves, and assign errors on it against their *co-defendants*. That only could be done by cross-bill. It could be done in no other way. The appeal of these defendants must be dismissed.

Chauncey M. Harris was one of the complainants in the original bill. An amendment to the original bill, made in September, 1883, shows he has since conveyed all his interest in the lands involved, and that interest, whatever it was, has passed to and is now held by defendant Edward Howe. He did not join with his co-complainant Justus B. Smith in taking an appeal from the decision of the circuit court, nor did he ask for or take any separate appeal on his own behalf. Yet he has assigned errors on the record brought to this court by other parties appealing. That he cannot do without leave of the court; and, if leave should be granted, it would perhaps be upon terms that might be imposed.

The errors assigned by him are called cross-errors. That is not accurate. They are in no sense cross-errors, as that term is used in the statute. They are, in substance, the same as the errors assigned by the defendants appealing, and, as printed in the abstract, they are identical with the other errors assigned by them. Being upon the same record, and not cross-errors, the errors assigned by him since the appeals of the other parties with whom he seeks to join in assigning errors have been dismissed; those assigned by him must be regarded as also dismissed, with the appeals in which they are assigned. Both fall together. Had he been injuriously affected by the decree of the court dismissing the cross-bill of Lawrence, there is no reason why he could not have assigned cross-errors on the record in his appeal. He was a defendant to the cross-bill, but the decision dismissing it was wholly and entirely in his favor. There could be no complaint on his part as to that decision, and he has not and could not assign cross-errors on the decree in his favor dismissing the cross-bill.

The court, on the final hearing of the cause, dismissed the cross-bill of Charles H. Lawrence, and from that decision he asked for and was allowed an appeal, which he afterwards perfected. The questions made on that appeal remain to be considered. It will be done briefly. One source of title which he insists upon is under a deed from Cyrus F. Miller, assignee in bankruptcy of Benjamin Harris. It will be recollected that Harris was adjudged a bankrupt on his own petition in 1843. Whatever title he may have had in the property in controversy at that time vested in his assignee in bankruptcy. Prior to his bankruptcy the land had been sold on an execution issued on the judgment of *Gardner v. Noble* as the property of the judgment debtor, and had been bought at the sheriff's sale by the plaintiff in execution. Later on, in 1856, on a bill filed by Cornell and Fellows, and to which the bankrupt was made a defendant, with others, a decree passed confirming the validity of the sale of the property to Gardner, and requiring the sheriff to make him a deed. The making of the deed by the sheriff, as was done, would relate back to and confirm the title in him as of the date of his purchase if the decree was valid and binding on the parties in interest.

There was, then, at the date Harris was adjudged a bankrupt, and the title to his property vested in his assignee, an apparent title, or at least an interest, in the grantees of Gardner adverse to the title of the bankrupt. Possession was taken under Gardner's title, whatever it was, and,

unless it was in some way assailed by the assignee in apt time, it is obvious it would mature into paramount title that would prevail against any title that was in the assignee. That was not done either by the assignee or his grantee. Section 5057, Rev. St. U. S., provides:

"No suit, either at law or in equity, shall be maintainable in any cause between an assignee in bankruptcy and a person claiming an adverse interest touching any property, or right of property, transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee."

In this case there was certainly an *interest* in the grantees of Gardner in the land adverse to the title of the bankrupt, and unless the assignee undertook to recover that interest within two years from the time the right accrued to him, which was at the date of his appointment, in January, 1843, his right to do so would be forever barred. Whatever title came to him from the bankrupt remained in him until 1847, when he conveyed to Anson S. Miller. As the right of the assignee to maintain an action at law or a suit in equity to recover the interest claimed by other parties adversely to the rights of the bankrupt's estate was then barred by the statute, no grantee of the assignee could maintain a suit to recover such adverse interest in the property.

But there is another reason for affirming the decision of the circuit court dismissing the cross-bill, that is unanswerable. It is the laches of the parties holding the title the complainant in the cross-bill now seeks to maintain. The alleged assignment of Harris to Jacob Early was made in 1839. The deed from Cyrus F. Miller to Anson S. Miller was made as far back as 1847. There is no pretense that any one ever attempted to assert any title to the lands in controversy derived from either assignee until 1871, when the complainant in the cross-bill commenced his action in ejectment to recover the property. Since the alleged title vested in Early more than 32 years had then elapsed, and since the supposed title vested in Miller under the bankrupt act nearly 24 years had elapsed, and no one had made any previous effort to recover the property. In the mean time the property had been bought and sold many times in the confident belief the purchasers were obtaining a perfect title; some of them, at least, paying the full value of the property. The doctrine of laches, as understood by the court, has been often declared by its previous decisions. *Dempster v. West*, 69 Ill. 613; *Cox v. Montgomery*, 36 Ill. 398; *Winchell v. Edwards*, 57 Ill. 46; *Bush v. Sherman*, 80 Ill. 160. The principle that lies at the foundation of all the cases in this court on this subject is, the party who challenges the title of his adversary to real property must be diligent in discovering that which will avoid the title or render it invalid, and diligent in his application for relief. Unreasonable delay, not explained by equitable circumstances, has always been declared evidence of acquiescence, and will bar relief.

Surely the grantors of complainants in the cross-bill have not been diligent in their application for relief in this case. More than a quarter of a century was suffered to pass before any one attempted to assert any title acquired either from the assignee in bankruptcy, or the assignee un-

der the voluntary assignment made by Harris for the benefit of his creditors. Since then the land has increased in value manifold times, and other rights have attached, founded in good faith and for valuable considerations, and now, at this late day, the complainant in the cross-bill seeks to have the title established in him. This would be inequitable, and especially after the lapse of so great a period, even if it should be conceded the former grantees may have had equitable rights in the premises had they asserted them in apt time. Not a single fact is proven that stood in the way of an earlier application by them for relief, had they believed they were entitled to any. There is evidence, however, that tends to show the former grantees of the assignees of Harris had abandoned all claim to the property long years ago, and, to induce the belief, the present claim is put forth on the doctrine of chances that a speculation might possibly be realized. It seems difficult to understand how the claim of ownership to this property, now become very valuable, from either source insisted upon, can be put forth in good faith. The proposition that the complainant in the cross-bill can assert any title to the property that his grantees could not, needs no argument in its support. Their laches will constitute as effectual a bar to him as it would be to them had this suit been brought in their names, or by them. The decree dismissing the cross-bill was clearly warranted both by the law and the evidence, and should not be disturbed.

The appeal taken by Edward Howe, and that taken by Mary A. Frazier, William C. Clark, Mary C. Clark, and Lora A. McCrary, will be dismissed, and the decree dismissing cross-bill will be affirmed.

(117 Ill. 109)

#### TROWBRIDGE v. CROSS.

(*Supreme Court of Illinois. May 14, 1886.*)

##### 1. HOMESTEAD—PARTNER CANNOT HAVE, IN PARTNERSHIP REALTY.

A partner cannot have a homestead in the real estate of the firm, as against a copartnership debt, and without the consent of the copartner. The statute on homestead exemptions (1 Starr & C. St. c. 52, § 1 *et seq.*) was not intended to apply to partnership reality.

##### 2. PARTNERSHIP—PROPERTY—INTEREST OF PARTNER.

Partnership property, whether real or personal, is a fund or estate held for the purposes of the partnership as a separate and distinct entity. The interest of a partner therein is only a claim against the floating balance or surplus which may remain after the payment of the firm debts.

Appeal from De Witt.

*Fuller, Monson & Ingham*, for appellant.

*Moore & Warner*, for appellee.

CRAIG, J. This was an action of ejectment, brought by James A. Trowbridge against George W. Cross, to recover a certain tract of land in De Witt county. The land originally belonged to Gilbert Beebe, who conveyed it to Cross & Bennett, a firm composed of George W. Cross and Orlando B. Bennett, formed for the purpose of manufacturing and

selling tile. A mill was erected on the land, and the business of the firm was conducted on the property; Cross, one of the partners, erected a house on the property, which he occupied with his family. The firm contracted a debt in the transaction of its business, upon which a judgment was rendered. An execution was issued and levied on the land in question, which was sold, and, no redemption having been made, the title passed to Trowbridge, who brought this action to recover the land. The defendant, Cross, claims that the property was his homestead, and, as such, was not liable to levy and sale in satisfaction of the judgment, and this is the only defense relied upon to defeat a recovery. On the trial the circuit court held that the property was not liable to sale on the judgment, and rendered a judgment against the plaintiff for costs. The plaintiff appealed. The other member of the firm, Bennett, does not consent or agree that Cross shall have a homestead in the property, and the only question which has been argued, and the only one presented by the record, is whether one member of a firm can hold a homestead estate in the real estate of the firm as against a copartnership debt, and without the consent of the copartner.

Section 1 of our statute in relation to homestead exemptions provides that every householder having a family shall be entitled to an estate of homestead to the extent in value of \$1,000 in the farm or lot of land and buildings thereon owned or rightly possessed by lease or otherwise, and occupied by him or her as a residence. The statute also provides that such homestead shall be exempt from sale on judgment for the payment of debts. This statute has always received a liberal construction in favor of those claiming its protection; it being the policy of our law to afford a home for a failing debtor and his family out of his property, not exceeding in value \$1,000 when actually occupied as a residence by a householder. But whether this statute has any application to partnership property is a question which has never been presented directly to this court.

In *Thomp. Homest. & Ex.* § 196, it is said: "That a single partner cannot claim an exemption out of unsettled partnership assets is settled by a decided weight of authority." In *Pond v. Kimball*, 101 Mass. 105, the supreme court of Massachusetts held that the exemption is several, and not joint. "It applies to the debtor in the singular number, and is personal and individual only." It was also held that property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. The same rule was adopted in *Guptil v. McFee*, 9 Kan. 35, and in *Gaylord v. Imhoff*, 26 Ohio St. 317; *Rhodes v. Williams*, 12 Nev. 23. In Indiana the supreme court of that state has held, in a number of cases, that one partner cannot hold a portion of the partnership property as exempt. *State v. Emmons*, 99 Ind. 452; *Love v. Blair*, 72 Ind. 281; *Ex parte Hopkins*, 2 N. E. Rep. 587, (opinion filed October 9, 1885.) The same rule has been adopted in other states. In Iowa and New York a different rule prevails. *Hewitt v. Rankin*, 41 Iowa, 35; *Stewart v. Brown*, 37 N. Y. 350.



It will not, however, in the view we take of the question, be necessary to enter upon an extended review of the decisions of courts of other states, as we are of opinion our court has established a rule in regard to partnership property which, in effect, when carried to its logical result, must be conclusive of the questions involved.

It will be conceded that there is a wide difference between real estate held by a failing debtor in his own right and real estate owned by a firm, and it may well be doubted whether copartnership property was within the contemplation of the legislature when the exemption statute was enacted. In Story, Partn. § 360, in discussing the nature and character of firm property, the author said:

"As between the partners themselves, the debts and liabilities of the firm to creditors and third persons, they [the assets] are a fund appropriated, in the first instance, to the discharge and payment of such debts and liabilities, and there is, properly speaking, as between them, a lien thereon, or at least an equity which may be enforced through the partners in favor of creditors, although it may not directly attach in the creditors by virtue of their original claims in all cases."

The doctrine announced by Story was sanctioned and approved by this court in *Rainey v. Nance*, 54 Ill. 80. It is there said, as to the order in which debts against the firm, and then against the individual members of the firm, shall be paid, it is the settled rule that no one partner has a right to share in the firm property except the portion which remains after full payment of all debts and liabilities of the partnership; and it thence follows that each partner has a right to have the same applied to the due discharge and payment of all such debts and liabilities before any of the partners, or his personal representatives, or his individual creditors, can claim any right to the same.

In *Bopp v. Fox*, 63 Ill. 540, the same principle is announced, and in the decision of the case it is there said:

"It is a well-known rule governing the relation of partnerships that partnership property must first be applied to the payment of partnership debts, and that the true and actual interest of each partner in the partnership stock is the balance found due to him after the payment of all partnership debts, and the adjustment of the partnership accounts between himself and his co-partners, and in equity real estate forms no exception, but stands on the same footing in this respect with personal property, no matter in whom the legal title may be vested."

In the case cited the court also held that a partner who took the legal title to one-fourth of the land in equity never had any beneficial interest in the land distinct from partnership purposes; that he took the title to the land clothed with an implied trust that it should be applied to the payment of the partnership debts, if necessary. In the same case it was held that a widow of a deceased partner was not entitled to dower in partnership real estate until all partnership debts had been paid, and the accounts between the partners had been adjusted. This case was followed by *Simpson v. Leech*, 86 Ill. 286, where the same rule was declared.

If the property here involved is to be regarded as personal property as to the rights and interest of the partner Cross so long as there was partnership debts, then it would seem plain that the right of homestead provided by the statute could not be invoked, as an estate of homestead cannot be predicated on personal property. Or, if the copartner Cross took the property clothed with an implied trust that it should be applied on the payment of partnership debts, as held in the case cited, he could have no interest whatever in the land after it had been appropriated to that purpose, as was done when it was sold in satisfaction of a partnership liability. After the property had been taken and sold for partnership liabilities, there was nothing left upon which a homestead right could be predicated.

We are committed to the rule that the right of dower will not attach to partnership real estate, as against partnership liabilities; and, if dower will not, it is difficult to perceive any principle upon which it can be held that the right of homestead can be sustained. The right of dower is denied because the partner has no beneficial interest in the property distinct from partnership purposes. The right of homestead may be denied for the same reason, upon the ground that the property must primarily be devoted to the payment of partnership liabilities, and that a partner has no interest in the property upon which a homestead can be based until the partnership debts are paid. As was said before, we do not think that our statute in regard to homesteads was intended to apply to partnership property, but the object was to exempt individual property,—such property as a householder might acquire, not as a partner of a firm, but as his own; and, when property is purchased by a firm, the title is held subject to all the incidents of partnership property.

The judgment of the circuit court will be reversed, and the cause remanded.

(117 Ill. 30)

**NOBLE and others v. SCHOOL DIRECTORS and others.**

(*Supreme Court of Illinois.* May 14, 1886.)

**SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL DIRECTORS—DUTY TO DEFEND SUIT AND PRESERVE PROPERTY.**

It is the duty of school directors who, upon entering office, find a suit pending against the district intended to deprive it of valuable property, to resist such suit, and preserve the property of the district. A decree suffered by default in the private interests of a director is obtained by fraud, and will be vacated.

Appeal from appellate court, third district.

*Warren & Pogue*, for appellants.

*Fifei & Phillips*, for appellees.

CRAIG, J. This was a bill, brought by school directors of district No. 8, township 7, in Jersey county, against Thomas J. Terry, Caleb Noble, and others, to set aside a decree which had been rendered in the circuit court of Jersey county at a special term of such court held in January, 1882, on the ground that the decree was obtained by fraud. The decree sought to be impeached was rendered in the case of *Thomas J. Terry et*

*al. v. A. M. Slaten et al.*, which had been commenced on the nineteenth day of December, 1876; the defendants being the directors of school-district No. 8. The object of the bill, as originally filed, was to enjoin the issuing of \$10,000 of bonds of school-district 8 to purchase certain property known as the "Hamilton Primary School." It turned out, however, that the bonds had been issued before the filing of the bill and the service of the injunction. After the commencement of the suit the district employed Snede & Hamilton as its attorneys, and they obtained a dissolution of the injunction. After the injunction was dissolved, the complainants amended their bill, and on the amended bill they set up that the bonds had been issued before the filing of the bill, and that the said property had been purchased with the bonds. They therefore prayed that the bonds be decreed to be surrendered, and the property reconveyed to the Hamilton primary school.

When the bill which resulted in the decree complained of was filed, in 1876, Slaten, Cadwalader, and Curtis were the three directors of the district. In April, 1879, Thomas J. Terry, one of the complainants in the suit against the district, and, indeed, the leading spirit in the prosecution of the case, was elected a director in the district. A short time after his election, I. C. Noble was also elected a director. In April, 1880, Lehmuhl was elected a director in the place of Slaten, who was acting when the bill was first filed. Thus the three members of the board were changed. On the eleventh day of September, 1879, director Terry presented a resolution to the board, which was adopted, and read as follows:

"That the bonds heretofore issued by a former board of directors for the sum of \$10,000 be hereby declared void; and the Messrs. Warren & Pogne be employed as the attorneys of this district in all suits, and all attorneys heretofore employed are hereby discharged, and that the said firm of Warren & Pogne be instructed to institute proceedings to obtain a reconveyance of the school property, for which said bonds were given."

It will be observed that Warren & Pogne were the solicitors of Terry and others who brought the bill against the district. After the adoption of the above resolution, the district was without attorneys, and it may also be said that the complainants in the bill had assumed the position of prosecutors and defenders of the subject-matter of the litigation in which the district was interested.

After the adoption of the resolution, and on the nineteenth day of May, 1881, the case came on for a hearing, when a default and a decree *pro confesso* was taken against the school directors of district No. 8, and subsequently a final decree was rendered as heretofore stated. Although, under the resolution adopted by the board which discharged the attorneys who had previously acted for the board, and employed Warren & Pogne, the solicitors of the complainants, as the future attorneys of the board, it might be inferred that Warren & Pogne acted in a double capacity, yet such is not the case. The evidence shows that they refused to act for the board in the then pending case, and, so far as they are concerned, no unprofessional conduct can be attributed to them.

But the same cannot be said in regard to the conduct of the directors of the district, or, at least, a majority of them. When they were elected directors of the district, they assumed a public trust. They had the charge of the funds and property of the district in trust for the people of the district, and, as such, they are to be held to a strict account. They had no right to allow private interest to conflict or in any manner interfere with their public duties. When these directors came into office, they found a suit pending against the district to take from it valuable property, which had been purchased and paid for in the bonds of the district. Now, what was the plain duty of these directors,—men elected by the people to protect and preserve their property? Were they authorized to discharge attorneys who had been employed to defend the district, and allow a default to be taken against the district? Were they authorized to allow a suit in their own behalf to be prosecuted to a final decree against the district, without interposing any defense whatever? This would not be right or just. It was a fraud upon the rights of the people of the district for the directors to allow a decree to be entered against the district without interposing any defense, and no one of the board of directors should be allowed to profit by a fraudulent act.

When they assumed the position of directors, they had no right to allow private interest to conflict with public duty. Equity and good faith required them to defend and protect the property of the district to the best of their skill and ability; regardless of any and all private interest which they might have; and, when they failed to do this, they proved recreant to their trust, and their acts cannot be upheld in a court of equity. The people of the district could only act through their board of directors. They were therefore, in this instance, powerless, and it might in many cases defeat the ends of justice to hold that the people of a district should be bound and concluded by a decree where a board of directors have disregarded their trust, and allowed a judgment to be entered against the district, as was done here, interposing no defense whatever. We think the only conclusion to be reached from all the evidence is that the president of the board of directors, in his own interest, and entirely ignoring and disregarding the interest of the district, allowed the decree to be rendered.

And we think it is a case where a court of equity may properly interfere, and set aside the decree, and allow the district to defend. It is true, as suggested by counsel, that a defendant who has been negligent, and allowed a judgment to be entered against him through his laches, cannot come into court, and obtain relief as against his own negligent acts. But the principle which precludes a negligent party from obtaining relief has no application to a case of this character.

These officers, intrusted with the rights of the public, have disregarded their trust, and, as is claimed, suffered the district to be defeated in their own private interest.

We think the decree of the circuit court was correct. The decision of the appellate court will therefore be affirmed.

(116 Ill. 650)

**MARTIN and others v. GLOBE INS. Co. and others.***(Supreme Court of Illinois. May 14, 1886.)***1. EQUITY—FRAUD—WIFE'S PROPERTY CONVEYED TO HIS CREDITORS—CONSIDERATION—VACATION DENIED.**

A conveyance by a wife of her separate property, in trust for the payment of her husband's debts, and the dismissal of suits, and discharge of claims by his creditors, is for valuable consideration, and will not be set aside on the ground that it was procured from her by fraud, in the absence of clear proof. There is no proof in the present case showing any fraud, deception, or misrepresentation.

**2. SAME—VACATION NOT OBTAINABLE BY CREDITORS PROCURING THE CONVEYANCE, OR THEIR ASSIGNEE.**

Where certain creditors procured the conveyance by the debtor's wife of her property for the payment of their claims, neither they, nor their assignee, are entitled to have such conveyance set aside.

**3. SAME—LACHES A BAR—VACATING DEED BY TRUSTEE.**

A bill to vacate a conveyance by a trustee, which bill was not filed until after the lapse of several years, and after the death of the trustee, is denied, on the ground of laches.

Appeal from Vermillion.

*Helm & Helm* and *J. B. Mann*, for appellants.

*George F. Harding*, for appellees.

SCOTT, J. It appears from this record that on the first day of August, 1871, Pamela Martin, since deceased, was the owner of the lands in controversy, situated in Iroquois county, consisting of 480 acres. These lands had been conveyed to her by George K. Clark, since deceased, and were at the time incumbered by two trust deeds,—one made by Pamela Martin and Ezra H. Martin to David J. Lyon, dated January 20, 1871, to secure a note of E. H. Martin and wife to George K. Clark, of the same date, for the sum of \$4,000, with interest; and another trust deed, dated February 18, 1871, made by the same parties to Henry T. Helm to secure a note of \$3,000, made by and to the same parties. Later on, in the same year, it appears Ezra H. Martin became and was involved in financial difficulties. His indebtedness was not very large, but some of his creditors became very persistent in their efforts to collect their respective claims. Attachment suits were commenced by one or more of his creditors, and the writs levied upon this land in controversy as the property of the attachment debtor, notwithstanding the fact the title of record was in the name of his wife. Other creditors undertook to secure their claims, and one of them had a petition prepared, and perhaps filed in the United States court, to cause the common debtor to be placed in bankruptcy. In consequence of these legal proceedings, it seems the business of Ezra M. Martin, which was that of a contractor and builder, was so much interrupted he could not prosecute it successfully or profitably.

Negotiations were entered into with his creditors with a view to adopt measures to give him relief. Accordingly, at a meeting of his creditors called for that purpose, it was agreed that Martin should cause these lands to be conveyed to a trustee, to be agreed upon, for the benefit of

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his creditors; and that such trustee should have power to sell the lands and personal property, to be thereafter included in a deed of assignment to be made by Martin and his wife, and to distribute the proceeds, after first paying the expenses of the trust, among all of the creditors ratably in proportion to their respective claims; and if any surplus should remain, it was agreed it should be paid to Ezra H. Martin. In consideration of that agreement on the part of Ezra H. Martin, and on his performing the same, his creditors bound themselves to "release and forever discharge the said Ezra H. Martin, his heirs, executors, and administrators, of and from all debts, demands, actions, and causes of action which they may have, in law or equity, or which may result from the existing state of things, from any and all contracts, liabilities, doings, and omissions, from the beginning of the world to this date." This agreement was signed by creditors and by Ezra H. Martin, but not by his wife. It bears no date, but it was evidently made about the date of the deed of assignment, which bears date the sixth day of September, 1871. The party selected as trustee, to whom the property should be conveyed under the provision of the agreement, was Henry B. Lewis, and accordingly a deed conveying these lands to him, in trust for the benefit of the creditors, was made, executed, and duly acknowledged by Ezra H. Martin and Pamela, his wife, and was afterwards recorded in the county where the lands are situated. In the deed of assignment it is recited these lands are subject to the two trust deeds above mentioned, to secure certain indebtedness to George H. Clark, from whom Mrs. Martin had obtained a deed for the lands. Lewis accepted the trust created by the deed of assignment, and afterwards undertook to execute it. As before noted, Mrs. Martin was not a party to the agreement between her husband and his creditors, but it was copied into the deed of assignment, and in that way she made it declare the terms of the trust upon which she was willing to convey the property to the trustee.

Conceding the lands were the property of Mrs. Martin, as it is insisted they were, the agreement of the creditors to release and discharge her husband from all liability to them was a sufficient consideration to support the deed of assignment as to her. Construing the agreement and the deed of assignment together, it would seem the true construction is that Mr. and Mrs. Martin had parted with their entire interest in these lands, whatever that may have been, and thereafter the creditors had no claims whatever against Ezra H. Martin, and looked only to the trust property for the satisfaction of their respective claims. All the possible interest the grantors could have remaining in the lands after the making of the deed was the covenant that any surplus that might remain after all the creditors had been paid should be paid to Ezra H. Martin.

After the making of the deed they had no interest whatever in the lands, nor any interest in the execution of the trust, if no surplus should remain. There is some conflict in the evidence as to the amount of the debts owing by Martin, and it is shown he owed a sum large enough, when added to the amount secured on the lands, to more than exhaust their utmost value; so that it would seem the grantor could never have

any interest, even in the execution of the trust, if the deed of assignment was valid and binding on the grantors. After the making of the agreement, and the deed of assignment, all legal proceedings that had been instituted against Martin were abandoned, and thereafter the creditors made no claim whatever against him on account of what he may have owed them. He was as completely discharged from all claims of the creditors who had signed the composition agreement as though they had been paid in money.

Efforts were made by the trustee and some of the creditors to effect a sale of the interest the trustee had in these lands, for the benefit of the creditors, as was provided should be done. No sale was made of the lands until the following summer, when the interest the trustee had in the property was sold to George K. Clark for \$12,000; but out of that sum was to be deducted the amounts due on the trust deeds before mentioned, and also all taxes that Clark may have paid to preserve the liens of his trust deeds, and the balance was to be paid in one and two years, with 8 per cent. interest. Accordingly, on the thirteenth day of August, 1872, Lewis and his wife, by quitclaim deed, conveyed all of the lands to George K. Clark. On the day of the making of the deed Lewis was about to go east, and did not have time to ascertain how much would be coming from Clark. It was thought it would be about \$3,000. A brief memorandum of the terms of the sale was made and signed by Clark, and at the same time he gave Lewis his note for \$3,000, payable at one day after date.

It was understood, however, that, so soon as practicable, the parties would ascertain the exact amount to be paid by Clark, and for that sum he was to give the trustee his notes, payable in one and two years, with interest. It was also understood that Clark was not bound to secure the amount to be paid by him otherwise than by giving his promissory notes. The trustee claims he had the consent of the creditors to make the sale to Clark at the price he did, and to take his notes without sureties or other security. As to this fact in the case the evidence is conflicting. This branch of the case may be remarked upon further on. The title thus acquired by Clark seems to have remained in him until the eleventh day of March, 1873, when he, his wife joining with him, conveyed a part of the lands to Sidney P. Walker, in trust, to secure the payment of his note to the Globe Insurance Company for \$4,000, with interest at 8 per cent. per annum. On the same day Clark and wife conveyed the residue of the lands to the same trustee, to secure his other note to the Globe Insurance Company for \$3,000, with interest at the rate of 8 per cent. per annum.

These trust deeds were regularly acknowledged and recorded in the proper county. Subsequent to these transactions the original bill in this case was filed by Pamela Martin. There is nothing in this record that shows the date of filing of the bill, but it was to the August term of 1873. The object of the original bill was (1) to have the deed of assignment to Lewis set aside, and held for naught, on the ground the real estate embraced in it belonged to complainant as her separate property, and

that the deed had been wrongfully obtained from her; and (2) to have the deed made by Lewis and wife to Clark set aside because it had been made in violation of the trust. To the original bill George K. Clark, Henry B. Lewis, Ezra H. Martin, the husband of complainant, and the creditors who had signed the composition agreement, were made defendants. On the thirteenth day of August, 1874, George K. Clark, his wife joining with him in the execution, made another trust deed on the same lands, by which he conveyed the same to Alexander McCoy, in trust to secure a note of \$40,000 made by George K. Clark, payable to his own order. This note was indorsed by Clark, and delivered to the Globe Insurance Company. A demurrer to the original bill having been sustained, complainant obtained leave to and did, on the twenty-first of October, 1874, file an amended bill, in which the contents of the original bill were restated, and some new matters alleged. So far as anything contained in this amended bill may be necessary to an understanding of the decision to be rendered, it will be stated in the brief discussion that is to follow upon the merits of the case.

To this amended bill the Globe Insurance Company and Sidney P. Walker were made defendants. On the twelfth day of February, 1877, a stipulation was signed by counsel to change the venue of the cause from the circuit court of Iroquois county to the circuit court of Cook county. The cause then passed from the docket of the circuit court of Iroquois county, but the record was never sent to the county to which the venue had changed. Nothing further was done in the case until November 24, 1882, when an order was made reinstating the case on the docket of the circuit court of Iroquois county. On the thirteenth day of December, 1882, a supplementary bill was filed by the original complainant, in which she stated that on the twenty-sixth of October, 1877, in the district court of the United States, George K. Clark was adjudged a bankrupt, and afterwards, on the second day of July, 1881, he died, leaving his widow, Isabella H. Clark, as his sole legatee. By that amendment to the bill the assignee of Clark and his widow, and perhaps his heirs at law, were made defendants.

On the sixth of February, 1883, Pamela Martin, the original complainant, died, and her heirs at law, the present complainants, obtained leave to prosecute the suit on their own behalf, and to file a supplemental and amended bill, which they did on the twenty-third day of March, 1883. Some of the allegations of this bill introduce new matters for the first time into the case, and, so far as they are important, they will be noticed in the sequel. On the fourth of March, 1884, the death of Sidney P. Walker was suggested, and his heirs made defendants. At the March term, 1884, of the circuit court of Iroquois county, the then presiding judge of that court, having been of counsel in the case, of his own motion, changed the venue of the cause to the county of Vermillion, and the record was accordingly transmitted to the circuit court of that county.

On the twentieth of February, 1885, Abner C. Harding, by his solicitor, George F. Harding, made application to become defendant in the



cause, and on the fourth of March, 1885, his application was allowed. The transcript of the record contains what purports to be an amended and supplemental bill, filed as of the date of the thirteenth of April, 1885, by the present complainants; but it does not appear to be signed by either complainants, or by any solicitor for either of them. It seems the notes made by George K. Clark to the Globe Insurance Company came into the hands of Abner C. Harding, and, after answering the original bill, he filed a cross-bill, in which he alleged the execution of the notes by Clark to the Insurance Company; that by indorsements thereon he became the owner of them; and asks the foreclosure of the trust deeds by which they were secured. A number of the persons made defendants, among whom was Isabella H. Clark, the widow of George K. Clark, deceased, filed answers, in which they disclaimed any interest in the subject-matter of the suit, and asked to be hence dismissed. The other defendants, both to the original, amended, and supplemental bills, and to the cross-bill, answered the same; but as their answers are not under oath, they are not important, except as they may serve to put the matters alleged against them at issue, and it will not be necessary to state the contents of any of them, further than to say some of defendants most interested in the lands in their answers insist upon laches of complainants as a bar to relief, in any event.

If the decree of the circuit court dismissing the original, amended, and supplemental bills can be sustained, as it is thought may be done, that would dispose of the whole case, so far as the parties assigning errors in this record are concerned. It is a matter of no interest to them, if they can obtain no relief on their bills, what decree may be rendered on the cross-bill of Harding, as between the heirs of Clark and his mortgagees, and that branch of the case will not be further considered.

The validity of the deed of assignment, so far as it affected the rights of the original complainant, Pamela Martin, is challenged, principally on the ground she was not informed as to all the facts concerning her husband's indebtedness, and that she had no legal advice as to her rights in the premises, and therefore was overreached in the transaction, by the persistent efforts of the creditors to collect their claims off her husband. It is alleged if she had known the extent of her husband's indebtedness, she would not have made the deed of assignment. In the supplemental bill, filed by the present complainants, it is charged the making of the deed of assignment was procured by the fraudulent conduct of George K. Clark, combining with some of the creditors to secure the making of the deed for their personal benefit.

The evidence in this record has been examined with care, and it is not perceived it sustains either ground upon which the right to relief is based. There is very little evidence in this record other than the testimony of Ezra H. Martin, the husband of the original complainant, that tends, even in the slightest degree, to impeach the fairness of the making of the deed of assignment. The deposition of Mrs. Martin was taken, as well as that of Mr. Clark, to be used as evidence on the trial, but both were lost before the case came to a hearing. Since their deposi-

tions were taken and lost, both Mrs. Martin and Mr. Clark have died, so that the record does not contain the testimony of either of them. There is nothing that shows, with any degree of certainty, that Mrs. Martin was overreached, either by her husband or any of his creditors, or any one else, in the matter of procuring from her the execution of the deed of assignment for the benefit of her husband's creditors. There was a controversy whether the lands embraced in the deed really belonged to her or to her husband. They had been attached as his property, and the creditors were about to try the question of ownership. Of this fact she was made fully acquainted. When a compromise was proposed by which her husband was to be released and discharged from the claims of the creditors that were pressing him so hardly, she was fully informed of the terms agreed upon. In that respect there was no imposition practiced upon her. Whether the exact amount of her husband's indebtedness was stated to her is matter of little consequence, for an error in that respect would hardly vitiate the transaction, if otherwise fair. The most damaging testimony is that given by Martin in relation to the conduct of Clark in procuring the making of the deed of assignment, and the composition agreement. It will be observed the charge that the deed of assignment and the composition agreement were procured by fraud on the part of Clark was first made by the present complainants in their amended and supplemental bills. It was never made by the original complainant, either in her original bill, or in any of her amended bills, nor was it ever made by any one until since the death of Clark. These facts are admitted by counsel in his argument, and the force of the objection is freely conceded, that the charge, if made at all, should have been made in the life-time of the party alleged to have been guilty of fraudulent conduct. But this was not done. Since this charge was not made until after the death of the alleged guilty party, it has become more difficult to defend against it. What Clark, if living, would say in respect to it, of course cannot be now known. He never had an opportunity to deny the fraudulent conduct with which he was charged. It is probable, if living, he would deny most, if not all, that Martin alleges against him that so seriously affects his character, both as a lawyer and as a citizen.

Counsel is frank enough to concede, if the charge had no other support than the testimony of one man, it should not be allowed a place in the case. The testimony of Kimmey is all the evidence, other than the testimony of E. H. Martin, that lends the slightest support to the accusation of fraudulent conduct on the part of Clark. But that, when carefully considered, does not seriously tend to impeach his integrity in the transaction. It seems Kimmey was the legal adviser of Martin, and, perhaps, his wife, concerning their difficulties. Martin, he says, wanted an older lawyer, and it was agreed Clark should be associated with him. The witness says Clark advised the making of the deed, and the composition agreement. Suppose he did? It is not certain, in view of what subsequently transpired, that was not the best measure that could have been adopted for the interests of both Martin and his wife. After one

of these consultations, this witness says he told Martin that Clark "had gone back on him." Notwithstanding this notice, Martin still advised with Clark, and it must have been after this interview that this witness made the draft of the papers that were subsequently executed by Martin and his wife to complete the assignment for the benefit of creditors. This witness further says he always insisted that Mrs. Martin had a clear right to the farm, and could hold it in spite of any or all of her husband's creditors. It is true he says that he and Clark differed in regard to Mrs. Martin's rights, and as to the best policy for Martin to pursue. Clark undoubtedly advised the making of the agreement with the creditors, and the deed of assignment. It may be that Kimmey advised against both measures. This shows, most conclusively, the matter was thoroughly considered, and the arrangement entered into after the most mature deliberation and investigation; and now, after the lapse of so many years, and since the death of the party implicated, the transaction should not be set aside, unless it is shown, by the clearest and most satisfactory evidence, it was fraudulent. That has not been done.

Passing now to consider briefly the other branch of the case, it is seen that, since the death of his wife, Ezra H. Martin has conveyed to the present complainants any interest he may have had in the premises. It is also made to appear that most, if not all, of the creditors have assigned their respective claims against Martin to complainants. It is now said the present complainants stand in the shoes of the creditors, and, as they claim under them, they hold all the equities that existed in their favor before or under the assignment. Conceding the correctness of the position taken, it is plain the creditors could not have the deed of assignment set aside that they had procured to be made for their own benefit. But could they have the deed from the trustee, Lewis, set aside? Many of the creditors consented to the making of the sale to Clark as it was made. Lewis thought he had the consent of all the parties in interest to make the sale to Clark, but as to some of the parties he may have been misinformed. But, be that as it may, many of the creditors, and some of the principal ones, did consent to the sale, and they are estopped to complain it was wrongful. What rights did these creditors have who did not give their consent to the sale to Clark? It would have been their privilege, no doubt, to have filed a bill to set aside the sale to Clark if fraudulent, and to compel the trustee to go forward, and further execute the trust in their favor; or, perhaps, to have had the trustee removed, and one appointed who would have more faithfully executed the trust.

But this bill was never framed with a view to compel the trustee to execute the trust. Its purpose, in the first place, was to cancel the whole arrangement as a fraud upon the wife of the debtor; and that she might have the property back, free from the claims of her husband's creditors; and that she might have all subsequent incumbrances removed as a cloud upon her title. This, it is obvious, could not be done either in favor of the original complainant or in favor of the present complainants. The utmost that either the party entitled to the surplus or the creditors could do, in the case the trustee was wasting or mismanaging the trust prop-

erty, would have been to compel him, by bill, to observe his duties to the *cestuis que trust*, or had him removed for unfaithfulness. Had it been shown by bill, in apt time, the sale to Clark was fraudulent, or an improvident one, no doubt the court would have set it aside, and ordered a resale for the benefit of the creditors, or the parties interested in the surplus.

In the original bills Mrs. Martin never asked to have the trust executed by the trustee that she might have the benefit of any surplus that might remain after the payment of creditors. On the contrary, she always demanded that the deed of assignment, and all subsequent conveyances of the property, be set aside as a fraud upon her rights, and that she might have the property back, free from all subsequent incumbrances. If the bill, as now amended, could be treated as a bill to enforce, in favor of the present complainants, the rights creditors may have had in the trust property, it comes too late. Such laches have been suffered as would bar any relief. Conceding the sale by the trustee to Clark was either fraudulent or improvident, no relief could be had against it in favor of the creditors, or other persons interested in the trust property, unless a bill for that purpose had been brought without unreasonable delay. That was not done.

There was no error in the decision of the circuit court dismissing the original, amended, and supplemental bills for want of equity, and its decree, in all respects, must be affirmed.

(102 N. Y. 420)

PEOPLE *ex rel.* WELLER *v.* TOWNSEND.

(Court of Appeals of New York. June 1, 1886.)

1. COURTS—JUDGES—SURROGATE—TERM OF, WHERE ELECTED TO FILL VACANCY.  
ALEXANDER HAGNER was elected surrogate of Queen's county in November, 1879, for six years from January, 1880, but died in April, 1880, and was succeeded by GARRETSON, who was appointed by the governor "for and during the time limited by the constitution and the law." He held office until June, 1881. Defendant was then elected to the office, and held it until January, 1886, when Weller demanded it, claiming under an election held November 1, 1885. *Held*, that he was not entitled to such office, as the term of defendant's office was six years from the time of his election.
2. SAME—TERM OF SURROGATE GOVERNED BY LAWS RELATING TO COUNTY JUDGE.  
That, under the system in vogue in this state, it is impossible, by legislative enactment, to sever the modes of selection of the terms of office of the county judge from that of surrogate, save in the counties of New York and Kings.
3. SAME—LAWS 1871, CH. 859, AND LAWS 1881, CH. 618.  
That chapter 618 of the Laws of 1881, providing that a vacancy happening in the office of county judge shall be filled for a full term of six years at the next general election thereafter, operates both to fix the *status* of a surrogate thus elected, and to repeal any prior legislative provision, if any there were, repugnant thereto, and was a legislative interpretation of chapter 859, § 8, Laws 1871.
4. SAME—ACT OF 1871.  
That the act of 1871, in the words "when such officers shall be elected to fill a vacancy," refers simply to the contingency out of which the necessity for an election arises, and does not attempt to limit the term for which the officers named were to be elected.

Appeal from judgment of general term, Second department, affirming judgment of supreme court in favor of plaintiff.

*John E. Parsons*, for appellant, Chas. De Kay Townsend.

*H. E. Sickels*, for respondent, the People, etc.

RUGER, C. J. The only question presented by this appeal is whether the defendant, who was elected surrogate of Queens county at a general election in November, 1880, is entitled to a full term of six years from January 1st succeeding his election, or is limited to filling out the unexpired term of his predecessor. ALEXANDER HAGNER was elected surrogate of the county in November, 1879, for a term of six years from January 1, 1880, but, after holding the office about three months, died April 8, 1880, and was succeeded by GARRET J. GARRETSON under an appointment from the governor "for and during the time limited by the constitution and the law," and GARRETSON duly qualified, and discharged the duties of the office until January 1, 1881. The defendant then entered the office by virtue of his election, and continued to discharge its duties until January 1, 1886, when the relator demanded possession, claiming under an election held in November, 1885, at which he received a majority of the votes cast for surrogate. This election was invalid unless the term to which the defendant was entitled by virtue of his election expired on December 31, 1885.

The office of surrogate, as it now exists, was created and organized under the judiciary article of the constitution adopted in 1870, and the statutes passed to effectuate the constitutional intent. The portions of the constitution relating to the present inquiry read as follows. Article 6, § 15, provides:

"The existing county courts are continued, and the judges thereof in office at the adoption of this article shall hold their office until the expiration of their respective terms. *Their successors shall be chosen by the electors of the counties for the term of six years.*" "*The county judge shall also be surrogate of his county; but in counties having a population exceeding forty thousand the legislature may provide for the election of a separate officer to be surrogate, whose term of office shall be the same as that of county judge.*"

In order to carry into effect these provisions, the legislature passed chapter 859 of the Laws of 1871, which, among other things, provided for the election of county judges in each of the counties of the state (except New York and Kings) upon the expiration of the terms of office of the existing incumbents, and for the election of separate officers as surrogates, at the option of the boards of supervisors of the respective counties whose population exceeded 40,000. Under these provisions nearly one-half of the counties of the state elected to avail themselves of the privilege of choosing separate officers as surrogates, and the duties of the offices of county judge and surrogate throughout the state were thereafter distributed among three classes of persons, viz.: those who performed the duties of both county judge and surrogate, those who discharged those of county judge alone, and those who acted as surrogates only. The scheme of the constitution whereby the duties of both surrogate and county judge were, in a majority of the counties of the state, united in

the same person, rendered it imperative that their terms of office should be identical, and furnished an obvious reason for the requirement relating thereto contained in that instrument. In the case of county judges who perform the duties of surrogate, they are, by force of the constitution, none the less county judges, although they also act as surrogates, and are affected by all legislation applicable to county judges or surrogates; but, in the case of separate officers elected as surrogates, their terms of office must conform to those of all county judges, as the result of the fundamental law declaring that they "shall be the same as the county judge."

In view of the circumstances, it will be seen how impossible it is, by legislative enactment, to sever the modes of selection of the terms of office of one of these classes from the other, save in the counties of New York and Kings, which are in this respect excepted from the operation of the constitution. It may occur that the competency of persons to fill the respective offices of surrogate and county judge may differ, and might require one to cease to serve in one capacity, whereas he could lawfully continue to act in the other; but this does not seem to us to present any obstacle to the enforcement of the constitutional provision as to the identity of their respective terms of office. *People v. Carr*, 100 N. Y. 236; S. C. 3 N. E. Rep. 82. In the case of county judges who are also surrogates, the termination of their competency as county judges would also render them incompetent to serve as surrogates, inasmuch as their right to act as surrogates is a mere incident to the office of county judge, and must terminate when their capacity to serve as county judge ceases. As to separate officers holding the office of surrogate, the circumstance that they are authorized to continue to act as surrogates when a county judge would be ineligible to serve in a judicial capacity does not create any difference in their respective terms of office, or introduce any embarrassment in enforcing the constitutional scheme as to the identity of their terms of office. It would therefore seem that the language of the constitution had indissolubly wedded the official terms of all county judges and surrogates, and had thus placed the subject beyond the legislative power to effect any discrimination between these offices in that respect.

We are thus brought to the consideration of section 5 of the act of 1871, which it is claimed has that effect. It reads as follows:

"Sec. 5. The separate officer elected and performing the duties of the office of surrogate, and the legal officer discharging the duties of county judge and of surrogate, and elected at the election provided for in this act, shall enter upon their duties on the first day of January next after such election, and shall hold their office for the term of six years from said first day of January; but when such officers shall be elected to fill a vacancy, then they shall enter upon the discharge of the duties of the office to which they have been elected immediately upon the receipt of the certificate of such election."

In this connection it is important to consider also the amendment of that act effected by chapter 613 of the Laws of 1881, which is as follows:

"Sec. 9. When a vacancy shall occur in the office of any county judge in any of the counties of the state, (except New York and Kings,) from any cause, before the expiration of term, the office shall be filled for a full term

of six years at the next general election happening not less than three months after such vacancy occurs."

Whatever provision may at any time be enacted by the legislature affecting the term of office of county judge must, if lawfully adopted, be, by force of the constitution, equally applicable to the office of surrogate. Thus the act of 1881 providing that a vacancy happening in the office of county judge shall be filled for a full term of six years at the next general election thereafter operates both to fix the *status* of a surrogate thus elected, and to repeal any prior legislative provisions, if any there were, repugnant thereto. *Livingston v. Harris*, 11 Wend. 329; *Fowler v. Bull*, 46 N. Y. 57; *Harrington v. Trustees, etc.*, 10 Wend. 547.

Although this amendment was adopted subsequent to the election under which the defendant claims, it became a law before the election of the relator, and must be regarded, not only as a legislative interpretation of the act of 1871, but as determining the law of the land when the rights of the parties herein accrued. Whatever effect this amendment had upon the term of office of a county judge under the force of the constitutional requirement that the term of a surrogate shall be the same as that of a county judge, it cannot be questioned but that it had a like effect upon surrogates. The amendment, in terms, refers generally to the office of county judge alone, but this embraces not only those persons who are county judges, but also those who are also surrogates of their county. If the act of 1871 is susceptible of the construction placed upon it by the relator, we should have not only one term of office for a county judge and another for a surrogate, but also different terms for the same office in respect to the several duties required to be discharged by him. A construction so absurd and repugnant to common sense should not be adopted if the language of the statute is reasonably susceptible of any other meaning.

It is also well to premise that there are no considerations of public policy to be subserved, or special object to be accomplished, in preserving the periodicity of election in the case of these officers, (as there was in the *Case of McClave*, 99 N. Y. 83; S. C. 1 N. E. Rep. 235,) which requires the adoption of fixed consecutive periods for their election. The primary object of the constitution seems to have been to make the officers elective, and to give efficiency to the administration of their duties by lengthening the terms of their incumbents, and this seems to be best promoted by giving a legitimate effect to every constitutional election of such officers. In considering this question it is also important to observe that there is no express provision, either of the constitution or the statutes, which restricts the term of an elected county judge or surrogate to any other period than that of six years mentioned in the constitution, and the point presented is whether, in giving a construction to the statute of 1871, it shall be held by implication to have been intended to restrict the duration of the term in any case. The language of the section is susceptible of two constructions only, and they are presented by the respective parties thereto. The defendant claims that the words "where such officer shall be elected to fill a vacancy" may be interpreted ac-

ording to the popular signification of the language, and considered descriptive merely of the occasion for the election, and not as defining the terms of office; while the relator insists that they define the limit of the term. Upon the success of this contention the relator's case must stand or fall.

Although the question made has, under the aspect presented by the various statutes relating thereto, been the occasion of quite conflicting views on the part of able jurists, and may not be entirely free from doubt, yet we think, when examined in the light of the controlling effect to be given to the constitutional provisions, it is still capable of a reasonably certain solution. All of those contingencies for which the constitution either expressly or impliedly provides, must be governed by its provisions, and it is only in cases expressly delegated to the legislature for its action, or when the constitution is silent on the subject, that the legislative will is controlling. An examination of the constitution indicates certain subjects affecting the question under consideration upon which its framers have clearly expressed their will, and which are decisive, as we think, of this appeal. Thus express provisions declare that county judges and surrogates are to be elected, and, when elected, their terms of office are to commence on the first day of January next succeeding their election, and to continue for six years therefrom. The language of the constitution is broad, plain, and unequivocal. The successors of the judges then in office "shall be chosen by the electors of the counties for the term of six years." Who are the "successors" of the judges then in office? It confessedly does not mean the immediate successors alone, but, by universal acceptance, has been held to lay down the rule not only by which the constitutional term of all successors shall be determined, but also a permanent method for their selection. *People v. Carr*, 86 N. Y. 514. The language applies to all of the indefinite line of successors of the original incumbents, and furnishes a controlling rule on the subject, except in the special cases where the constitution provides for the filling of vacancies. Whenever a successor to a prior incumbent is to be chosen by election, his term of office is fixed at six years by the express provision of the constitution. Section 16, art. 6, of the constitution provided for certain vacancies in these offices by authorizing the legislature, on the application of the board of supervisors of any county, to provide for the election of special officers to discharge the duties of county judge and of surrogate in such counties in case of their inability, or of a vacancy; and in some of the counties of the state these provisions have been availed of, and the special officers so chosen necessarily fill any vacancy occurring in the offices, to discharge the duties of which they were elected. In other counties, however, vacancies in the office of county judge and surrogate must be supplied according to the general provisions regulating the mode of filling them provided by the constitution and statutes; and the county of Queens is one of such counties.

In the case of elective officers the necessity for the existence of some continuous authority to fill vacancies temporarily, in order that the performance of their duties may not be too seriously interrupted, and the



inconvenience and inadequacy of any system by which such power could be exercised by the people through the medium of popular elections except at regular periods, led to the adoption of that clause of the constitution which delegated to the legislature power to make provision for such cases. The entire scope and theory of the constitution, however, requires those offices, when vacant, to be filled by the people at their regular annual election when it is possible to do so; but, when a departure from that mode is rendered necessary by any accident, the power of selection is limited to the shortest space of time possible, and a return to the elective principle at the earliest opportunity is necessitated. The constitution therefore provides that the legislature shall make provision for the selection of persons to fill temporarily such vacancies as may occur in public offices, but in the case of the adoption of any other mode than that of election such power is limited to the period of time intervening between the commencement of the political year next succeeding the first annual election after the happening of the vacancy and the occurrence of the vacancy. *People v. Keeler*, 17 N. Y. 371; section 5, art. 10, Const.

In the exercise of this power, it was competent for the legislature to provide, as it did by section 5 of the act of 1871, for the selection of some person to fill the office of surrogate between the occurrence of a vacancy and the first day of January thereafter; and the designation, by such section, of the persons who had been theretofore elected as surrogate did not thereby enlarge his constitutional term, but provided simply a mode of filling out a term of limited duration over which the legislature had unquestionable constitutional authority. During the period intervening between the occurrence of a vacancy happening so that an election can be held at a regular general election, and the commencement of the next political year, the constitution gives the legislature unlimited power to indicate the mode of filling it, and it is competent to provide therefor by conferring power of appointment upon the executive department, or in such other mode as in its discretion it may deem wise and prudent.

After the death of HAGNER, GARRETSON was appointed to fill the vacancy in the office "for and during the time limited by the constitution and the laws." It was competent for the legislature to provide that his authority should terminate upon the election of a successor, and that such successor should serve during the remainder of the limited term extending to the first of January succeeding the occurrence of the vacancy. The legislature had not, however, the power to restrict the term of a duly-elected officer whose term of office had been fixed by the constitution, or to provide any other term for a surrogate than that belonging to a county judge. A reasonable construction of the act of 1871 therefore requires us to hold that the words "when such officer shall be elected to fill a vacancy" refer simply to the contingency out of which the necessity of an election arises, and do not attempt to limit the term for which the officers named were to be elected. To hold otherwise would bring the provision in conflict with the limitations upon the legis-

lative power imposed by the constitution, (*Sage v. City of Brooklyn*, 89 N. Y. 200,) and create an unwarrantable distinction between the terms of office pertaining to county judges who perform the duties of judge and surrogate, and those who hold only the separate office of county judge.

The interpretation thus put upon the act of 1871 not only gives it legitimate effect, but avoids a conflict with constitutional provisions, and brings the office of county judge and surrogate into harmony, in respect to filling vacancies therein by an election, with those of judges of the court of appeals and supreme court, and also with those of sheriffs, county clerks, registers, coroners, district attorneys, and most other elective officers mentioned in the constitution. Section 1, art. 10, Const.

It is unnecessary for us to attempt to give a construction to section 2492 of the Code of Civil Procedure, inasmuch as the board of supervisors of Queens county has not attempted to exercise the authority conferred by that provision.

These views lead to the conclusion that the defendant was elected to the office of surrogate of Queens county in 1880 for the full term of six years from the first day of January succeeding, and is entitled to hold such office during that period.

The judgment of the supreme court should be reversed, and final judgment rendered for the defendant, with costs.

(All concur.)

(102 N. Y. 415)

#### BURR v. DE LA VERGNE.<sup>1</sup>

(*Court of Appeals of New York*. June 1, 1886.)

##### 1. PATENTS FOR INVENTIONS—ASSIGNMENT—PARTNERSHIP—AGREEMENT TO SHARE PATENT TO BE PERFECTED WITH FIRM MONEYS.

While a partner acquires no interest in an invention by a copartner merely because of the firm relation, even though it relates to an improvement in machinery to facilitate the business carried on by them, yet where he persuades his copartner to agree to pay expenses of experiments in perfecting an invention in consideration of a share in the results, and the firm pays such expenses, and afterwards the said partner and the inventor take out a patent for the invention in their joint names, to the exclusion of the other partner, the latter can maintain an action to compel his copartner to carry out the agreement.

##### 2. SAME—AGREEMENT VALID THOUGH BY PAROL—REV. ST. U. S. § 4898.

Such an agreement is not void by reason of section 4898 of the United States Revised Statutes, forbidding the assignment of patent by parol, as it related to an inchoate invention, not perfected or patentable at the time the agreement was made.

##### 3. REFERENCE—INTERLOCUTORY JUDGMENT—APPEAL.

The point that there was no reference pursuant to the interlocutory judgment is an irregularity to be reached by motion, and is not brought up by an appeal from the judgment simply.

Appeal from judgment of general term supreme court, First department, affirming judgment in favor of defendant.

*Oscar Frisbie and E. N. Dickerson*, for respondent, *William H. Burr*.

<sup>1</sup> Affirming 33 Hun, 608, *mem.*

*Sidney S. Harris and Saml. Hand, for appellant, John C. De La Vergne.*

ANDREWS, J. The proposition asserted in behalf of the defendant, that one partner acquires no right or interest, legal or equitable, in an invention made by his copartner during the existence of the partnership, by reason merely of the copartnership relation, although the invention relates to an improvement in the machinery to facilitate the business carried on by the firm, and although the partner making the invention uses copartnership means in his experiments, and is also bound, by the copartnership articles, to devote his whole time and attention to the firm business, is a doctrine supported by authority and consonant with reason. *Stemmer's Appeal*, 58 Pa. St. 164; *Belcher v. Whittemore*, 134 Mass. 330.

The proposition assumes, however, that there was no agreement pursuant to which a joint right was to be acquired in inventions made by either partner, and that the making or perfecting of inventions was not within the scope of the partnership business. The defendant relies upon this principle as decisive against the claim of the plaintiff to demand any share in the joint inventions of Mixer and the defendant, for which patents were issued to them jointly. This contention is put upon the ground that the agreement between the plaintiff and the defendant, upon which the plaintiff bases his action, as proved and found, related to an interest in inventions which should be made by Mixer under the arrangement between Mixer and the defendant. It is therefore claimed that the agreement is confined to an interest in inventions made by Mixer exclusively, and does not extend to joint inventions made by Mixer and the defendant. But this construction of the contract, if allowed to prevail in this case, would operate as a fraud upon the plaintiff. When the agreement was made, Mixer had in mind an undeveloped idea which he desired to embody in an experimental machine, to test its practicability and usefulness, and he therefore proposed to the defendant that experiments should be carried on in the brewery of De La Vergne & Burr, and that he would give the defendant one-half interest in the invention, provided the latter would pay the expenses of making the experiments and of constructing an experimental machine to test the value of the invention. The defendant, as the evidence on the part of the plaintiff tends to show, then presented the proposition to the plaintiff, and offered to give him one-half of his proposed interest under the proposition of Mixer, provided the plaintiff would agree that the expenses of the experiments, and of constructing the experimental machine, should be paid by the firm. The plaintiff consented, and an expenditure of \$40,000 was incurred, and paid by the firm in prosecuting the enterprise, which finally resulted in the perfecting of the invention, and the construction of a machine apparently of great value. Three several patents were applied for, and issued to defendant and Mixer jointly. This fact furnishes the foundation for the claim made that these patents were not within the agreement between the parties.

It must be assumed that the inventions covered by these patents were

the joint inventions of the joint patentees. This is the inference from the patents themselves, and it is claimed that the inference is conclusive and incontestable upon a collateral inquiry. Assuming this to be true, nevertheless it does not, we think, furnish an answer to the claim of the plaintiff to an interest in these patents, under his arrangement with the defendant. The referee finds, and the evidence justifies the finding, that the most material parts of the invention were Mixer's. Nor can there be any reasonable doubt that the patents embraced the original idea of Mixer, existing when the original negotiation commenced between him and the defendant, but adapted and perfected by experiment until the invention took its final form. Assuming, as perhaps must be assumed, that in the course of these experiments the defendant contributed original suggestions which were adopted, and entitled him to claim the inventions as the joint inventions of himself and Mixer, nevertheless we are of opinion that, as between himself and the plaintiff, they must be regarded, for the purposes of this action, as the inventions of Mixer alone, and that any contribution on the part of the defendant thereto must be considered as having been made in aid of Mixer while proceeding under the original agreement. Any other conclusion would, as we have said, work a fraud upon the plaintiff. It is significant, as bearing upon this view, that all the experiments, including whatever was done at the suggestion of the defendant, were conducted at the expense of the firm, and were treated as expenses incurred under the arrangement between the parties. It is sufficient, without further elaborating this part, to state our concurrence in the conclusion reached by the learned trial judge as to the right of the plaintiff to an interest in the patents, including the patent issued to the defendant in his own name alone.

We are also of opinion that no error was committed in adjudging that the plaintiff was entitled to share in all the advantages derived or derivable by the defendant from the inventions, past or future, which are within the contract between the parties. The profits heretofore received by the defendant from licenses or sales of the right to use the invention are assumed by the defendant to be reached and covered by the judgment. We think the defendant is justly accountable to the plaintiff for his share, according to his interest under the contract. It is not the case of one joint owner and patentee exercising the right to license the use of the invention, which he has a right to do without accountability to the other joint owners or patentees. The defendant denied the title of the plaintiff, and refused to clothe him with a legal title to his interest in the patents; thereby practically precluding him from availing himself of their use by granting licenses to others. His situation was analogous to that of a tenant in common of land, who has been ousted by a co-tenant, who has appropriated the rents and profits exclusively to his own use. The plaintiff cannot have the full benefit of his agreement unless the defendant is held to account for the profits received by him. The judgment does not specifically define what future inventions will come within or result from the contract between the parties. This can be determined when the question arises.

The claim that the agreement, being by parol, was void under the statute of the United States, is not well founded. The agreement related to an inchoate invention, not perfected or patentable at the time the agreement was made, and was not, therefore, within section 4898 of the United States Revised Statutes, which declares that "every patent, or any interest therein, shall be assignable in law by an instrument in writing." In the case of a perfected invention, the statute does not prevent the obtaining of an equitable title thereto or interest therein by parol, (Walk. Pat. § 274,) nor does it apply to a parol executory agreement to transfer an interest in an invention contemplated, but not perfected, and not cognizable under the patent laws when the agreement was made. The plaintiff, by the agreement, acquired an equitable right which attached to the interest of the defendant in the patents subsequently issued, and he is entitled to demand a legal title corresponding with his equitable interest.

The objection that there was no reference pursuant to the interlocutory judgment is not based upon any fact affirmatively appearing on the record. But assuming that the final judgment was rendered without a reference, it was nevertheless entered upon the direction of the judge before whom the case was tried, and at most it was an irregularity to be reached by motion, and is not brought up by an appeal from the judgment simply.

We think the judgment should be affirmed.

(All concur.)

(102 N. Y. 702)

O'CONNOR v. COUZEN.

(Court of Appeals of New York. June 1, 1896.)

INTOXICATING LIQUORS—CIVIL DAMAGE ACT—LAWS 1873, CH. 646—EVIDENCE NECESSARY TO SUSTAIN ACTION.

Where it is shown that defendant kept a liquor store; that he knew plaintiff's husband to be a regular drunkard; never sober in his place; and plaintiff testifies that she saw her husband drinking liquor in defendant's place with persons named; that he was "beastly drunk," and brought home, etc.; that she requested defendant not to sell, which he continued to do; and that her husband struck her, and failed to support her,—makes out a case sufficient to require a submission to the jury, even though defendant denies each charge, as the jurors are not bound to believe him.

N. C. Moak, for appellant, Lawrence Couzen.

Chas. J. Patterson, for respondent, Mary O'Connor.

DANFORTH, J. It is now contended by the appellant that there is no evidence that O'Connor drank intoxicating liquor on defendant's premises, or, if he did, that it intoxicated him, or was the cause of legal damage to the plaintiff, and hence that the defendant is not liable under the provisions of "the act to suppress intemperance, pauperism, and crime," (Laws 1873, c. 646,) on which this action is founded. The same propositions were submitted to the trial court. At the close of the plaintiff's case, and again at the close of the entire testimony, a motion was made to dismiss the complaint. It was denied; and an exception then taken is the only one presented by the record. That the

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defendant kept a liquor store during the time in question; that he knew O'Connor to be a regular drunkard; that he had seen him in his place many times, and never sober,—was his own testimony. The plaintiff testified that in February or March, 1880, she saw her husband drinking liquor in the defendant's place, with persons whom she knew and named; that he was afterwards, "beastly drunk," brought home by one of those persons and another; that she saw him in the defendant's saloon repeatedly, naming several instances, drinking ale "and pretty drunk;" and upon other occasions drinking liquor sometimes, and sometimes ale; that she repeatedly spoke to the defendant, requesting him not to sell her husband liquor; that he disregarded her requests; that after these occasions her husband struck and otherwise abused her, and failed to render her support or contribute to it. The defendant denies that he sold or gave to O'Connor any liquor or intoxicating drink. He denies, also, that he was notified by the plaintiff not to sell her husband liquor. He goes so far as to say that upon one occasion when O'Connor tendered money with which to pay for liquor he refused it.

If the jury believed the defendant's testimony, a verdict against him would have been impossible. They were not bound to believe him; their verdict shows they did not. The evidence was sufficient to require a submission of the question as one which might be answered in favor of the plaintiff.

Other propositions have been argued by the learned counsel for the appellant, but they are founded upon no exception, and therefore permit no consideration upon this appeal.

We think it plain that the judgment should be affirmed.

(All concur.)

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(107 Ind. 307)

**JUNE and others v. PAYNE and others.<sup>1</sup>**

(*Supreme Court of Indiana. June 3, 1886.*)

**1. APPEAL—WHEN OPERATES AS A STAY.**

An appeal prayed for in term-time, and perfected within the time limited, suspends all further proceedings under the judgment; but an appeal in vacation, without bond, does not operate as a stay.

**2. REPLEVIN—BOND—ACTION UPON—RETURN OF PROPERTY—MITIGATION OF DAMAGES.**

In an action upon a replevin-bond given to retain the possession of property, the return of the property, after the commencement of the action, may be considered in mitigation of damages.

Appeal from Montgomery circuit court.

*Kennedy & Kennedy* and *Ristine & Ristine*, for appellants.

*Wright & Seller*, for appellees.

**NIBLACK, J.** The facts upon which this case rests may be briefly stated as follows: In July, 1881, David June, Erastus B. French, and Robert Brayton, the plaintiffs below, and appellants here, commenced an action against John F. Payne, Benjamin M. Payne, and John P. Payne, in the court below, to recover the possession of a portable engine

<sup>1</sup>Rehearing denied, 3 N. E. 556.

made by Y. D. June & Co., of Fremont, Ohio; and, to enable the defendants in that action to retain the possession of the engine pending the action, the said Benjamin M. Payne, as principal, and Thompson Davis, Martin Sarvies, David Vancleve, and Asbury T. Hicks, as his sureties, afterwards, on the twentieth day of July, 1881, executed a bond to the plaintiffs in the penal sum of \$1,000, conditioned that if the said obligors should safely keep such engine, and in nowise injure the same, and should deliver said engine to the plaintiffs, or to the sheriff of Montgomery county, in the event that judgment should be rendered for the return thereof, such bond should be void. On the twenty-seventh day of May, 1882, the plaintiffs in that action recovered a judgment against the defendants for the possession of the engine, and for the sum of \$600 in case a return of the engine could not be had. The defendants at the time prayed an appeal to the supreme court, and 30 days' time was given within which they might file an appeal-bond in the penal sum of \$1,000, to the approval of the clerk. Such a bond was filed within the time limited, and approved by the clerk, but a transcript of the proceedings appealed from was not filed in the supreme court until the third day of May, 1883. Pending the appeal in this court no *supersedeas* was issued, and no proceedings were taken for the enforcement of the judgment appealed from; both parties seemingly awaiting a final decision upon the appeal before taking further action concerning the matters in controversy. On the first day of November, 1883, the judgment of the court below was affirmed. See *Payne v. June*, 92 Ind. 252. Some time near the last day of that month one of the defendants to the judgment thus affirmed met one of the plaintiffs' attorneys on the street in the city of Crawfordsville, and, informing him that he was ready to make return of the engine, inquired as to whom he should deliver it; whether to him, the attorney, or to the plaintiffs, at Fremont, Ohio. To this inquiry the attorney replied that he did not want the engine; that he preferred to have the money,—the engine being at that time five or six miles away in the country. A few days later, that is to say, on the fifth day of December, 1883, the plaintiffs, June and others, commenced this action against Benjamin M. Payne, and his sureties upon the bond executed by them, as hereinabove stated, for their alleged failure to make return of the engine in accordance with the stipulations of that bond. On the tenth day of the same month the defendants in this action brought the engine to the city of Crawfordsville, and delivered it to the sheriff of Montgomery county.

The defendants thereafter answered in four paragraphs: *First.* That an appeal had been prayed in term-time from the judgment for the recovery of the engine; that the appeal had been perfected by the execution of a proper appeal-bond, and the filing of a transcript in the supreme court; and that such appeal was pending and undetermined when this action was commenced. *Second.* That the judgment for the recovery of the engine had been appealed from as above set forth, and that, while such appeal was still pending, they had returned the engine described in the bond to the sheriff of Montgomery county. *Third:*

That an appeal had been taken, as above stated, and that, immediately after the judgment appealed from was affirmed, they, the defendants, tendered back the engine to the attorneys for the plaintiffs, who refused to receive the same, whereupon they delivered said engine to the sheriff of Montgomery county. *Fourth.* That an appeal had been prayed and taken as stated in the first paragraph herein, but without averring that such appeal was still pending and undisposed of. A demurrer was sustained to the second paragraph, and overruled as to the remaining paragraphs, of the answer. Issue. Trial by jury, and verdict for the plaintiffs, assessing their damages at \$35.20. Answers to special interrogatories respectively submitted to the jury found the facts to be substantially as hereinabove stated, and showed that the amount of the damages assessed by the general verdict was for costs due upon the original judgment. The plaintiffs thereupon moved for judgment in their favor, upon the answers to the special interrogatories, for the sum of \$600, the adjudged value of the engine, with interest, including also the amount of costs due upon the original judgment; but that motion, as well as a motion for a new trial, was overruled, and judgment was rendered for the amount of the damages assessed by the general verdict.

The plaintiffs appealing assign error upon the overruling of their demurrer to the first, third, and fourth paragraphs of the answer, upon the overruling of their motion for judgment upon the answers to special interrogatories, and upon the refusal of the circuit court to grant them a new trial.

We see no objection to the sufficiency of the first and third paragraphs of the answer. An appeal prayed for in term-time, and perfected within the time limited by the court, suspends all further proceedings under the judgment appealed from, and a return of the engine to the sheriff was a performance of the principal condition of the bond. Wells, Repl. § 426.

As to the sufficiency of the fourth paragraph of the answer we need not inquire, since, upon the whole case, we regard the question of its sufficiency as of no practical importance at the present hearing. The evidence, supplemented by the answers to the special interrogatories, showed affirmatively that the plaintiffs were not injured by the overruling of the demurrer to that paragraph. It was thus made to appear that no such an appeal as that relied upon in defense by the first and fourth paragraphs of the answer was in fact taken, and that the appeal which was afterwards consummated was an appeal in vacation, without bond, and consequently without any stay of proceedings. *Burk v. Howard*, 15 Ind. 219.

The important, and indeed controlling, questions at the trial were—*First*, were the defendants guilty of unreasonable delay in offering to return or in returning the engine? *Secondly*, could the return of the engine after the commencement of this action be taken into consideration in mitigation of the damages?

It is true that, in cases of this kind, the property must be returned in as good order as when received under the bond, and within a reasonable



time after a return has been awarded, and that, too, without a demand for its return. Wells, Repl. §§ 419-423, both inclusive. But what is a reasonable time must, to a considerable extent, depend upon the circumstances attending each particular case. In the case before us there was evidence tending to show that there was an implied understanding that no measures would be taken to enforce the penalty of the bond, or to disturb the *statu quo*, until there was a final decision of this court upon the appeal taken in the replevin suit. There was also evidence tending to prove that from the first the plaintiffs did not desire a return of the engine, but preferred to abide the course of events in this court, and, if practicable, to eventually recover the value of the engine in money. This was in part well illustrated by the refusal of one of their attorneys to give any directions concerning the return of the engine only a few days before this action was commenced. Then, a petition for a rehearing, which had been filed in the cause, was not overruled until the twelfth day of December, 1883, seven days after the institution of this action, and two days after the engine was returned to the sheriff. There was evidence, therefore, which justified the jury in coming to the apparent conclusion that there had been no unreasonable delay in returning the engine.

Having reached this conclusion, the jury were further justified in taking the return of the engine into consideration in mitigation of the damages. *Schrader v. Walfin*, 21 Ind. 238; *Story v. O'Dea*, 23 Ind. 326; Wells, Repl. §§ 457, 458. It was also proven that the engine was in as good condition when it was returned as it was when the bond in suit was executed. We have consequently no reason for concluding that the general verdict was not substantially right upon the evidence.

The judgment is affirmed, with costs.

(107 Ind. 32)

### OHIO & M. Ry. Co. v. COSBY and others.

(*Supreme Court of Indiana. June 4, 1886.*)

#### 1. HUSBAND AND WIFE—ACTION—COMPLAINT—CAUSE OF ACTION IN ALL PLAINTIFFS.

While, as a general rule, a complaint, to withstand a demurrer, must show a cause of action in all the plaintiffs, an exception occurs where the plaintiffs are husband and wife, and the action is to recover damages for injury to the person or character of the wife.

#### 2. DAMAGES—MEASURE OF, IN ACTION BY HUSBAND AND WIFE FOR PERSONAL INJURIES TO WIFE.

In an action by the wife, in which her husband joins, to recover for injury to her person, the jury cannot include in their assessment damages caused the husband which he might recover in a separate action.

#### 3. SAME—WHEN DAMAGES MAY BE GIVEN FOR PERMANENT DISABILITY—INSTRUCTION.

To justify the assessment of damages, in such case, for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of.

#### 4. EXCEPTIONS—BILL OF EXCEPTIONS—FAILURE OF JUDGE TO SIGN IN TIME—EFFECT.

If a proper bill of exceptions is presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit.

Appeal from Dearborn circuit court.

*H. D. McMullen*, for appellant.

*O. F. Roberts* and *Roberts & Stapp*, for appellees.

MITCHELL, J. Lizzie Cosby and her husband joined in a complaint against the Ohio & Mississippi Railway Company to recover damages for an alleged injury to the wife. The complaint charges that Mrs. Cosby, having taken passage on one of the railway company's trains, arrived at Aurora, her place of destination, and, having left her seat, and stepped upon the first step leading from the rear platform of the car in which she had been seated, while waiting there for the train to stop, the conductor carelessly and negligently seized her by the arm, and, with force, while the train was in motion, without fault on her part, pulled her violently onto the platform of the depot. Damages in the sum of \$5,000 are alleged to have accrued to the wife on account of internal injuries sustained by the misconduct of the conductor. A demurrer was overruled to the complaint, after which, upon issue joined, the cause was tried to a jury, with the result that a verdict and judgment were rendered for the plaintiff.

The ruling on the demurrer is complained of. The appellant contends, the husband having joined his wife in suing for a personal injury to the latter, that, as the complaint stated no cause of action in favor of both, the demurrer for want of sufficient facts was well taken. The general rule is, as the appellant argues, that a complaint, to withstand a demurrer, must state a cause of action in favor of all the plaintiffs. *Holman v. Hibben*, 100 Ind. 338; *Darkies v. Bellows*, 94 Ind. 64; *Parker v. Small*, 58 Ind. 349. An exception occurs where, as in this case, the plaintiffs are husband and wife, and the action relates to injuries to the person or character of the latter. In such cases, while it is not necessary, it is not improper, to join the husband. *Hamm v. Romine*, 98 Ind. 77; *Roller v. Blair*, 96 Ind. 203; *Rogers v. Smith*, 17 Ind. 323.

The complaint was to recover for the personal injuries sustained by the wife. It embraced no cause of action in favor of the husband. It was, nevertheless, under the authorities cited, not subject to demurrer on that account. That the wife might have maintained an action in her own name, without joining her husband, as provided in section 5131, Rev. St. 1881, does not alter the case. That a different rule is held by some of the courts may be conceded. *Michigan Cent. R. Co. v. Coleman*, 28 Mich. 440, and cases cited. There was no error in overruling the demurrer to the complaint.

The correctness of the following instruction given by the court is next called in question.

"If you find for the plaintiffs, then you will determine from the evidence the amount the plaintiffs are entitled to recover, not exceeding, however, the amount demanded in the complaint; and, in estimating the damages, if any are proved, you should take into consideration the injury inflicted upon the plaintiff Lizzie Cosby; the pain and suffering undergone by her in consequence of her injuries, if any are proved; and also any permanent injury sustained by her, if the jury believe from the evidence that the said plaintiff

has sustained permanent injury from the wrongful acts complained of; and also the expense of medical attendance, if any, and for loss of time occasioned by said injuries, if any is shown by the evidence."

This instruction proceeded upon the erroneous assumption that the jury were authorized to include in their assessment the damages recoverable by the husband, as well as those which the wife might recover for her separate use. This was a fatal error. Presumptively the husband was entitled to maintain a separate action to recover for medical attendance, loss of service, and of the society of his wife. He could not recover for these in an action in which his wife was suing for injuries to her person, nor could such damages be recovered by them jointly. It was equally impossible, as the complaint was framed, for the wife to recover for medical attendance or loss of time. Her right was limited to recover for the injuries to her person, including pain, anguish of mind, and all such other damages as were not presumptively injuries to the husband. *Long v. Morrison*, 14 Ind. 595; *Fuller v. Railroad Co.*, 21 Conn. 557; *Baltimore, etc., Ry. Co. v. Kemp*, 61 Md. 74; *Cregin v. Railroad Co.*, 75 N. Y. 192; 2 Woods, Rys. 1245.

In Iowa, by statute, in a suit by a husband and wife for injuries to the wife, the husband may join thereto claims in his own right. *McDonald v. Railroad Co.*, 26 Iowa, 124.

In support of the charge under consideration it is plausibly argued that, inasmuch as, under the statute of 1881, a married woman has power to incur liability for medical attendance, and since she has the right to the profits of her own labor, such attendance and loss of time constituted proper elements of damage in her favor. That the situation of a married woman might be such that in an action for an injury to her person she might also recover for medical attendance, and for loss of time, may be conceded; but, to warrant such a recovery, some special circumstance rebutting the presumptive right of the husband must be averred and proved. No claim is made of any such averments or proof.

The appellant requested the court to instruct the jury that, in order "to justify the assessment of damages for future or permanent disability, it must appear that continued or permanent disability is reasonably certain to result from the injury complained of." This was a proper instruction. In *Cleveland, C. & I. R. Co. v. Newell*, 104 Ind. 264-277, S. C. 3 N. E. Rep. 836, it is said the jury may "take into consideration all the consequences of the injury, future as well as past, when the proof before them renders it reasonably certain that future loss and suffering are inevitable." That an injury may possibly result in permanent disability will not warrant the assessment of damages for a possible disability, unless it is also reasonably certain to follow.

Rulings of the court having relation to the propriety of certain hypothetical questions propounded on both sides are presented for consideration. As these rulings involve the frame of the particular questions, rather than any principle, and as we think it scarcely possible that questions of that character could assume the same shape on a second trial, we do not consider them.

For obvious reasons the ruling of the court on the motion for a new trial for newly-discovered evidence is not considered.

It only remains that we notice the insistence of appellee based on *La Rose v. Logansport Nat. Bank*, 102 Ind. 342, S. C. 1 N. E. Rep. 805, to the effect that the bill of exceptions containing the evidence and instructions of the court is not in the record. The case under consideration is distinguishable from that relied upon. Besides, it may be considered that the case cited and relied upon is explained, and in a degree modified, by *Robinson v. Anderson*, 6 N. E. Rep. 12, where it is held that, if a proper bill of exceptions is prepared and presented to the judge within the time allowed, his delay in signing and causing it to be filed will not deprive the party of its benefit. Within this rule the bill of exceptions is properly in the record.

For the reasons given the judgment is reversed, with costs.

(106 Ind. 589)

SHANNON v. HAY.

(*Supreme Court of Indiana. June 4, 1886.*)

1. MORTGAGE—FORECLOSURE—SALE—LAND MORTGAGED TO STATE—HOW TO BE OFFERED BY AUDITOR.

Upon the sale by a county auditor of land mortgaged to the state for the use of a township, it is sufficient to ask if any one will pay the amount due, and take a less quantity than the whole of the land, without offering any specific part.

2. SAME—ACTION TO SET ASIDE VOID SALE AND CONVEYANCE—PURCHASE MONEY MUST BE PAID OR TENDERED.

A party whose mortgage debt has been paid by the purchase of property at a void sale cannot have the sale and conveyance set aside without payment or tender to the purchaser of the amount paid by him.

Appeal from Vigo circuit court.

*Pierce & Harper*, for appellant.

*James T. Pierce, N. G. Buffs*, and *H. J. Baker*, for appellee.

Howk, C. J. Appellant, Shannon, the defendant below, assigned as error upon the record of this cause that the trial court had erred in its conclusion of law upon its special finding of facts. The facts found specially by the court were, in substance, as follows:

The appellee, Hay, on January 13, 1865, made the following note and mortgage to the state of Indiana, to-wit, (here follows what purports to be the copy of a mortgage executed by Hay to the state of Indiana, for the use of congressional township 10 N., range 9 W., of Vigo county, of a tract of land of the same description as that given in Hay's complaint herein,) to secure the payment of \$300, with interest at the rate of 8 per cent. per annum in advance, according to the conditions of the note thereto annexed, and what purports to be a copy of such note. Appellee paid interest on such note and mortgage from 1865 to 1872, inclusive, to-wit, \$21 each year, and from 1873 to 1876, inclusive, to-wit, \$24 each year; and such annual payments of \$24 were made at the request of the county treasurer and auditor, without any special contract, in writing or otherwise, for him so to do. Appellee failed to pay the interest for 1877, 1878, and 1879. The county auditor advertised the land in controversy, together with other tracts of land belonging to other parties, all in the same notice, in the *Terre Haute Gazette*, as follows, (giving

a copy of the notice.) The only proof that the notices were posted in the township in which the land was situate was the following certificate of Louis Hay, then the sheriff of Vigo county, but since dead, who was requested to post such notices by the then auditor of Vigo county, (setting out what purports to be a copy of such sheriff's certificate.) Newton Rogers, treasurer of Vigo county, made the following certificate, which was signed by him and the auditor of such county, and recorded in the auditor's office, and filed in the treasurer's office, (here follows what purports to be a copy of such certificate.) Before the commencement of this suit, appellee did not make, nor has he made at any time since, any tender of the amount due on such note and mortgage. The tract of land so mortgaged contained 152 acres, consisting of three "full forties" and a "fractional forty" in the north-west quarter of section 20, township 13, range 9 W., in Vigo county, Indiana, and was of the value of \$5,000. The county auditor offered such land, as follows: "Who will take the whole tract, and pay the sum of \$348 therefor?" and Patrick Shannon bid the sum of \$355 for the whole tract. The auditor then said: "Who will take a less quantity than the whole tract, and pay the amount due on such note and mortgage?" No one offering to take a less quantity than the whole tract, the whole tract was then offered; and, Patrick Shannon bidding \$355, the whole tract was struck off to him for such sum of \$355, which sum he paid to the county treasurer, and took his receipt therefor. Such land was susceptible of division, and might have been sold in parcels, without injury to the whole; and the land was not offered in parcels except as aforesaid. The county auditor, after having executed the following deed to Patrick Shannon, recorded the same in the proper order-book of the county commissioners, and afterwards delivered the same to said Patrick Shannon, (here follows what purports to be a copy of such auditor's deed to Patrick Shannon.)

Upon the foregoing facts the court stated, as its conclusion of law, that the sale of such land was illegal and void; the land not having been offered in parcels, as required by law.

Did the trial court err in its conclusion of law upon the facts specially found? We are of opinion that this question must be answered in the affirmative. This is not a case where the officer selling the land is required to offer and sell the land in separate and distinct parcels; unless, indeed, it appears on the face of the mortgage that several separate and distinct parcels or lots of land are described therein. In this latter case the statute expressly requires that the auditor shall elect, in advance of the sale, which one of the several lots or tracts shall be first sold. "saving to the mortgagor, if practicable, the tract on which his house is located;" and in such case, of course, the auditor must sell in parcels. *Benefiel v. Aughe*, 93 Ind. 401; section 4392, Rev. St. 1881. In the case in hand, however, the land in controversy was described as an entirety, or as one single tract or lot, in appellee's mortgage to the state, as follows: "That part of the north-west quarter of section 20, in township 13 north, of range 9 west, which lies south of the road leading to Durkee's ferry." In such a case, while the statute contemplates the sale of a less quantity than the whole tract if any one will pay the amount due on the note and mortgage for such less quantity, yet it is clear, we think, that the auditor is not required to offer any certain or specific less quantity or parcel of the whole tract, because the statute expressly provides that, where a less quantity than the whole tract is bid

for by one who will pay therefor the entire amount due, "such quantity shall be taken in a square form, as nearly as possible, off of the north-westerly corner of said tract." Section 4392, *supra*; *Bonnell v. Ray*, 71 Ind. 141.

The facts found by the court in this case show, we think, that the land in controversy was offered and sold by the auditor of Vigo county, in so far as the mode of crying the sale is concerned, in substantial compliance with the requirements of the statute. Therefore it follows that the court erred in its conclusion of law, and for this error the judgment below must be reversed. The facts of the case have been so imperfectly found, and so many matters of evidence merely, in lieu of the facts which such evidence would possibly tend to prove, are erroneously set out in the special finding of facts, that we cannot remand the cause, with instructions to state other conclusions of law upon such special finding, but must instead remand the same for a new trial.

Besides, the appellee has sued in this case to have his title to the land in controversy quieted, as against appellant, by the decree of the court. When, therefore, the trial court found, as it did, that the appellee had never, at any time before or since the commencement of his suit, paid or tendered to appellant the amount paid by him in satisfaction of appellee's note and mortgage, and interest thereon, we are of opinion that the court ought to have promptly dismissed the suit at appellee's costs. For, however erroneous the auditor's sale and conveyance of the land to appellant may possibly have been, it is certain that such sale and conveyance resulted in the payment by appellant of appellee's note and mortgage to the state for the use of its school fund. In such case, even though such sale and conveyance were illegal and void, the appellee cannot be heard in a court of equity to ask that such sale and conveyance be set aside and declared void until it appears that he has first done, or offered to do, what equity requires of him, namely, the payment or tender to appellant of the amount paid by him as aforesaid in satisfaction of appellee's note and mortgage. This is the doctrine declared in many of our cases which cannot be distinguished in principle from the case in hand. *Harrison v. Haas*, 25 Ind. 281; *McWhinney v. Brinker*, 64 Ind. 360; *Lancaster v. Du Hadway*, 97 Ind. 565; *Rowe v. Peabody*, 102 Ind. 198; S. C. 1 N. E. Rep. 353.

The judgment is reversed, with costs; and, appellant's death having been suggested, upon the petition of Thomas A. Anderson, administrator of such decedent's estate, he is substituted as the appellant in this cause, and this judgment is rendered in his favor.

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(106 Ind. 562)

FRAZIER v. STATE.

(*Supreme Court of Indiana*. June 5, 1896.)

CRIMINAL LAW—REVIEW OF JUDGMENT.

Section 615, Rev. St. 1881, providing for a review of judgment upon complaint, does not apply to a criminal case.

Appeal from Decatur circuit court.

*J. S. Scobey*, for appellant.

*The Attorney General*, for appellee.

MITCHELL, J. The record presents this single question: Does section 615, Rev. St. 1881, which provides, in substance, that any person who is a party to a judgment may, at any time within one year, file, in the court in which such judgment was rendered, a complaint for its review, apply to a criminal case?

The appellant was indicted for murder in the first degree. He appeared in the Decatur circuit court on the seventeenth day of February, 1882, and, upon a plea of guilty, was sentenced by the court to imprisonment for life. On the first day of March, 1886, he filed a complaint for a review of the judgment; alleging as error apparent upon the face of the record that the court was not authorized to assess punishment in such a case without the intervention of a jury. The court sustained a demurrer to the complaint, and the question above stated is now before us on appeal.

The offense with which the appellant was charged, was one for which he might have been capitally punished. It was therefore not competent for him to waive a trial by jury, nor was the court authorized, without the intervention of a jury trial, to assess his punishment. *Wartner v. State*, 102 Ind. 51; S. C. 1 N. E. Rep. 65; *Lowery v. Howard*, 103 Ind. 440; S. C. 3 N. E. Rep. 124. The proceedings were erroneous, and, upon appeal within the time prescribed, would doubtless have been reversed. It does not follow that a bill of review will lie under the Code of Civil Procedure. The Civil Code cannot be resorted to for a remedy in a criminal case. Provision for reserving exceptions, and for the review of decisions and orders of the court, made in the progress of criminal trials, is found in the Criminal Code. By its provision a review may be had by an appeal to this court. This, no other having been provided, must be deemed to be exclusive of all other means for obtaining a review in a criminal case.

In case of a common-law right which has not been supplanted or abrogated by statute, and for obtaining which no statutory method has been provided, resort may be had to the common-law remedy, so far as it is applicable, as in *Sanders v. State*, 85 Ind. 318. Since, however, the Criminal Code, as we have seen, furnishes an adequate remedy for the review of decisions in criminal cases, it alone must be looked to for guidance on that subject. *Well's Case*, 2 Greenl. 322; *People v. Carnal*, 6 N. Y. 463; *People v. Clark*, 7 N. Y. 385; Bish. Crim. Proc. § 1401.

Judgment affirmed, with costs.

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(106 Ind. 425)

STATE v. PORTSMOUTH SAV BANK.

(*Supreme Court of Indiana*. May 24, 1886.)

1. PUBLIC LANDS—SWAMP LANDS—TITLE OF STATE—BEAVER LAKE.

The swamp-land act of 1850 (9 U. S. St. at Large, 519) operated as a present grant to the state of Indiana of its swamp lands on being identified, and the

selection, by the state, of Beaver Lake lands, confirmed by the act of 1873, (17 U. S. St. at Large, 409,) perfected the title thereto, which relates back to the date of the original act of 1850.

2. **SAME—NO AUTHORITY TO SELL UNTIL SURVEYED, SELECTED, AND DESCRIBED.**  
Under the acts for the disposal of swamp lands, (Acts 1851, p. 110, and Acts 1852, 1 Rev. St. 1876, p. 952,) none of such lands could be sold until surveyed and selected and described as swamp lands.
3. **SAME—PUBLIC OFFICERS—AUTHORITY TO DISPOSE OF STATE'S LAND MUST BE CONFERRED BY STATUTE.**  
Public officers have no authority to dispose of the state's land, except such as is conferred upon them by positive statute.
4. **SAME—BEAVER LAKE.**  
The state officers, having no authority to sell the bed of Beaver lake directly, the same being unsurveyed and unplatted, could not do it indirectly by selling the border lands, which were surveyed and platted.
5. **SAME—ESTOPPEL—STATE NOT ESTOPPED TO ASSERT TITLE TO BEAVER LAKE LANDS—STATUTE OF LIMITATIONS.**  
The state, having the title, is not estopped to assert it as to the even-numbered lots in Beaver lake, by accepting and approving a deed to the odd-numbered lots in settlement of a claim; nor by assessing and collecting taxes thereon; nor by allowing improvements to be made, the title being equally open to the notice of all parties; nor has the state lost its rights by reason of the statute of limitations.
6. **STATE—WHEN BRINGS SUIT, TREATED AS ANY OTHER SUITOR.**  
Although the general rule is that the state cannot be sued, yet when it goes into court of its own accord it must be treated as any other suitor, and a cross-complaint may be filed against it.<sup>1</sup>

Appeal from Newton circuit court.

*Francis G. Hord and Julian & Julian*, for appellant.

*Baker, Hord & Hendricks, S. P. Thompson, and E. L. Winston*, for appellee.

ZOLLARS, J. Beaver lake is situated in Newton county, some four miles south of the Kankakee river. In 1850, and for a few years thereafter, the lake was a body of water covering about 17,000 acres of land, and averaging from five to seven miles in length, and from two to four miles in width. There was eight feet of water at the deepest place. From this place the water gradually became more shallow until at the margins it was not over a couple of inches deep. There was an island in the lake of about 100 acres, on about 40 acres of which there was growing timber, the balance being marshy. The lake was surrounded on all sides by swamp lands. These lands so bordering on the lake had been surveyed and platted, and were subject to private entry. In making the survey, the same was extended around the lake to its margins, and a meandering line established. No part of the lake had been, nor has it been, surveyed; its whole interior, except the island, having been covered with water. Pursuant to an act of congress passed on the twenty-eighth day of September, 1850, known as the "Swamp-land Act," these border lands, by a proper designation, were patented to the state. After receiving the patents for these lands, and before selling any of them, the state surveyed and located a ditch to drain the lake into the Kankakee river, which was some 40 feet lower than the lake.

<sup>1</sup>See note at end of case.



With the completion of the ditch, in the spring of 1854, the water was lowered, and so receded as to expose, upon an average, 40 feet of the bed of the lake around the margin. Commencing at the river, for three and three-fourths of a mile, the ditch was about 16 feet wide, and from 2 to 4 feet deep. Through a sand ridge near the margin of the lake the ditch was some 15 feet deep. The average width of the ditch is now about 50 feet, and the average depth is about 8 feet, except through the sand ridge, where it is 24 feet deep. This increased width and depth is mainly the result of the action of the water. The increased depth and width of the ditch has had the effect to more completely drain the lake.

On the twenty-first day of November, 1853, the state conveyed, by patent or patents, to John P. Dunn and Amsi B. Condit the swamp lands surrounding and adjacent to the lake. The conveyance or conveyances described the border land by government subdivisions, and did not, in terms, include any of the unsurveyed bed of the lake. They took possession of and commenced paying taxes on said marginal tracts. On the thirteenth day of December, 1856, Dunn and Condit conveyed the same real estate to Michael G. Bright.

The state claims, and by this action seeks to recover, a portion of the bed of the lake, which appellee claims to own as a remote grantee of Bright. Appellee resists the claim of the state, and, among other contentions to be hereafter noticed, insists—*First*, that the swamp-land act of congress, *ex proprio vigore*, carried to the state the title to the bed of Beaver lake; *second*, that the conveyance of the border lands by the state to Dunn and Condit carried the bed of the lake, and the island in the lake.

As appellee's title, upon either of its theories, is dependent upon the title that the state may have had, it becomes necessary to ascertain when and how the state became the owner of the bed of the lake. The act of congress of September 28, 1850, known as the "Swamp-land Act," is as follows:

"Be it enacted, that, to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said state.

"Sec. 2. And be it further enacted, that it shall be the duty of the secretary of the interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the state of Arkansas, and, at the request of said governor, cause a patent to be issued to the state therefor; and on that patent the fee-simple to said lands shall vest in said state of Arkansas, subject to the disposal of the legislature thereof: provided, however, that the proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of the levees and drains aforesaid.

"Sec. 3. And be it further enacted, that, in making out a list and plats of the land aforesaid, all legal subdivisions the greater part of which is 'wet and unfit for cultivation' shall be included in said list and plat; but, when

the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

"Sec. 4. And be it further enacted, that the provisions of this act be extended to, and their benefits be conferred upon, each of the other states of the Union in which such swamp and overflowed lands, known and designated as aforesaid, may be situated." 9 U. S. St. at Large, 519; 1 G. & H. 737.

There are many decisions by the different courts of the land interpreting the above act. They are not all in harmony, nor is the reasoning in all of them very explicit or satisfactory. There is a line of decisions, supported by plausible arguments, holding that the title to the swamp lands remained, and still remains, in the United States, and did not and has not passed to the states, except as the lists and plats have been made and approved by the secretary of the interior, and, as held in some of them, patents issued, as provided in sections 2 and 3 of the act. *Wright v. Roseberry*, 68 Cal. 252; *Grantham v. Atkins*, 63 Ill. 359; *Thompson v. Prince*, 67 Ill. 281; *Stephenson v. Stephenson*, 71 Mo. 127.

It is proper to observe here that the supreme court of Illinois has abandoned the doctrine of the cases above cited; following, in later cases, what that court conceived to be the holding of the supreme court of the United States. *Keller v. Brickley*, 78 Ill. 133. It is not certain that this case does not go beyond the holdings by the United States supreme court. See, also, *Bristol v. County of Carroll*, 95 Ill. 84. The earlier ruling in Illinois seems to be in harmony with the later cases above cited. See *Whiteside Co. v. Burchell*, 31 Ill. 68.

On the other hand, it seems to have been held in some of the cases that the swamp-land act, *ex proprio vigore*, passed to the states the fee-simple title to all the swamp lands, without any segregation or patent. In the case of *Fore v. Williams*, 35 Miss. 533, it was held that the swamp-land act, from its passage, vested the absolute title in the state to all the swamp lands as fully and completely as if the act had designated the lands by specific description; that nothing further was necessary to enjoy the grant but to locate the lands as swamp lands, and thereby render the subject of the grant certain; and that such location was the sole purpose of the second section of the act.

Some of the cases hold that, while the swamp-land act of 1850 operated as a present general grant to the states of the swamp lands therein situated, yet, without the selection of the lands as such, and the approval of such selection by the secretary of the interior as provided in the second and third sections of the act, the state acquires no title to any particular tract that they could or can convey to a purchaser. *Daniel v. Frazer*, 40 Miss. 507. This case interprets the case of *Fore v. Williams*, *supra*, as so holding. Others, not going quite so far, hold that, while the swamp-land act made a grant *in presenti*, and vested the title in the states to all the lands coming within the description, and that when they are properly designated and ascertained the grant relates to the date of the act, yet the state cannot convey title to any particular tract until it has been properly selected as swamp land, and the selection approved by the secretary of the interior. *Hendry v. Willis*, 33 Ark. 833; *Fletcher*

v. *Pool*, 20 Ark. 100. Other cases hold that the swamp-land act operated, *ex proprio vigore*, to convey the title to the swamp lands to the states; that the selection and patent under sections 2 and 3 of the act are necessary only for the purpose of fixing the location and description, and that the states may provide for the disposal of such lands before they have been selected or patented. *Allison v. Halfacre*, 11 Iowa, 450.

In the case of *Iowa R. Land Co. v. Antoine*, 52 Iowa, 429, S. C. 3 N. W. Rep. 468, the plaintiff claimed title under a railroad grant, and introduced in evidence the commissioner's certificate approved by the secretary of the interior. It was held that parol evidence was not admissible, in behalf of the defendant having no evidence of title, to impeach the plaintiff's title, by showing that the land was in fact swamp land, and hence passed under the prior swamp-land grant.

In the case of *Railroad Co. v. Fremont Co.*, 9 Wall. 89, it was held that, after the passage of the swamp-land act, the only important steps to be taken to perfect the title in the states were the ascertainment and designation of the several subdivisions which fell within the description of swamp lands as defined in the third section of that act, and that this duty was cast upon the secretary of the interior, as the head of the land department of the government.

In the case of *Railroad Co. v. Smith*, 9 Wall. 95, in speaking of the swamp-land act, it was said: "Now, here is a present grant by congress of certain lands to the states within which they lie; but it is by a description which requires something more than a mere reference to their townships, ranges, and sections." In that case it was held, by a divided court, that the swamp lands in a state were not covered and carried by a subsequent grant to a railroad company which excepted from its operation "all lands heretofore reserved by any act of congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatever," and that parol evidence might be resorted to for the purpose of showing that a particular tract of land was swamp land, within the meaning of the swamp-land act, and hence not covered nor carried by the railroad grant; the secretary of the interior not having made nor approved of the plat designating the land as swamp land. Upon this branch of the case the court said:

"By the second section of the act of 1850 it was made the duty of the secretary of the interior to ascertain this fact, [that the land was swamp land,] and furnish the state the evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend upon his action, but on the act of congress, and, though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the state to them could not be defeated by that delay."

In speaking of the former case of *Railroad Co. v. Fremont Co.*, *supra*, it was said:

"In the former case, the plaintiff, claiming under the swamp-land grant, was bound to establish his title by such evidence as congress may have determined to be necessary to make the title complete in the state, or grantee

of the state, to which the lands were supposed to be granted; otherwise the plaintiff established no legal title. In the present case it is not necessary, to defeat the title under the railroad grant, to show that all the steps prescribed by congress to vest a complete title in defendant, under the swamp-land grant, have been taken. It is sufficient to show that this land, which is now claimed under the railroad grant, was reserved out of that grant; and this is done whenever it is proved by appropriate testimony to have been swamp and overflowed land as described in the act of 1850."

What was said in this case, of course, should be limited to the case before the court. It has been so limited by subsequent decisions by that court.

In the case of *French v. Fyan*, 93 U. S. 169, it was said:

"This court has decided more than once that the swamp-land act was a grant *in presenti*, by which the title to those lands passed at once to the state in which they lay. \* \* \* The patent, therefore, which is the evidence that the lands contained in it had been identified as swamp-lands under the act, relates back, and gives certainty to the title of the date of the grant."

In speaking of the duty devolved upon the secretary of the interior by the second section of the swamp-land act, it was further said:

"We are of the opinion that this section devolved upon the secretary, as the head of the department which administered the affairs of the public lands, the duty, and conferred on him the power, of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

It was accordingly held that parol evidence could not be heard to show that the lands selected and patented by the secretary of the interior as swamp-lands were in fact not such.

In the case of *Martin v. Marks*, 97 U. S. 345, in speaking of the procuring of evidence of title in the states to the swamp-lands granted by the swamp-land act, it was said:

"We also held in previous cases that when this was ascertained, and the lands were identified, by proper authority, the title related to the date of the grant, namely, September 28, 1850, and superseded any subsequent grant or evidence of title issuing from the United States."

This language, again, must be limited to the case before the court. The case involved the swamp-land act and the act of 1857, which was an act providing that the selection of swamp lands theretofore made and reported to the commissioner of the general land-office, so far as such lands remained vacant and unoccupied, and not interfered with by actual settlement under existing laws of the United States, should be confirmed and approved, and the lands so listed should be patented to the several states, in conformity with the provisions of the swamp-land act, as soon as practicable, etc. U. S. St. at Large, p. 251. In speaking of those acts it was said:

"The act of 1850 was a present grant, subject to identification of the specific parcels coming within the description; and the selections, confirmed by the act of 1857, furnished this identification, and perfected the title."

It was further said that, if any question had been made, it would probably have been necessary, in support of the title under the swamp-

land act, to prove that the list of the swamp lands was on file with the commissioner of the United States land-office at the time the act of 1857 was passed.

In the case of *Rice v. Sioux City & St. P. R. Co.*, 110 U. S. 695, S. C. 4 Sup. Ct. Rep. 177, the general statement was again made that the swamp-land act of 1850 operated as a grant *in presenti* to the states then in existence of all the swamp lands in their respective jurisdiction.

In the case of *Ehrhardt v. Hogaboom*, 115 U. S. 67, S. C. 5 Sup. Ct. Rep. 1157, the patent for a tract of land was issued under the pre-emption laws. The defendant, in order to overthrow this title under the patent, proposed to show by parol that the land was swamp land, and hence passed to the state under the swamp-land act of 1850. It was held that such evidence was incompetent; that it is the duty of the land department, of which the secretary of the interior is the head, to determine whether land patented to a settler is of the class subject to settlement under the pre-emption laws, and that his judgment as to this fact is not open to contestation in an action at law.

In the case of *Cuhn v. Barnes*, 7 Sawy. 48, S. C. 5 Fed. Rep. 326, one of the parties claimed the land under the swamp-land act, and the other under another grant from the state, and a patent from the government, based upon that grant. The material question in the case was whether the patent for the premises was conclusive evidence in the action that they belonged to the wagon-road grant, and not to the swamp-land grant. It was said:

"The swamp-land grant was a grant *in presenti* of all the swamp \* \* \* lands in the state; \* \* \* but the determination of what lands come within this category, and what do not, rests with the secretary of the interior, and his decision is final. \* \* \* The power to ultimately determine what land passes under the grant, as being wet and unfit for cultivation, rests with the secretary."

It was accordingly held that the patent was conclusive evidence at law that the premises were included in the wagon-road grant, and were therefore not swamp lands.—the latter conclusion being a necessary element of the former,—and that, therefore, parol evidence was not admissible to show that the lands were swamp lands.

In the case of *State v. Milk*, 11 Fed. Rep. 389, involving the lake in question here, GRESHAM, J., said:

"Section 2 of the swamp-land act provided that, if the greater portion of any subdivision was wet or overflowed lands, the whole subdivision should be embraced in the grant, and it was left to official discretion what, if any, of the subdivision surrounding a lake were within the grant. But there was no doubt as to the character of the bed of Beaver lake. It was overflowed land, and as such the title to it was vested in the state. This lake was indicated upon the government surveys and maps, and nothing remained to show that its bed was overflowed land within the meaning of the act."

The correct doctrine to be gathered from the foregoing cases, and especially from the decisions by the supreme court of the United States, which are authoritative upon the construction of federal statutes, seems to be the following: *First*. The swamp-land act of 1850, *ex proprio*  
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*vigore*, was a grant *in presenti* to the states of all the swamp lands therein situated. This proposition is further supported by the doctrine declared in the cases of *Schulenberg v. Harriman*, 21 Wall. 44; *Hall v. Pickering*, 40 Me. 548. *Second*. Whether or not any particular tract of land was or is swamp land, within the terms of the grant, was and is a question for the decision of the secretary of the interior. *Third*. His decision upon that question, when once made, is final and conclusive, and cannot be questioned nor overthrown by parol evidence. *Fourth*. It is not necessary that the decision of the secretary that any particular tracts of lands were or are swamp lands should be evidenced by a patent to the state; it is sufficient that the lands have been selected as such, and the selection approved by that officer. *Fifth*. When such selection has been approved by that officer, and the particular tracts of lands thus identified as swamp lands, the title relates to the date of the grant, namely, September 28, 1850. *Sixth*. A patent to the state for swamp lands issued by the secretary of the interior is evidence that the designated tracts were properly selected as swamp lands, and fixes the title thereto as of the date of the swamp-land act, namely, September 28, 1850. *Seventh*. If the secretary of the interior has not designated any particular tract as swamp land, and has not decided to the contrary, and neglects and refuses to act in the premises, as against wrongful claimants, it may be shown by parol, in behalf of the state, or those claiming under it, that the land is in fact swamp land. This results from the necessity of the case, as the courts have no power to compel action by that officer. *French v. Fyan*, *supra*. The admission of such evidence is somewhat in line with the rule that admits parol evidence to identify the land intended to be conveyed. *Guy v. Barnes*, 29 Ind. 103; *Hammond v. Stoy*, 85 Ind. 452; *Rucker v. Steelman*, 73 Ind. 396. *Eighth*. While it may be that the state, in the absence of some statutes of its own to the contrary might convey its rights to and interest in any particular tract of land before it is segregated as swamp land, and such segregation approved by the secretary of the interior, the title of such grantee would be liable to be defeated by a decision by that officer that such land was not or is not swamp land within the meaning of the swamp-land act of 1850.

Our cases are in harmony with the above deductions. *Hamilton v. Shoaff*, 99 Ind. 63; *Matthews v. Goodrich*, 102 Ind. 557; S. C. 1 N. E. Rep. 175; *Murphy v. Ewing*, 23 Ind. 297; *Edmondson v. Corn*, 62 Ind. 17; *Nitche v. Earle*, 88 Ind. 375, 379.

On the fourteenth day of January, 1873, congress passed the following act:

"An act to release to the state of Indiana the lands known as the bed of Beaver lake, in Newton county, Indiana, in said state.

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that the lands in Newton county, in the state of Indiana, known as the 'Bed of Beaver Lake,' the same having been drained and reclaimed at the expense of the state of Indiana, and its assignees, be, and the same are hereby, released and quitclaimed to the state of Indiana." 17 U. S. St. at Large, 409.

The above act, we think, did not carry to the state the bed of Beaver lake. It was granted by the swamp-land act of 1850. Under that act, nothing was lacking except its identification as swamp and overflowed land. The above act operated as a recognition of the fact that the state had selected and treated it as swamp and overflowed land, confirmed that selection, and perfected the title as indefeasible. In analogy to what was said in the case of *Martin v. Marks*, *supra*, the act of 1850 was a present grant, subject to identification of the special parcels coming within the description, and the selection by the state, confirmed by the act of 1873, *supra*, furnished the identification, and perfected the title. The title, thus confirmed, relates back to the date of the swamp-land act of 1850.

Having reached this conclusion, it is not necessary to determine as to whether or not the patents from the United States to the state for the lands bordering upon and surrounding the lake, being grants from one government to another, by their own force, carried the bed of the lake. That the state claimed the swamp lands under the act of 1850 as a grant *in presenti*, even before their segregation, is apparent from its legislation upon that subject; for example, the legislature granted rights of way over such lands to railway companies. Acts 1851, p. 151. As was done elsewhere, the state, moving upon the theory that under the act of 1850 it was the owner of whatever lands were in fact swamp and overflowed lands, did not wait for action by the secretary of the interior, but provided for their survey, selection, and designation by state authority, and claimed payment from the general government for whatever of such lands had been disposed of by it subsequent to the act of 1850. Acts 1851, p. 110; 1 G. & H. 607, § 2; Id. 608, § 1; Id. 609, § 3. The selections made by state authority, when approved by the secretary of the interior, have almost, if not quite, uniformly been held to be sufficient under the swamp-land act of 1850. It results from the above reasoning and conclusions that the state has had title to the bed of Beaver lake since the passage of the act of 1850, unless it has in some way divested itself of the title thereto. Has it done so as to the portion which appellee claims, as the remote grantee of Bright?

As we have seen, the lake was surrounded on all sides by swamp lands. These lands had been surveyed and platted by authority of the general government, and were subject to private entry. In making the survey, the same was extended around the lake to its margin, and a meandering line established. These border lands, by the government subdivisions, were patented to the state. In the agreed statements of facts it is recited that on the twenty-first day of November, 1853, the state conveyed, by patent to John P. Dunn and Amzi B. Condit, all the marginal fractional 40-acre tracts constituting the contour and rim of the lake. This is all the record discloses upon the subject of the border lands, or any of them, being fractional 40-acre tracts. It is not shown whether the surrounding swamp lands patented to Dunn and Condit consisted of one row of 40-acre or fractional 40-acre tracts immediately upon the border of the lake, or whether lands back of and adjoining these were also in-

cluded in the patent. However this may be, it is not, perhaps, very material. No patent was issued to the state for the bed of the lake, nor has it ever been surveyed or platted by authority of the national or state government. The only plan of it is that made by Bright. As before stated, the contention of appellee is that the patent or patents from the state to Dunn and Condit for the border fractional 40-acre tracts carried the bed of the lake, consisting, as we have seen, of near 17,000 acres of land.

Soon after the passage of the swamp-land act by congress, the state, by its legislature, made provisions for the sale and disposal of the swamp lands thereby granted. Acts 1851, p. 110. An examination of this act makes it quite apparent that under its provisions the authorized officers could not sell any of the swamp lands until they had been surveyed and properly described by subdivisions, and had been selected and designated as swamp lands. In other words, the legislature, by that act, made no provision for the sale of unsurveyed and unplatted swamp lands, such as the bed of Beaver lake then was.

Another act providing for and regulating the sale of swamp lands was enacted in 1852, and was in force when the patent was made by the state to Dunn and Condit. That act repealed the above act of 1851. 1 G. & H. 579; 1 Rev. St. 1876, p. 952. The act of 1852 constituted the auditor and treasurer of each county agents on the part of the state to sell the swamp lands situated in their respective counties. The third section provided that after the state should receive its patents from the United States for the swamp lands the auditor of state should cause to be prepared maps or plats of all the swamp lands lying within the bounds of each county separately, showing the township, range, section, and parts of sections, together with the numbers of each, in which such lands lay, and forward the same to the different county auditors. Upon receiving the maps or plats the county auditors were required to give notice of the time and place of sale of the swamp lands. Section 4. He was required to offer the lands for sale at public auction in legal subdivisions, and, as near as practicable, in half quarter sections. Section 5. He was also required to strike off such tract or tracts to the highest bidder therefor for any sum not less than \$1.25 for each acre in the tract or tracts, and deliver the purchaser a certificate stating therein the tract or tracts purchased, the number of acres in the tract or tracts, and the price per acre. Sections 6 and 7. The act further required that, after payment for any tract or tracts, the county treasurer should give to the purchaser a duplicate receipt, stating therein the amount paid for each acre, the number of acres in the tract or tracts, the county, congressional township, range, and section in which they were situated. Section 9. The county auditors were required to keep a record of sales, giving therein a description of each tract of land sold, and stating the number of acres contained therein, and the price paid for each acre. Section 13. It was further provided that the swamp lands remaining unsold after being publicly offered should be subject to entry at the sum of \$1.25 per acre. Section 29 of the act provided that the proceeds of the sales of swamp lands, after the payment of the expenses of selling and draining, "shall



constitute a portion of and belong to the common-school fund of the state as in the constitution provided."

Here, again, it is apparent that the legislature, by the above act, made no provision for the sale of the unsurveyed and unplatted swamp lands. The designated officers were authorized to sell those lands by surveyed, legal, designated, and platted subdivisions, and at not less than \$1.25 per acre. In our opinion, if they had attempted to sell the bed of Beaver lake, unsurveyed and unplatted as it was, and the number of acres thereof unknown, their action would have been without authority and void. Upon such a sale there would have been no means of ascertaining the price per acre, because the number of acres was unknown. They could not have sold that land by subdivisions, because it had not been subdivided. In short, there would have been no way to comply with the various requirements of the act for making sales of swamp lands. Public officers have no authority to dispose of the state's lands except such as is conferred upon them by positive statute. Any sales of such lands by them, without such statutory authority, are void as against the state, unless they are in some proper way ratified by the state. *McCaslin v. State*, 99 Ind. 428; *Brown v. Ogg*, 85 Ind. 234; *Vail v. McKernan*, 21 Ind. 421; *Skelton School Com'r v. Bliss*, 7 Ind. 77; *Ferris v. Cravens*, 65 Ind. 262; *Whiteside v. U. S.*, 93 U. S. 247; *Hull v. County of Marshall*, 12 Iowa, 142. If they might not have sold directly the undefined quantity of land constituting the bed of the lake, it would hardly do to hold that, by selling and making patents for the border lands, they indirectly conveyed away 17,000 acres of the state's land, for which, so far as shown by the record, the state received nothing. Especially should this not be held when it is remembered that, by the terms of the grant to the state, the proceeds from the sale of the swamp lands were to be used by way of draining such lands, and that, by the constitution and statute of the state, the proceeds, after the payment of expenses and drainage, are set apart as a portion of the common-school fund. See *Green v. Irving*, 54 Miss. 450, 464.

The border lands were in a condition to be sold, and the officers had authority to sell them. The bed of the lake was not in a condition to be sold, and hence they had no authority to dispose of it directly or indirectly. Of this lack of authority Dunn and Condit were bound to take notice. They were bound to take notice of the public records and statutes. Those lands could not have been given away by the officers to the detriment of the school fund, and in violation of the object of the grant. Neither could they be disposed of in any way except in pursuance of law. The state held the swamp lands in trust for the people, and the object for which they were granted. Its grants of such lands, therefore, are to be construed strictly. *Wilcoxon v. McGhee*, 12 Ill. 381; S. C. 54 Amer. Dec. 409; *McManus v. Carmichael*, 3 Iowa, 1; *City of Terre Haute v. Terre Haute Water-works*, 94 Ind. 305. To grant the contention of appellee would be to hold that a grantee from the state of a 40-acre tract of overflowed or swamp land, bordering upon a lake four miles in width, would take, by the state's deed, not only the 40 acres, but, in

addition, a strip of land as wide as the 40-acre tract, and two miles long. Without entering upon a review of the numerous cases upon the subject of riparian rights, we are very clear that the deeds or patents from the state to Dunn and Condit carried to them no more of the swamp and overflowed lands than were included in the several surveyed subdivisions bounded by the lake. As fully supporting our conclusion in this case, and upon the general subject of grants of lands bordering upon natural lakes, we cite the following authorities: *State v. Milk*, 11 Fed. Rep. 389; *Boorman v. Sunnuchs*, 42 Wis. 233; *State v. Gilmanton*, 9 N. H. 461; *Seaman v. Smith*, 24 Ill. 521; *Fletcher v. Phelps*, 28 Vt. 257; *Mansur v. Blake*, 62 Me. 38; *Wheeler v. Spinola*, 54 N. Y. 377; Ang. Water-courses, § 41; *Paine v. Woods*, 108 Mass. 160; *Diedrich v. Northwestern U. Ry. Co.*, 42 Wis. 248. Whether or not this court would in all cases, as between private parties, apply the doctrine of the above authorities, in its strictness and to its full extent, is a question we need not here determine.

We are cited by appellee's counsel to the case of *Ross v. Frost*, 54 Ind. 471; *Ridgway v. Ludlow*, 58 Ind. 248; and *Edwards v. Ogle*, 76 Ind. 302. These cases are not controlling here. Neither of them involved swamp lands granted by the state. The first involved the rights of riparian proprietors upon an unnavigable river, and in the others their rights were limited by the subdivision in which their lands were situated. We decide nothing here in conflict with those cases, nor do we, by anything that is said in the case before us, intend to either extend or limit those cases.

Appellee, by counsel, contends, in the third place, that by reason of the facts set up in the answer, and adduced in evidence, the state is estopped to assert title to the land in dispute; and, in the fourth place, that this action by the state is barred by the statute of limitation.

In order to apply the doctrine of estoppel, we must assume (as we have above held) that the title is in the state, and must inquire whether anything has been done by or in behalf of the state that ought, in law or in equity, to estop the state to assert its title.

The material facts adduced in evidence, in addition to those already set out, are as follows: On the twenty-fifth day of April, 1857, Bright, claiming to own the bed of Beaver lake as riparian proprietor, made a plat of the same, dividing it into 40-acre tracts, and numbering them 1 to 427, inclusive, asserted his claim thereon, and caused it to be recorded in the records of the auditor of state, and of the county recorder of Newton county. On the nineteenth day of July, 1858, the officers of the state authorized Aquilla Jones, as agent for the state, to accept a deed from Bright for the consideration of a debt owing to the state by him, of about \$6,000, to all the odd-numbered alternate lots marked on said plat. On the thirty-first day of December, 1860, Jones, as such trustee and agent, made a deed of conveyance of said lots to the state. Each of the several deeds above were properly recorded. From and after the making of the deed last above, Bright claimed to own the even-numbered alternate lots, and offered them for sale. In 1865 the legislature of the

state authorized the sale of the odd-numbered alternate lots. Before the year 1862, the state had sold and conveyed all the odd-numbered alternate lots, referring in the patents to its source of title, and Bright had sold and conveyed, by warranty deed, all the other alternate lots as designated on said plat.

This statement about the sale of the lots we find in the agreed statement of facts; but it is difficult to see how it can be true, as the state did not authorize the sale until by the act of 1865. On and after the year 1857, the alternate lots claimed by Bright were each year regularly entered for taxation, and were assessed for state, county, and township taxes each year, and the taxes have been paid. On one occasion Bright brought an action to enjoin the collection of a township tax, but no question was made as to whether or not he had title to the lands. *Bright v. McCullough*, 27 Ind. 227. Since 1857 the lands described in the complaint, being a part of the even alternate numbers claimed by Bright, have been known, described, and designated in conveyances, and for taxation, by the numbers stated in the complaint as taken from the Bright plat, and have been continuously claimed, and in the possession of, as far as the said land could be possessed, and used, by the appellee, and those under whom it claims title of record. The lots in suit were sold and conveyed by Bright to Lemuel Milk, and by him to Algy Dean, and by him to appellee. In the deeds the lands were described by reference to the Bright plat upon the records of Newton county, and of the auditor of state. All of the deeds were duly recorded in Newton county. The several lots of land in suit form a part of the original bed of Beaver lake, and are described in the complaint as in the Bright plat. By this action the state seeks to recover from appellee 14 of the even-numbered alternate lots, amounting in all to 560 acres.

While Bright claimed to own the even-numbered lots, he extended a small ditch about one and one-half miles into the lake. Since then it has been continuously enlarged by the action of the water. In 1871 or 1872 the ditch dug by the state filled up with sand at the end near Kankakee river. This was remedied by persons who owned land near the river, although Milk, who claimed to own the even-numbered lots formerly claimed by Bright, seems to have paid a small part of the expense. At that time he claimed an interest in the bed of the lake, and was farming, ditching, fencing, and grazing cattle upon the redeemed portions. From 1864 until 1880, Milk had been extending a ditch as the water receded, until he had constructed it to the deepest part of the lake. This ditch, like the others, has been enlarged by the action of the water. At one time, perhaps in 1882, after this action was commenced, Milk did some work in cleaning the state ditch through the sand ridge. He also did some work in removing obstructions from that ditch. Mr. Dean, who claimed to own some of the Bright lots, did some farming and stock-raising upon the lands after they were reclaimed. He also did some work in removing obstructions from the state ditch. By means of the state ditch, and the other ditches extended into the lake, and the side ditches leading into them, the greater portion of the water has been taken

from the lake; there remaining a strip about three miles long and three-fourths of a mile wide, which is covered with water most of the time.

It is first contended by counsel for appellee that the state is estopped by reason of the act of 1865. As we have seen, after Bright had platted the bed of the lake, Aquilla Jones, in behalf of the state, accepted from him a deed for each alternate odd-numbered lot, and conveyed them to the state in 1860. The act was approved on the twelfth day of December, 1865. It is entitled, "An act to provide for the sale of certain lands belonging to the state of Indiana, in the counties of Jasper and Newton, and to give pre-emption to actual settlers thereon." The first section of this act is as follows:

"Be it enacted by the general assembly of the state of Indiana, that the lands belonging to the state of Indiana, in the counties of Jasper and Newton, acquired by conveyance from Michael G. Bright, dated November 19, 1860, and of Aquilla Jones, December 31, 1860, shall be offered for sale at public auction by the auditor and treasurer of the county in which said land may be situated," etc. Acts 1865, p. 192.

The state, through Jones, had accepted a conveyance from Bright for the alternate odd-numbered lots as designated upon the Bright plat, and the above act provided for their sale. Now, why should this act estop the state, as against Bright and his grantees, to afterwards assert its title to the alternate even-numbered lots, which he did not convey to the state? The lots were not accepted by the state in the way of compromise of conflicting claims as to the bed of Beaver lake, nor was the above act passed for the purpose of relinquishing the state's title to the lots not deeded to it by Bright. The agreed statement of facts shows, and it is asserted in the pleadings, that the lots were accepted by way of compromise of a claim of the state against Bright. But whether that, or something else, was the consideration, can make no material difference here. As to the lots deeded to the state, it may well be said that the state, in accepting the deed, recognized a claim by Bright, the relinquishment of which would be beneficial to the state. The controversy here, however, is not about the lots thus deeded to the state. The above act operated to ratify the acts of Jones in accepting the deed from Bright, and provided for the sale of the lots. It makes no reference at all to the lots not deeded. At that time Bright had no title at all to any portion of the bed of the lake. The title was in the state. Therefore, to hold that the above act estopped the state to afterwards assert its title to the lots not deeded by Bright would be to hold that, properly interpreted, it is equivalent to an affirmative declaration that, as to the lots not thus deeded, the title was in Bright. In other words, it would be to hold that, practically, the act invested Bright with the title to a large tract of the state's swamp lands, to which, before that act, he had no title at all. It would be to make that act operate, practically, as an alienation of a large tract of the state's swamp lands, for which it would and could receive nothing, and the value of which would be lost to the drainage and school funds. Such, clearly, was not the purpose of the act. Its object, as stated in the title, was to provide for the sale of specific lands then belonging to the state. Neither

the title nor the act manifests any purpose to settle conflicting claims to any lands either affirmatively or negatively; nor does the act, as we think, amount to an assertion that Bright had title to the lands conveyed to the state. The words "lands belonging to the state \* \* \* acquired by conveyance from Bright \* \* \* and Jones" were used more to identify the property. If not words of description merely, they were clearly not used as words of representation which can bind the state as to other lands than those mentioned in the act. In the construction of such acts, nothing should be inferred against the state. *Slidell v. Grandjean*, 111 U. S. 412, 437; S. C. 4 Sup. Ct. Rep. 475. Indeed, it might well be questioned whether, as against Bright, the state would be estopped to show that the title to the lots conveyed to it by him was in it, and not in him. *Osterhout v. Shoemaker*, 3 Hill, 513; *Sparrow v. Kingman*, 1 N. Y. 242; *Casey's Lessee v. Inloes*, 1 Gill, 430; S. C. 39 Amer. Dec. 658; *Macklot v. Dubreuil*, 9 Mo. 478; S. C. 43 Amer. Dec. 550. If, as against its grantees of the lots, deeded by Bright, the state were attempting to show that Bright had no title, we should have an altogether different case, and one to which some of the cases cited by counsel for appellee would be directly applicable.

As we have said, the above act in no way operated as a representation. It neither asserted nor conceded anything as to the title to the lots not deeded by Bright. It cannot be known, by a mere reading of the act, that it has any reference to any land in the bed of Beaver lake. The conditions of the title to those lots might have been and was as well known to Bright and his grantees as to the state authorities, including the legislature. Whatever title Dunn and Condit and Bright had, was of record. Bright's plat, if notice of anything to any one, was notice that Bright's only claim to the bed of the lake was as riparian proprietor through the deed or deeds from the state for the border land. They were bound to know the law, and hence bound to know that the deeds for the border lands did not carry the bed of the lake. They were bound to know that Beaver lake had not been surveyed and subdivided, and that hence, under the law of 1852 for the sale of the swamp lands, the officers had no authority to sell the bed of the lake. They were also bound to know that the act of 1855 made no provision for the sale of any portion of the bed of the lake except that deeded by Bright to the state. With this knowledge of the condition of the title, neither Bright nor his grantees were or are in a condition to urge an estoppel against the state by reason of the above act. Every element of an estoppel is lacking. *Sims v. City of Frankfort*, 79 Ind. 446, 452, 453; *Foster v. Albert*, 42 Ind. 40; *Fletcher v. Holmes*, 25 Ind. 458; *Platt v. Scott*, 6 Blackf. 389; *Clem v. Newcastle & D. R. Co.*, 9 Ind. 488; *Stoddard v. Johnson*, 75 Ind. 20; *Lash v. Rendell*, 72 Ind. 475; *Robbins v. Magee*, 76 Ind. 381; *Brant v. Virginia Coal & Iron Co.*, 93 U. S. 326.

Did the assessment of taxes upon the lands in dispute, the collection of the same, and the appropriation of the amount collected to public uses, estop the state to assert its title to the land? Bright and his grantees were claiming to own the land, and the taxes were assessed, doubtless,

under the mistaken notion, on the part of the officers, that the claim was well founded. Those officers, however, were ministerial officers whose powers and duties were defined by statute. They had no power to bind the state except when acting within the scope of their authority. The title being in the state, the lands were not taxable. The unauthorized acts of the ministerial officers in assessing taxes upon it, and collecting the amount from those claiming the land, will not estop the state to assert its title, even though the amount so collected by the officers has by them been appropriated to public uses. *Reid v. State*, 74 Ind. 252, and cases there cited; *McCaskin v. State*, 99 Ind. 428; *Union School Tp. v. First Nat. Bank, etc.*, 102 Ind. 464; S. C. 2 N. E. Rep. 194; *State v. Jones*, 95 Ind. 175; *Pettis v. Johnson*, 56 Ind. 139; *Mattox v. Heightshue*, 39 Ind. 95; *County of Buena Vista v. Iowa Falls, etc.*, R. Co., 46 Iowa, 226; *Crane v. Reeder*, 25 Mich. 303; *City of St. Louis v. Gorman*, 29 Mo. 593; U. S. v. *Maxwell Land-grant Co.*, 21 Fed. Rep. 19. It is not improper to observe here that the amount of taxes paid, is not shown by the evidence.

It is shown by the evidence, as we have seen, that appellee's grantors, during a number of years prior to the commencement of this action, extended ditches from the state ditch into the lake, and on one or two occasions did some work in cleaning the state ditch, and that they also built some fences around portions of the land constituting the original bed of the lake. What the extent of the fencing was, is not shown; nor is it shown that any fences were erected upon the specific lands in dispute; nor is it shown, either, what amount was expended in the way of ditching. As we have before said, Bright and his grantees were bound to know that they had no title to the bed of the lake. The state has done nothing that will justify a claim upon their part that they have been deceived or misled. Whatever they expended upon the bed of the lake, therefore, they must be held to have expended with the knowledge that the title to the land was in the state. They could not, by thus improving the state's lands, acquire title to them by estoppel.

In the case of *Casey's Lessee v. Inloes, supra*, it was held that estoppel of one standing by, and permitting improvements to be made on his lands by another, without disclosing his title, from afterwards setting up such title, does not apply to cases where the title is equally well known to both parties, or equally open to the notice of both parties. See, also, *St. Louis Smelting & Refining Co. v. Green*, 4 McCrary, 232; S. C. 13 Fed. Rep. 208; *County of Buena Vista v. Iowa Falls, etc.*, R. Co., *supra*.

In the case of *Bryan v. Uland*, 101 Ind. 477, 481, S. C. 1 N. E. Rep. 52, in speaking of improvements made upon another's land, it was said:

"It is only *bona fide* occupants of lands who have the right to claim the benefit of improvements made while in possession under color of title. Both the appellant and his grantor had knowledge of appellee's rights, and are therefore not within the rule. *Woodhull v. Rosenthal*, 61 N. Y. 382."

Especially should this doctrine be applied where it is sought to estop the state by improvements made upon its swamp lands. In such case the rule will be strictly and rigorously applied. *Gray v. Bartlett*, 20 Pick. 186; S. C. 32 Amer. Dec. 208; *Sparks v. Pierce*, 115 U. S. 408;

S. C. 6 Sup. Ct. Rep. 102; *Deffback v. Hawks*, 115 U. S. 392; S. C. 6 Sup. Ct. Rep. 95; *Union School Tp. v. First Nat. Bank*, *supra*.

There is nothing in the evidence to show that the state had notice that any improvements were being made upon the bed of the lake by appellee's grantors. It is not shown that any officer or agent of the state who had any duty to perform in relation to the swamp and overflowed lands, nor that any other agent or officer of the state, had any such notice.

We come now to the question of the statute of limitation relied upon by appellee. So far as material here, section 211 of the Code of 1852 (2 Rev. St. 1876, p. 122) was as follows: "The following actions shall be commenced within the period herein prescribed after the cause of action has accrued, and not afterwards: \* \* \* For the recovery of the possession of real estate, within twenty years." Section 224 of that Code (2 Rev. St. 1876, p. 129) was as follows: "Limitation of actions shall bar the state of Indiana and the United States as other persons."

The agreed statement of facts is that since Bright had his plat recorded, in 1857, the lands described in the complaint have been continuously claimed, and in the possession, as far as said lands could be possessed and used, by appellee, and those under whom it claims title of record. Whether or not any of the land in controversy is now under water is not shown by the evidence. It is shown, however, that until within the last four years the greater part of the bed of the lake has been under water. The most effectual ditching in the bed of the lake was done by Milk, between the years 1864 and 1880. It was impossible for Bright to have had possession of the bed of the lake, unless he in some way had constructive possession, because, during the time that he claimed to be the owner, it was almost wholly covered with water. He had no grant from the state, nor had he anything else that gave him color of title. Whatever possession he may have had, therefore, was limited to the particular land over which he had and exercised palpable acts of ownership.

In order that the above statute of limitations should run, assuming that it applied to the state, it was not necessary that there should have been possession under color of title. *Vunduyin v. Hepner*, 45 Ind. 595. But possession, without color of title, is limited to the particular land over which the claimant exercises palpable acts of ownership. *Bell v. Longworth*, 6 Ind. 273. In this case it was said:

"When a party is in possession of land claiming an adverse title, the question arises, to what extent does his claim reach,—what lands does his claim of title cover? And where there is nothing but naked possession to evidence it, his title must, from necessity, be limited to the lands over which he has exercised a visible authority known to others as owner; to those, in short, from which he has excluded the former owner and others. A man cannot go, solitary and alone, to the prairies or forests of the west, set himself down in the middle thereof, and claim that he possessed all, to an undefined extent, not then actually possessed by some one else. He must be limited to that portion over which he exercises palpable and continuous acts of ownership; there being no other evidence, in such case, to enable us to determine the quantity."

See, also, *Hall v. Powel*, 4 Serg. & R. 456; S. C. 8 Amer. Dec. 722; *Riley v. Jameson*, 3 N. H. 23; S. C. 14 Amer. Dec. 325; *State v. Porter*, 86 Ind. 404.

There is no evidence that Bright ever, at any time, had, or could have had, actual possession of any portion of the land in controversy. The plat of the bed of the lake made by him was a document not known to the law, and hence the record of it was notice to no one. But the making and recording of the plat, and the claim of title thereon asserted, if known to the state, were in no way the equivalent of actual possession of the land, such as would require the state to bring an action for its possession, or lose its rights under the statute of limitations.

There is no evidence that Bright's grantees exercised any acts of ownership over any portion of the bed of Beaver lake at any time beyond 15 years prior to the trial of the action in September, 1884. Indeed, it is not shown that they became the owners of any portion of the land in dispute prior to 1862. Within a period of 15 years prior to the trial the bed of the lake was almost wholly covered with water. This action was commenced in January, 1880; and hence, if Bright's grantees became such in 1862, 20 years had not elapsed between their purchase and the commencement of the action.

We have thus considered the case as made by the evidence. It shows that the state became the owner of the bed of the lake by grant from the United States, and does not show, nor tend to show, as we think, that the state has lost its right and title thereto by any conveyance or grant, nor that it is estopped to now assert that title, nor that the action is barred by the statute of limitations. Appellant's motion for a new trial, therefore, should have been sustained.

The plea under which the defense was made, appellee contends, is a cross-complaint to quiet title. Appellant contends that it is an answer only, and that, as the state cannot be sued, a cross-complaint to quiet title cannot be maintained. Although the state cannot be sued, yet when it goes into the courts to recover property, it goes as any other suitor, and must accord to the defendant the right to file a cross-complaint, and have the title litigated, settled, and quieted. *State v. Board of Com'rs*, 101 Ind. 69, 74. From the view we are constrained to take of the case, it is not very material whether the plea be treated as an answer or as a cross-complaint; although, looking to all of its averments, and the prayer for affirmative relief, we think that it is in its essential features a cross-complaint.

It is averred that, after making the plat, Bright had the actual and adverse possession of the bed of the lake; but this general averment is declared to rest upon the facts specifically stated. The facts so stated show that the bed of the lake was covered with water; that the possession was only such as he could have by and through his grant and title to the border lands; and that it was therefore not actual possession, but what appellee regards as constructive possession by reason of the ownership of the border lands. We have already seen that the grant of the border lands, and the possession of them by Bright, did not give him construc-



tive possession of the bed of the lake. He is therefore not shown to have had any possession of the bed of the lake, such as would put the statute of limitations in operation against the state. It is averred that Bright sold and conveyed away the lands in controversy on the eighth day of November, 1869. It is thus made manifest that Bright's grantees could not have had 20 years' possession of the land prior to the beginning of this action, on the seventeenth day of January, 1880. It is not material, therefore, what the averments as to their possession may be so far as they can affect the question of the statute of limitations.

Upon the question of estoppel it is sufficient to say that the case made by the cross-complaint is not materially different from that made by the evidence. Upon what has already been said upon that question, and upon an examination of the cross-complaint as a whole, we are constrained to hold that the demurrer thereto should have been sustained. It is certain that nothing would be lost by a remodeling of the cross-complaint.

Judgment reversed at appellee's costs, with instructions to the court below to sustain appellant's motion for a new trial, and to sustain its demurrer to the cross-complaint.

ELLIOTT, J., did not participate in the decision of this cause.

#### NOTE.

For an exhaustive discussion of the question of the right to sue the state, see *Sipple v. State*, (N. Y.) 1 N. E. Rep. 892, and the note thereto appended.

It is said, in the case of *U. S. v. Beebee*, 17 Fed. Rep. 36, that when the government becomes a party to a suit in its courts, it is bound by the same principles that govern individuals, and that the lapse of time may be a sufficient defense to the action instituted; that when the United States voluntarily appears in a court of justice, it at the same time voluntarily submits itself to the law, and places itself upon an equality with other litigants. The same is true in respect to a state.

It is held in *U. S. v. Southern Colorado Coal & Town Co.*, 18 Fed. Rep. 273, that one of the limitations to the general rule that when the government becomes a party to a suit in its own courts it stands upon the same footing as individuals, and must submit to the law as administered between man and man, is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. In the course of the opinion, Judge McCrory says: "It is true, as a general proposition, that when the government becomes a party to a suit in its own courts it stands upon the same footing with individuals, and must submit to the law as it is administered between man and man. But this general rule has its limitations, and one of them is that neither the defense of the statute of limitations nor that of laches can be pleaded against the United States. 'The general principle is that laches is not imputable to the government; and the maxim is founded, not in the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and its fiscal operations are so various, and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions.' *U. S. v. Kirkpatrick*, 9 Wheat. 736; *U. S. v. Hoar*, 2 Mason, 311; *U. S. v. Williams*, 5 McLean, 183; *Gibson v. Chouteau*, 13 Wall. 92; *U. S. v. Thompson*, 98 U. S. 486; *Gausson v. U. S.*, 97 U. S. 584. If, indeed, the lapse of time since the cause of action accrued has been so great as to afford the reasonable presumption that the witnesses who could testify concerning it are all dead, and the proofs lost or destroyed, a court of equity may, no doubt, on that ground, refuse to entertain the controversy. *U. S. v. Beebee*, 4 McCrory, 12; *S. C.* 17 Fed. Rep. 36."

It was said by Judge BAXTER in the late case of *U. S. v. McElroy*, 25 Fed. Rep. 804, that neither the statute of limitations nor laches will bar the government as to any claim for relief in a purely governmental matter; but when the government comes as a complainant into a court of equity, asserting the same rights as an individual,—a

mere matter of dollars and cents, involving no governmental right or duty,—although technically the statute of limitations may not bar it, the ordinary rules controlling courts of equity as to laches should be enforced.

(102 N. Y. 494)

**BRUNDAGE v. VILLAGE OF PORT CHESTER.<sup>1</sup>**

(*Court of Appeals of New York. June 1, 1886.*)

**1. TAXATION—ACTION TO RECOVER ILLEGAL TAX—STATUTE OF LIMITATIONS.**

In 1874, defendant was indebted to plaintiff in the sum of \$5,000, for grading Hoseco avenue. Plaintiff was apparently liable to contribute to work on village streets, and had been assessed about \$3,000 therefor, and the village threatened to sell his property to satisfy the claim. He demanded his money, and the village treasurer refused to pay, and finally plaintiff accepted the balance, about \$3,000, and it was paid him, and the assessment canceled. In 1888, plaintiff brought this action to recover back the amount deducted from his claim, as for money had and received by defendant for plaintiff's use, on the ground that the assessment was illegal and void. *Held*, that the cause of action was outlawed, as it was governed by the limitation of six years, instead of ten,<sup>2</sup> being an action in *assumpsit*, and not in equity, to vacate and set aside the assessment.

**2. SAME—STATUTE BEGINS TO RUN, WHEN.**

The cause of action, and the only cause of action, existing in favor of the plaintiff arose upon the maturity of his debt against the defendants, and not at the time of its attempted application,<sup>3</sup> and the statute began to run then.

Appeal from judgment and order of general term supreme court, Second department, reversing judgment in favor of plaintiff, and granting new trial.

*Isaac N. Mills*, for respondent, Village of Port Chester.

*Wilson Brown, Jr.*, for appellant, Robert F. Brundage.

RUGER, C. J. In the year 1874 the defendant was indebted to the plaintiff in the sum of upwards of \$5,000 for work and labor performed by him in the grading of Hoseco avenue in that village. The plaintiff was also then apparently liable to contribute to the expense of building and grading village streets, and had been theretofore assessed for that purpose by the village authorities in the sum of upwards of \$3,000, and they threatened to enforce and collect such assessment by a sale of his land. Under these circumstances, the plaintiff demanded payment from the village of the whole sum due him for work, but the village treasurer refused to pay the amount, but offered to pay the balance due him, after deducting the amount of the assessments in question. The plaintiff finally consented to accept such balance, and it was paid to him in 1874, and the assessment against him was thereupon canceled and discharged by the treasurer. This transaction is the basis of the plaintiff's claim to recover back money paid by him to the defendant.

It is not alleged in the complaint, and does not appear by the evidence or findings, that the plaintiff receipted for or canceled the indebtedness of the village to him, or that his right to enforce payment thereof was barred by any act done by or required of him by the defendant. This

<sup>1</sup> Affirming 31 Hun, 129.

<sup>2</sup> For a full discussion of the question of the statute of limitations, and when it begins to run, see *Perry Co. v. Railroad Co.*, (Ohio,) 2 N. E. Rep. 354, and note, 357-370.

action was brought to recover back the amount so deducted as for money had and received by the defendant for plaintiff's use, upon the alleged ground that the assessment referred to was illegal and void. The defense is the statute of limitations, and the question in the case is whether the ten or six years limitation applies.

It is claimed by the plaintiff that the action is in equity, to vacate and set aside the assessment as illegal and void, and to recover back the money paid as an incident of such relief. On the other hand, it is denied that any such relief is shown to be necessary, and that the action is simply one in *assumpsit*, and subject to the six-years limitation alone. We think the defendant's position is unanswerable.

It cannot be disputed but that if the action was brought to recover back the money paid upon an assessment apparently valid, and levied according to the forms of law, but rendered illegal by extrinsic facts, or those which were not apparent upon the face of the proceedings, that it was necessary for the plaintiff to proceed in equity to vacate such proceedings before he could recover back moneys paid thereon. *Horn v. Town of New Lots*, 83 N. Y. 100. There are several reasons, however, why this is not such a case.

1. The complaint shows affirmatively that the plaintiff is not entitled to equitable relief. It alleges in unqualified terms that such assessments had been vacated and annulled long prior to the commencement of the action, and this allegation is not only not denied by the answer, but is sustained by the express findings of the trial court, and must be regarded as an indisputable fact in the case. *Breucher v. Village of Port Chester*, 4 N. E. Rep. 272. If the action be considered, therefore, as anything but one in *assumpsit*, it is not maintainable at all, either upon the pleadings or the findings.

2. The evidence shows conclusively that no right of action accrued to the plaintiff out of the conduct of the defendant in requiring the application of the illegal assessment upon their indebtedness to the plaintiff. That indebtedness was not discharged by such action, but remains an existing and enforceable demand against the defendant as well after as before such transaction. The acts of the defendant did not extinguish the plaintiff's demand, or change the character of its liability to him. The existence of the illegal assessment would have constituted no defense to an action for their debt, and in the prosecution of such an action it would have been unnecessary, in the first instance, to impeach the validity of such assessment, as it could be availed of only by way of counter-claim to the plaintiff's claim, and, as such, was assailable at law for its illegality. Even if we could imply from the evidence in the case that the plaintiff assented to the application of his debt, the fact that it was obtained by duress vitiated such consent as much as it deprived the payment of its voluntary character, and would not stand in the way of a prosecution of his claim. The transaction did not operate in any way as a payment of the debt.

This cause of action was governed by the six-years period of limitation, and expired in 1880, three years before the action was commenced.

The acceptance by the plaintiff of a certain amount upon his debt operated only as payment *pro tanto*, and left him at liberty to sue for and collect the balance at any time thereafter within the statutory period of limitation. The cause of action, and the only cause of action, existing in favor of the plaintiff arose upon the maturity of his debt against the defendant, and not at the time of its attempted application, and the statute of limitations then began to run against it.

3. No money was paid by the plaintiff to the defendant upon the assessment in question. The defendant has simply neglected to pay the plaintiff the amount due from it, and remains liable to him for the balance. This liability has not been converted into another cause of action by its refusal to pay the debt. An action to recover for money paid, or had and received, will not lie generally, except upon the payment of money. *National Trust Co. v. Gleason*, 77 N. Y. 400; *Cummings v. Hackley*, 8 Johns. 202; *Moyer v. Shoemaker*, 5 Barb. 319. It has been held, however, that the action may be maintained when its equivalent has been actually accepted as money by the party receiving it; as, where an agent has discharged his principal's debt by applying thereon a debt owing by himself, (*Bardley v. Root*, 11 Johns. 464;) or where a surety has transferred property to the creditor, who received it in payment of a judgment. In such cases the principal has been held liable for the amount of his debt discharged by the payment, as for money paid by the surety for him. *Bonney v. Seely*, 2 Wend. 481. But here nothing has been received by the defendant, and its legal situation remained unaffected by the attempted application of the illegal assessment upon its legal indebtedness. No money or its equivalent has been received by the defendant, and the effort to sustain this action is an attempt to convert a simple contract liability into one to recover for money illegally held by the debtor for the use of the creditor. We do not find any case going far enough to uphold such a claim. The judgment should therefore be affirmed.

(All concur.)

(102 N. Y. 337)

MOORES v. TOWNSHEND.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

## 1. EQUITY—CLOUD ON TITLE—JURISDICTION AS TO REMOVING—EVIDENCE NECESSARY.

Plaintiff, by his complaint, alleged that he was the owner of premises in dispute, and asked that defendant deliver up tax deed under which the latter occupied, and that the clerk of arrears cancel it, and all records relating to it in his office. Plaintiff's only proof of title was a deed from one Foley, as "referee duly appointed in a decree in partition entered at a special term, January 31, 1882." The complaint and the proof showed that defendant, Townshend, was, at the time of the decree, and a long time prior, in possession under a deed dated September 13, 1873, from the comptroller of New York, under city assessment sale. *Held*, that the proof was entirely inadequate to establish any title in the plaintiff, as against a stranger to the action in which it was given.

## 2. SAME—ESTABLISHING LEGAL TITLE.

Further, that the facts disclosed did not show any right on the part of the respondent to equitable relief, as equity has never been extended to cover cases brought merely to establish a legal title, or recover possession alone.

Appeal from judgment general term supreme court, First department, affirming judgment for plaintiff.

*John Townshend*, for appellant, John Townshend.

*L. A. Gould*, for respondent, William Moores.

RUGER, C. J. The relief granted by the judgment appealed from required the defendant to deliver up for cancellation, as a cloud upon the title, the conveyance under which he occupied the premises in dispute, and that the clerk of arrears cancel the conveyance, and also all records and entries relating to the same in his office. This relief was purely equitable in character, and needed for its support the proof of some facts giving the court jurisdiction of such a cause of action. *Heywood v. Buffalo*, 14 N. Y. 540; *Bockes v. Lansing*, 74 N. Y. 437.

We have been unable to discover, either in the evidence or the findings, any proof of such facts, or of facts sufficient to entitle the plaintiff to either legal or equitable relief. The complaint alleged that the plaintiff was the owner of the premises in dispute, and, although the allegation was denied by the answer, neither the evidence nor the finding, in this respect, supported the complaint. The whole claim of the plaintiff for relief rested upon the truth of the allegation, and, being totally unproved, there is no theory upon which he could be entitled to judgment upon the findings for any relief. The only proof of title in the plaintiff by the findings for fact is that derivable from the production of a deed purporting to be executed by one John A. Foley, describing himself as a referee duly appointed in a decree in partition entered at a special term of the supreme court, January 31, 1882, in an action between one Freeman, plaintiff, and one De Groot and others, defendants, authorizing the sale of the premises in question by such referee. The parties to the partition action other than those named are not disclosed, and there is no proof or finding that any of them, or their grantors, ever had title to or

<sup>1</sup> Reversing 34 Hun, 628, *mem.*

possession of the premises in dispute, or any part thereof. On the contrary, the allegations of the complaint, as well as the proof, showed that the defendant, Townshend, was, at the time of such decree, and for a long period of time prior thereto had been, in possession of the premises, claiming title under a conveyance dated September 19, 1873, to him from the comptroller of the city of New York, executed in pursuance of a sale for the non-payment of an assessment duly imposed, in accordance with the statute, by the municipal officers of New York. If we look at the proof, it does not aid the findings, for it was wholly confined to the production and proof of the referee's deed, and certain alleged terms of sale which did not disclose any fact bearing upon the ownership of the premises. This proof was entirely inadequate to establish any title in the plaintiff, as against a stranger to the action in which it was given.

The evidence was undeniably competent, and therefore unobjectionable, except as to the order of the proof; and that would have been unassailable, as it was in the discretion of the court. The question arising thereon was solely as to the legal sufficiency of the evidence, and was fairly presented by the defendant's exception to the finding of law directing judgment for the plaintiff.

It is essential to the support of a judgment that the findings of fact should establish a legal right, on the part of the successful party, to the relief granted; and when they do not, and there is nothing in the evidence to show such right, an exception to the legal conclusion of the court directing judgment raises the question whether, upon all of the facts found, the party succeeding is entitled to the judgment directed. *Hemmingway v. Poucher*, 98 N. Y. 287. The question, therefore, seems to be properly raised in the case, and requires the reversal of the judgment appealed from.

It is further urged by the appellant that the facts disclosed on the trial did not show any right on the part of the respondent to equitable relief. We think this point, also, is well taken. The only ground alleged for the relief demanded was the want of an adequate remedy at law, and yet the facts stated showed presumptively the existence of such a remedy, and the falsity of the averment. No reason is averred in the complaint why the plaintiff could not obtain all of the relief to which he was entitled, by an action of ejectment; and an examination of the findings and evidence shows that none in fact existed. *Phillips v. Gorham*, 17 N. Y. 270. The complaint was manifestly insufficient in this respect. *Bockes v. Lansing*, 74 N. Y. 448; *Ocean Bank v. Olcott*, 46 N. Y. 19; *Allerton v. Belden*, 49 N. Y. 378; *Venice v. Woodruff*, 62 N. Y. 467.

We have been unable to find any case where a party out of possession has been allowed to sustain an action *quia timet* to remove a cloud upon title, except when it was specially authorized by statute, or when special circumstances existed, affording grounds for equitable jurisdiction aside from the mere allegation of ownership of the legal title. Indeed, the right to appeal to a court of equity in such cases was originally based upon the assumption that the legal title to the property in dispute had

been established by an action at law, and jurisdiction was entertained solely for the purpose of protecting the party in the enjoyment of rights in possession thus legally established; and, while the jurisdiction has in the course of time been somewhat extended, it has never been stretched to cover cases brought merely to establish a legal title or recover possession alone. *Spencer*, Eq. Jur. 658; *Story*, Eq. Jur. (11th Ed.) § 711; *Adams*, Eq. 199; *Pom. Eq. Jur.* §§ 1395-1399. In all the cases cited to the effect that equity will entertain jurisdiction to set aside assessments and conveyances as a cloud upon title when the invalidity of the alleged title or incumbrance does not appear upon the face of the conveyance or proceeding, and requires extrinsic evidence to demonstrate its existence, the party bringing the action was in possession of the property, or other circumstances gave equitable jurisdiction. *Scott v. Onderdonk*, 14 N. Y. 9; *Hatch v. City of Buffalo*, 38 N. Y. 276; *Fonda v. Sage*, 48 N. Y. 173; *Marsh v. City of Brooklyn*, 59 N. Y. 283. When the invalidity of the disputed title appears upon the face of the conveyance, or in any proof which the claimant is required to produce in order to maintain an action to establish it, no suit whatever can be maintained in equity to set it aside, because it is said that a title obviously void does not constitute even a cloud upon the title of the true owner.

The question in this case is not as to the propriety or impropriety of uniting legal and equitable causes of action in one complaint, but it is whether sufficient facts have been alleged and proved to sustain such respective causes of action. It was said by Judge RAPALLO, in *Bockes v. Lansing*, *supra*, that, "to sustain such an action, the facts must be alleged which would be necessary to entitle him to the relief had he sought it in separate actions."

The cases of *Lattin v. McCarty*, 41 N. Y. 107, and *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 474, have been cited to support the claim that actions to remove a cloud upon title and recover possession may be joined, and that courts of equity will entertain jurisdiction to give relief in such actions. We do not think that those cases sustain such a doctrine. In both of those cases special circumstances existed outside of the legal title and right to possession which conferred the jurisdiction exercised. As was said by Judge RAPALLO in *Bockes v. Lansing*, with reference to *Lattin v. McCarty*:

"The instrument sought to be set aside as a cloud was a deed which apparently, and without any extrinsic proof, established a title paramount to the plaintiff's, and the complaint showed that the defendant had fraudulently obtained possession of the premises, and claimed to own them under the deed."

The action there was sustained solely upon the ground that the defendants held the legal title by virtue of a deed fraudulently obtained, and the possession by a fraudulent attornment by the tenant of the owner, and therefore ejectment could not have been maintained. These facts were held to give the equitable jurisdiction there exercised.

In *Remington Paper Co. v. O'Dougherty*, 81 N. Y. 481, the action was brought by a purchaser under the sale, upon execution, before his right

to a deed had matured, among other things, to set aside a previous conveyance apparently paramount to the plaintiff's right, upon the ground that it was forged; and also certain judgments and mortgages which it was alleged had been paid, and were kept alive for fraudulent purposes. It was held that the facts alleged constituted a case for equitable jurisdiction, and that the court, having jurisdiction for some purposes, could exercise it to give the relief to which the party was entitled.

No facts are alleged in this case giving the court equitable jurisdiction, and we are of the opinion that the judgment of the court below should be reversed, and a new trial ordered, with costs to abide the event.

(All concur.)

(102 N. Y. 708)

MURTFELDT and others v. NEW YORK, W. S. & B. Ry. Co.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. SPECIFIC PERFORMANCE—DISCRETION OF COURT.

Defendant purchased land of plaintiffs in Orange county, adjoining the Hudson river, and agreed always to keep a passage-way under the railway for the use of plaintiffs. *Held*, that in view of the difficulty of constructing it, and its inutility, when constructed, it was within the discretion of the court, in its equitable jurisdiction, to deny specific performance of the contract, and leave plaintiffs to their remedy for damage for its breach.

2. TRESPASS—TO LAND—SUBCONTRACTOR BUILDING ROAD.

Defendant let a contract of building a road, and it was sublet, and the subcontractor trespassed on plaintiff's land; but, as it did not appear that the contract which defendant made with the contractor could not have been executed as made, without any interference with plaintiff's land where trespassed upon, *held*, that defendant could not be said to have caused the trespass.

Appeal from judgment general term supreme court, Second department, affirming judgment for defendants.

STATEMENT OF CASE.<sup>2</sup>

The plaintiff Mary F. Murtfeldt was the owner of a life-estate in a parcel of land on the right bank of the Hudson river, north of the city of Newburgh, and the other plaintiffs in this action, with James L. Murtfeldt and Bertha Murtfeldt, who are not joined as plaintiffs, were the fee-owners. After the railroad of the defendant was projected over the land of the plaintiffs in this action, they executed and delivered to the defendant a deed of conveyance of a strip of land through this parcel, of 100 feet in width, substantially parallel with the river. This conveyance left a narrow strip of land between the land conveyed and the river, about 200 feet long, and 30 feet wide in the widest part, and the plaintiffs reserved the right, by their deed, to cross to their land eastward of the lot so conveyed, whether under water or above, and the right to cross the railway of the defendant, when constructed, to and from that land, but not so as to interfere in any way with the use of the strip for railway purposes. The deed also contained the following covenant: "And a passage-way under said railway, at or about station 112, shall be constructed and maintained always by the party of the second part, for the use of the parties of the first part, their heirs and assigns, which said passage-way shall be at least eight feet wide and six feet high in the clear." The interest of James and Bertha was afterwards also conveyed to the defendant.

<sup>1</sup> Affirming 34 Hun, 632, *mem.*

<sup>2</sup> See opinion of DYKMAN, J., in general term.



In the construction of the railroad an extensive cut was made through the land, which left a bank on the westerly side, near station 112, from 70 to 90 feet high. Towards the northerly part of the land, however, the railroad is about on the natural grade, and then further north it is built on tressels. If the under-crossing should be constructed as stipulated in the covenant, it would partly fill with water at the influx of the river tide; and, besides that, no practical connection could be made with such under-crossing for the use of the plaintiff by reason of the precipitous character of the high embankment on the west.

The plaintiff in this action seeks a specific performance of the covenant for this under-passage, and the trial court found that it was not a case calling for the exertion of the power of the court in that direction, and the general term was like-minded.

*E. A. Brewster*, for appellants, Mary F. Murtfeldt and others.

*A. S. Cassedey*, for respondent, New York, W. S. & B. Ry. Co.

EARL, J. In view of the difficulty in constructing a useful passage under the railroad, and the inutility to plaintiffs of such passage, if constructed it was certainly within the discretion of the court below, in the exercise of its equitable jurisdiction, to deny specific performance of defendant's contract to construct the passage, and leave the plaintiffs to their remedy for damages for breach of the covenant. *Trustees of Columbia College v. Thacher*, 87 N. Y. 311. There was no allegation in the complaint that the plaintiffs had suffered any damage from the breach of the covenant to construct the passage. There was no proof upon the trial which authorized the court to award any damages for such breach, and there was no claim made by the plaintiffs that, if specific performance should be denied, the case should be reserved for further proof and hearing as to the damages. The whole case was submitted to the trial judge upon the proofs given, and he did not err, under the circumstances, in leaving the plaintiffs to their action at law to recover their damages for the breach of covenant. He found, however, as matter of law, that they had not sustained any damages from the breach of the covenant. That finding was properly based upon the finding of fact that they had proved no amount of damages from the breach of the covenant, and cannot be given wider scope. Mary F. Murtfeldt, one of the plaintiffs, had a life-estate in the premises to be benefited by the covenant, and the other plaintiffs were owners of the reversion, and hence the plaintiffs were not jointly interested in these damages, and it is difficult to perceive how the reversioners are entitled, at this time, to any damages for breach of this covenant, and hence the learned trial judge may have meant by that finding of law that the plaintiffs were not jointly entitled to the damages. But that finding must be construed with the other, which turned the plaintiffs over to their action at law for their damages, and could not, therefore, conclude them in such action should they bring one.

As to the damages for trespass upon the lands west of the railroad, the proof did not authorize a recovery by the plaintiffs. They, through their agent, had knowledge, at the time, of what was done by the contractors under the defendant, and made no objection. It let the con-

tract to construct its road to the North River Construction Company. The latter company sublet the construction of the road through plaintiff's premises to Ward, MacKin & Co., and they sublet a portion of their work to one O'Rourke, by whom the alleged trespass was committed. It does not appear that the contract which the defendant made with the North River Construction Company could not have been executed as made without any interference with plaintiff's land on the west side of the railroad, and hence it cannot be said that the defendant caused the trespass, or is liable for it. But there is a still further answer to the claim for damages on account of the trespass. The plaintiffs did not prove, and did not offer by any competent evidence to prove, any amount of damages for the alleged trespass, and the trial judge so found, and hence there was no basis for the allowance of any substantial damages to the plaintiffs. The judgment should therefore be affirmed, with costs.

(All concur.)

(102 N. Y. 468;

PEOPLE *ex rel.* MURRAY and others *v.* McCLAVE, Treasurer, etc.

(*Court of Appeals of New York.* June 1, 1886.)

**MUNICIPAL CORPORATIONS — POLICE RELIEF FUND — LAWS 1885, CH. 486 — CONTRIBUTION TO, BY OFFICER, MUST BE VOLUNTARY.**

The contribution to the police relief fund by an officer, authorized by chapter 486 of the Laws of 1885, must be voluntary on his part, and the treasurer of the board of police, etc., cannot, against the will of any member of the force, deduct for such purpose any portion of his pay. RAPALLO, J., dissents.

Appeal from order general term supreme court, First department, denying application for *mandamus* to compel the respondent to deduct the sum of two dollars per month from the pay of the police force, and pay the same to the trustees of the pension fund of the city of New York.

*Edward M. Shepard* and *Charles W. Welmore*, for the People, etc.

*Mr. Dean*, for respondent, John McClave, Treasurer, etc.

DANFORTH, J. Whether we look at the precise language of the statute in question, (Laws 1885, c. 486,) or the substance of the matter included in it, we are brought to the conclusion reached by the general term, that the contribution to the fund created by that act must be voluntary; that the defendant cannot, against the will of any member of the police force, deduct for its purpose any portion of his pay; that the relators cannot, without his consent, receive it.

*First*, its language. It is entitled "An act to create a relief fund in the police department in all cities of this state having, according to the last census, a population exceeding one million." By section 2 the fund consists of a sum of money equal to two dollars per month for each member of the police force of said department, and also for each member or employe of the police department other than the said police force, "who shall desire to avail himself of the privileges and provisions of this act, and also for members of the Police Mutual Aid Association of the said department who, at the time of the passage of this act, are in good stand-

ing therein, and who shall desire to contribute to said fund, to be paid monthly by the treasurer of the board of police, or commissioner of police of said department, to the treasurer of the board of trustees of the police relief fund created by this act, from moneys deducted from the pay of such members of said force, or members or employes of said department; and the treasurer of the board of police, or commissioner of police of said department, is hereby authorized and directed to make such deduction from the pay of the members of said police force as herein provided."

It is evident that three classes of persons, all within the police department, were in the mind of the legislature at the preparation of this act: (1) members of the police force; (2) other members or employes of the department; (3) certain members of the mutual aid association of the department,—and all these were deemed possible beneficiaries. It is also evident, and is conceded by the appellant, that the second and third class contribute or not as they please. If they contribute, they share in the privileges of the fund, but otherwise not. They then have an election to make a present use of their money, or, by its surrender, secure a future advantage to their appointee or widow or representative. I am unable to find any reason for placing the first class in a less favorable or different position. The prescribed fee is the same.

But it is said, in behalf of the appellant, that while, as to the second and third class, the contribution is voluntary, the legislature has made that of the members of the force compulsory by express direction to the defendant, through whom their pay must come, to make the deduction. But here is the very point of the controversy. Is he to make that deduction unless the member of the police force, whose pay he holds, "desires to avail himself of the privileges and provisions of the act?" I think not. Nothing can better express the meaning of the statute than the words quoted. In their natural order, among the clauses of the section where they stand, they qualify and limit the general words which precede them, and leave each member of the police force, as well as the other classes there enumerated, to determine for himself whether he will accept the opportunity afforded by the statute, and make provision against his death. That is the substance of the statute, and its design. The fund created is not for pensions, nor its benefit confined even to the family of the policeman. No one can share in its advantages who has not contributed, and he who has may have the sum accruing upon his death paid to such person as he in writing shall direct. Act 1885, § 4. The act is beneficent, but the legislature has not sought to compel any one to accept its terms, and it is therefore unnecessary to determine whether they lawfully could or not.

The order appealed from should be affirmed, but without costs.

(All concur, except RAPALLO, J., dissenting, and MILLER, J., not voting.)

(102 N. Y. 714)

**HARBECK v. HARBECK.<sup>1</sup>***(Court of Appeals of New York. June 1, 1886.)***HUSBAND AND WIFE—DIVORCE—MARRIAGE.**

This action was for an absolute divorce on the ground of adultery. The issue was whether parties were married; no ceremony having been performed. Plaintiff was formerly the wife of Montgomery, who abandoned her. She lived with Harbeck until 1879, passing as his wife; both believing Montgomery to be dead, which was not true. Defendant then married Kate Hammel. *Held* that, as the union between the parties was at first illegal, and no contract of marriage was entered into between them afterwards, the plaintiff could not maintain her action.

Appeal from judgment general term supreme court, First department, affirming judgment in favor of defendant.

*Wm. F. Howe*, for appellant, Caroline Harbeck.

*Wm. Fullerton*, for respondent, John H. Harbeck.

DANFORTH, J. The trial judge and the general term have found against the defendant, and, notwithstanding a difference of opinion among the judges of the court below, we are constrained, after a careful consideration of the evidence, to sustain the judgment which followed the conclusion of the majority. That the union between the parties was at first illegal is conceded. If a change occurred, it was followed by no formal celebration, nor is there evidence of any present agreement to take each other for husband and wife; and that they ever passed, by contract or by mutual consent, from the state of concubinage into that of marriage, is made doubtful by the admissions of the plaintiff, proven by the testimony of her sister, by that of the defendant's father, and by other witnesses. If that testimony is true, it is difficult to find that she herself regarded the connection as matrimonial, or that its continuance depended upon anything more binding than the inclination or will of the defendant. It is true that he assumed the character of husband and she of wife, and reported themselves in that relation to their associates and others; and there was enough in their conduct, *prima facie*, to entitle each to the civil rights which belong to the real character; but the testimony to which I have referred, and circumstances disclosed by others, raised a conflict in evidence, which we cannot, as an appellate court, declare to be insufficient to show that the assumption was unfounded. Such was the conclusion of the trial judge. His finding is that no contract of marriage was ever entered into between the plaintiff and defendant, and we cannot say it has no evidence in its support. In the face of that finding, this appeal must fail. The judgment should therefore be affirmed.

(All concur.)

(102 N. Y. 486)

**GOLDSCHMIDT and others v. MUTUAL LIFE INS. CO. OF N. Y.<sup>2</sup>***(Court of Appeals of New York. June 1, 1886.)***LIFE INSURANCE—PROOFS OF DEATH—CAUSE OF DEATH—SUICIDE—EVIDENCE.**

One policy on life of Oscar Edler was payable in 60 days after due notice and proofs of death, "unless \* \* \* he shall die by his own act or hand."

<sup>1</sup> Affirming 31 Hun, 640.<sup>2</sup> Reversing 33 Hun, 441.

The other was payable on proof of death in form specified. Plaintiffs, assignees of policies, put them in evidence, and testified that they saw dead body of insured. Defendants introduced proofs of death in which the cause of death was given as not known, and, in answer to question in said proof, plaintiffs had annexed what purported to be a coroner's inquest, evidence, and verdict of jury, but which, in such proof, they denied were true, or that any such inquest had been had, etc. On this the court ruled that the complaint should be dismissed "unless the plaintiff showed how the death of Edler was produced; that, as to it, they had the affirmative." *Held* error; that the record furnished of the inquest, etc., was a mere communication of hearsay evidence, the truth of which was denied at the time it was given; that the proofs of death were in all respects complete without the statement as to the coroner's inquest. It was for defendants to show by proof that the suicide alleged had been actually committed.

Appeal from judgment of general term supreme court, First department, affirming judgment for defendant.

*Wm. G. Wilson*, for appellants, Adolph Goldschmidt and others.

*Robert Sewell*, for respondent, Mutual Life Ins. Co. of N. Y.

DANFORTH, J. This was an action brought by the plaintiffs, as assignees of two policies of insurance—one for \$3,500, the other \$1,500—issued by the defendant, upon the life of one Oscar Edler. The defense was that he came to his death by suicide, and so the defendants incurred no liability; but the answer contained an offer of judgment for \$231.96, being the amount of premiums received. Upon trial of the issue the court ruled that the defense was made out, and directed a verdict for so much only as was admitted to be due. The correctness of this ruling turns upon the legal effect of answers and information given in connection with the preliminary proofs of death served by the claimants, and presents the only question suggested by the record.

The policy of \$3,500 was payable, by its terms, "in sixty days after due notice and proof of the death" of the life insured, unless, among other things not material here, "he shall die by his own act or hand, whether sane or insane;" in which case "the policy shall be null and void," and the company will return the premiums paid. The character or nature of the proof of death is not specified, nor other language used in reference to it than is above given. The other policy is different. It is payable "within sixty days after notice, and the proofs hereinafter required, of the death of said Oscar Edler, shall have been furnished to the company at its office," and provides that "the proofs of the death, by which the contract matures, shall contain full and true answers, under oath, to the questions in the company's blanks for proofs of death, relating to the life, health, and death of the person in question; and shall include (1) a statement of the extent and character of each and every claimant's interest in the policy; (2) the statement of the physician, or physicians if more than one, who attended the deceased during his last illness, or within a year previous; (3) the statement of a responsible householder acquainted with the deceased; (4) the statement of the undertaker." But the policy declared "that the self-destruction of the person, whether voluntary or involuntary, and whether he be sane or insane at the time, is not a risk assumed by the company in this contract, but in every such case the company will, upon demand made, and the

surrender of this policy, accompanied with satisfactory proofs of such death within sixty days after its occurrence, pay the net reserve upon it held by the company at the beginning of the year in which death occurs."

The complaint stated that Edler died on the twenty-seventh of August, 1876, and, in regard to each policy, that proofs of his death, as thereby required, were served upon the defendant. The answer admits the death of Edler at or about the time named, and "that proof of his death has been served upon it, as in the complaint stated." As to the claim under the first policy, the defendants allege that the "said Edler committed suicide, and took his own life by his own act and by his own hand;" and, as to the second, that he came to his death by self-destruction. They also put in issue the assignment by him.

Upon the trial the plaintiffs put in evidence the policies, and proved their title by assignment. They then called Daniel Goldschmidt, who testified that he was one of the plaintiffs, and he was about to state the consideration of the assignments, and the extent of plaintiffs' claim under them, when the defendant's counsel objected, and the proposed evidence was excluded. He then testified that he knew of Edler's death on the twenty-seventh of August, 1876; that he attended the funeral, and saw his dead body. The defendant's counsel then placed in the hands of the witness certain papers, marked "Exhibit No. 1 for Identification," containing proofs of death and other matters referred to in the second policy, and proved by him that the signature to the certificate was his own, and also that of the firm of which plaintiffs were the members. The exhibit contained various papers entitled as follows: (1) "Claimant's Certificate;" (2) "Attending Physician's Certificate;" (3) "Friends' Certificate;" (4) "Undertaker's Certificate,"—all upon the defendant's blanks, and given in answer to questions framed by them. Among those addressed to the claimants, in paper called "Claimants' Certificate," are these questions and answers:

"Place and date of death? No. 324 West Fifty-second street, in the city of New York, as we are informed and believe, August 27, 1876. (a) Remote cause of death? (a) Disease of the bladder and urinary organs. (b) When did the health of the deceased first begin to be affected? (b) Not known to us, but we are informed and believe several months before his death. (c) Immediate cause of death? (c) Not known to us, other than he was afflicted by the above-mentioned disease. (d) Duration of last illness? (d) Not known to us, except that he had been afflicted with the above-mentioned disease for several months before his death. (e) Give every particular in relation thereto within your knowledge. (e) Not known to us, except that for several months he appeared to be suffering severe pain, consequent, as we suppose, upon the above-mentioned disease. Name and residence of every physician who attended and prescribed for deceased during the last year prior to death, or since he became out of health? Dr. F. Zinsser, of No. 47 West Twenty-eighth street, in the city of New York, as we are informed, prescribed for deceased during this period. We know of no other. Did deceased violate any condition of the above-mentioned policy in respect to residence, travel, occupation, use of spirituous liquors, dueling, suicide, violation of law, or had he been convicted of felony? No, not to our knowledge."

Then follows this direction and answer:

"In case of coroner's inquest, furnish the company with verdict of the jury, and all the evidence on which such verdict was based. We are informed that what purported to be a coroner's inquest was held. We annex a copy of what is represented to us to be the verdict of the jury, and of the evidence on which said verdict was based. But we do not hereby admit that there was any such inquest, verdict, or evidence, and we deny that the purported finding of such alleged jury was true or well founded, and we deny the fact alleged to have been found by such jury, and we deny the truthfulness of the alleged evidence on which said verdict is said to be based."

Attached to the papers referred to is a copy of the testimony purporting to have been taken before the coroner, and a copy of the inquisition,—in effect that a jury of seven, whose names are given, "upon their oaths and affirmations, say that the said Oscar Edler came to his death by suicide, by cyanide of potassium, on the twenty-seventh day of August, 1876, at No. 324 West Fifty-second street." The plaintiffs rested.

The defendant's counsel then proposed to read the exhibit, "for the purpose of basing a motion thereon that the complaint be dismissed," "because the proofs of death show affirmatively, on the face, that this man did not die within any of the risks assumed by this company. They show that he died by his own hand." The plaintiffs' counsel objected, "except so far as they are evidence of the death, as required by the rules of the company, and of the plaintiffs' presentation of proof to the company under their rules," and separately objected to the proceedings before the coroner being introduced in evidence as an admission of the plaintiffs, or as evidence of the statements contained therein. Both objections were overruled, and to each decision the plaintiffs' counsel excepted. The trial judge then ruled "that the complaint should be dismissed unless the plaintiffs showed how the death of Edler was produced; that as to it they had the affirmative." To this the plaintiffs excepted, and, they giving no further evidence, the defendant's motion was granted, and the complaint dismissed; but, on application of defendant's counsel, and against the objection of the plaintiffs, the court subsequently ordered a verdict for the plaintiffs for the sum admitted by defendants to be due.

In these rulings we think the trial court erred.

In the *first* place, the complaint alleges, and the answer admits, the issuing of the policies, the death of Edler during the life of the policies, that proof of his death was served upon the defendants, and demand of payment made as set forth in the complaint. So far there was a complete case conceded; and if the plaintiffs' title to recover had not depended upon their character as assignees, which was denied by the answer, no evidence could have been required on their part. Under the first policy the obligation of the defendant became perfect in 60 days after the death of Edler, and notice and proof of his death. No particular form of proof was specified in the policy, and the only reference to it is the clause which thus fixes the time when the money is to become payable. No doubt the company were entitled to such proof as would afford rea-

sonable assurance that their liability for loss existed; but, where the policy does not require specific information, nothing more can afterwards be required.

*Second*, the company did, however, prepare inquiries upon the points named in the policy, and they were answered. They had from the claimant the time of death, its remote and its immediate cause. They also had much other information, to which the terms of this policy make no allusion. They had from a friend of Edler, and from the undertaker who buried him, positive statements, on oath, as to his death and actual burial, and his identity with the person insured. They suggested no defect in these respects, nor was any suggested on the trial. The only claim was that the copy of the proceedings on the inquest, given in addition to the proof required by the policy, made out a case of suicide, and required the plaintiffs to show the contrary. I can discover no principle upon which such a proposition can stand. The policy makes no provision for it. The original proceedings would not be evidence upon the issue. Its verity is not admitted by the claimant; it is denied. It could not have been required by the defendant. It was not adopted by the plaintiff; but, out of what must now seem ill-advised courtesy, was furnished to the defendants at their request. It contained matter which, if properly substantiated, would have availed the defendants in maintaining an affirmative defense, but in no view suggested to us by the learned counsel for the respondents could it, as now presented, change the burden from them to the plaintiffs. If, by any process of reasoning, any part could be taken as an admission of the plaintiffs, it must be taken as a whole, and, so taken, is no concession of any fact, but a mere communication of hearsay evidence, the truth of which is at the same time denied,—enough to put the defendant upon inquiry,—but in itself is no answer to the plaintiffs' claim even in the first instance.

It is argued that the court below was controlled by authority, and the case then cited is relied upon by the defendant to uphold the ruling, viz., *Insurance Co. v. Newton*, 22 Wall. 32. Under what circumstances the proofs in that case were prepared does not appear; the statement being that "the proofs of death consisted of several affidavits, giving the time, place, and circumstances" of the death of the insured, "and the record of the jury upon the coroner's inquest." It may be inferred that the whole were verified by the claimant, and that they were called for by the contract of insurance; for the court held that "the preliminary proofs presented to an insurance company, in compliance with the conditions of the policy of insurance, are admissible as *prima facie* evidence of the facts stated therein against the insured, and in behalf of the company;" and the court say: "The narration of the manner of the death of the deceased was so interwoven with the statement of his death that the two things were inseparable." In the case before us it is quite otherwise. The insurer raised no issue as to the preliminary proofs of death, and they were in all respects complete without the statement as to the coroner's inquest. Its contents formed no part of the representations of the claimants. The statements were not sworn to by them, nor presented



as worthy of belief. They were in no respect bound by them. Nor were they necessary, as in the case cited, to qualify the defendant's admission, on which the plaintiffs then relied.

I have spoken more particularly of the first policy. The second policy, as we have seen, contains other provisions concerning proofs of loss. They have been complied with literally. They do not require the facts and circumstances attending the death to be set forth in the proofs, nor do they call for any information concerning an inquest or other examination. Under this policy, as under the other, the question was unwarranted; and, although the circumstances stated were calculated to gratify curiosity, and perhaps serve a useful end, formed no part of the proofs called for, nor were they given as matter credited by the claimants. The insurer could, so far as it thought proper, regulate its conduct by any suspicions thereby excited, but it could not make use of the statement as one binding upon the plaintiffs. If the policy was void by reason of any act of Edler, or if his death was from a cause against which they had not insured, it was for them, as the case stood, to make good the averment in the answer, and show by proof that the suicide alleged had been actually committed. It was not necessary for the plaintiffs to ask to go to the jury. The trial court, in admitting the coroner's inquest, and proceedings under it, in evidence, and in deciding that the burden of showing that the insured did not die by his own hand, as therein stated, was on the plaintiffs, committed errors in favor of the defendants and at their request. They cannot now object that some other course might have been taken. As the case stood, no question of fact was in dispute, and the plaintiffs were entitled to recover.

The judgment appealed from should therefore be reversed, and a new trial granted, with costs to abide the event.

(All concur.)

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(102 N. Y. 477)

PEOPLE *ex rel.* PORT CHESTER SAV. BANK v. CROMWELL, Treasurer.<sup>1</sup>

(*Court of Appeals of New York.* June 1, 1886.)

COUNTIES—MANDAMUS—COUNTY TREASURER—LOSS FROM TAKING DRAFT, INSTEAD OF CASH, FOR COUPONS.

M. & Co. were the legal depositaries of the moneys of Westchester county used to redeem its bonds, and before November 1, 1884, received funds of defendants to redeem coupons. On November 6th relator presented \$500 worth of coupons to M. & Co. for payment, and requested a draft for the amount, which M. & Co. gave on a New York bank, and relator surrendered the coupons, which were charged to defendant's account as paid. M. & Co. could have paid in cash if relator had chosen to take it. The draft was presented in November, and protested,—M. & Co. having failed in the mean time; and relator was granted a *mandamus* to compel the county treasurer to pay the amount of coupons. *Held* error; that relator had not shown a case enabling him to recover, as the loss resulted from the voluntary action of relator in accepting a draft instead of money, and he so discharged the county, and accepted the responsibility of M. & Co.

Appeal from order and judgment of general term supreme court, Second department, reversing order denying *mandamus*, and granting it.

<sup>1</sup>Reversing 38 Hun, 384.

*Isaac N. Mills*, for the People, etc.

*Wilson Brown, Jr.*, for appellant, David Cromwell, Treasurer.

RUGER, C. J. In the consideration of this appeal the defendant is entitled to have the facts determined in accordance with the relation thereof contained in his opposing affidavits. The statements of the affidavits are conflicting, and as the relator, notwithstanding that fact, still demanded a peremptory *mandamus*, it could only be granted upon the assumption that there were no disputed facts. Its action was equivalent to a demurrer to the case presented by the opposing affidavits, and the question thus presented must be determined upon the assumption of their truth. *People v. Richards*, 99 N. Y. 620; S. C. 1 N. E. Rep. 258; *People v. Supervisors, etc.*, 73 N. Y. 175; *People v. Supervisors, etc.*, 64 N. Y. 600. The facts thus presented are that Masterton & Co. were the legal depositaries of the moneys of the county of Westchester applicable to the redemption of its bonded indebtedness, and, before November 1, 1884, had been put in funds by defendant, its county treasurer, to redeem the coupons for interest on its debt maturing on that day. The relator held such coupons, to the amount of upwards of \$500, and on November 6, 1884, presented them to Masterton & Co. for payment, and, upon being interrogated as to the manner of payment, stated that it wished a draft for the amount. Thereupon Masterton & Co. delivered to the relator their sight draft upon the National City Bank of New York for the amount thereof, and it surrendered to Masterton & Co. its coupons, which were immediately charged to the defendant's account as paid, and the coupons were afterwards delivered to the county treasurer. At the time of this transaction Masterton & Co. had on hand cash sufficient to pay the amount of such coupons, and would have paid them in currency but for the election of the relator to take the amount in a draft. The draft was presented by the relator to the National City Bank, sometime in November thereafter, and was protested for non-acceptance and non-payment; Masterton & Co. having failed in the mean time. That fact was made public on the 8th, although Masterton & Co. were insolvent on the 6th, and remained so until after the draft was presented. Upon these facts the relator applied for a peremptory *mandamus* against the county treasurer requiring him to pay the coupons. The defendant alleges that he had no money in his hands with which to pay them, and no means for raising the amount from the tax-payers of the county by virtue of any statutory authority.

The remedy sought is of doubtful propriety in its application to the circumstances related, and it might well be said that payment of the general indebtedness of a county cannot be enforced by the punishment of its financial officers; but, as we are of the opinion that the relator has not shown a case entitling him to recover upon the merits, we prefer to dispose of the appeal upon that ground.

The claim of the relator is that the loss occasioned by the insolvency of Masterton & Co. shall be imposed upon the defendant, and enforced by the compulsory process of the court. It is evident that this loss re-

sulted from the voluntary action of the relator in accepting a draft, instead of money, for the obligations of the county then surrendered, and that it thereby intended to discharge its claim upon the county, and to accept in lieu thereof the responsibility of Masterton & Co. This is the plain meaning of the transaction as evidenced by the unequivocal acts of the parties, and it cannot be obscured by supposed analogies to other situations. Masterton & Co. were the special agents of the county to pay their coupons, as a bank is the agent of its depositor to pay his check. If, upon presentation, such agent or bank should refuse payment, the debt remains unpaid; but, if the creditor accepts anything other than legal currency in payment, the debt is discharged. *Crawford v. West Side Bank*, 100 N. Y. 50; S. C. 2 N. E. Rep. 881. The authority of the depository is simple, and limited to the act of making payment; and if the creditor goes further, and deals with it for any other transaction than that of receiving payment, he does so upon his own responsibility, and must bear the consequent loss, if any, of such a transaction.

The surrender of the possession of the coupons by the relator was inconsistent with the expectation of any continuance of liability on the part of the county thereon, as it was beyond the power of Masterton & Co. to authorize such an expectation. The county had provided the funds for the payment of its indebtedness; and, if the creditor accepted anything else than cash for its obligations, he was at liberty to do it, but acted on his own responsibility in so doing. The entire scope of the agency of Masterton & Co. was to pay out the moneys of the county to its creditors, in the amounts, to the persons, and at the time specified in its obligations, and, outside of the performance of this duty, they had no power to bind or affect the county. The limitations upon their authority arose from the nature of the business they were authorized by statute to transact, and were obvious to all who had financial dealings with the county.

By the transaction considered, the relator authorized Masterton & Co. to immediately appropriate to their own use the funds provided by the county to pay the coupons, and, when they were afterwards delivered to the county, Masterton & Co. became entitled to a credit therefor in their accounts. It was thus placed beyond the power of the county to reclaim those funds, or hold the bondsmen of Masterton & Co. liable for default of their principal. Masterton & Co. were not parties to the obligations presented, and were under no liability thereon, and their draft was the obligation of a third person accepted in exchange for the coupons surrendered. The defendant had no authority over this transaction, and it was beyond his power to influence or prevent it.

There is little analogy between this case and that of *Indig v. National City Bank*, 80 N. Y. 100, cited by the relator, and apparently much relied on. There the defendant was an agent of the plaintiff, employed to make collection of a note at a distant point, and was sued for alleged negligence in accepting the draft of its corresponding agent in payment of the collection. The liability depended solely upon the question of negligence. It was held that the collection was made according to the

known and customary usages of business, and in accordance with the implied authority conferred upon the agent in transacting such business for its principal. It was further intimated in the case that the plaintiff therein had suffered no loss, as it did not appear that the note had been paid; the maker not having sufficient funds on deposit at the place of payment, at its maturity, to pay it. The implication from this case is quite strong that if the maker had provided funds, as the defendant did here, to pay the obligation, that the transaction would have operated as payment of the note.

This case is similar, in some respects, to that of *Smith v. Miller*, 43 N. Y. 171, where it was said that "a creditor may so deal with negotiable securities received from his debtor for collection, and to be placed to his credit when paid, as to discharge the debtor from all liability, whether the securities are in fact paid or not. He may make them his own, so as to substitute the parties to the securities as his debtors, in place of his original debtor, by his dealings with those parties, or by giving time for payment, or by any other act prejudicial to the interests of the debtor." *Southwick v. Cox*, 9 Wkly. Rep. 22; *Vernon v. Boverie*, 2 Show. 296. The same result will follow any neglect or laches of the creditor in obtaining payment of negotiable instruments transferred from which loss and injury ensues. In that case the defendants, who resided at Buffalo, were indebted to plaintiffs, living at New York, and in payment of such indebtedness remitted to them a sight-draft on an apparently solvent firm residing in the same city with whom the drawers had funds. The plaintiff presented the draft, and accepted a check upon a bank in that city, from the drawees, in payment thereof. This check would have been paid if presented on the day of receipt, but the plaintiff omitted to present it until the next day, when payment was refused. The maker having in the meanwhile become insolvent, it was held that the plaintiff had by his laches released the drawers of the draft from liability to him, and constituted the makers of the check his debtors for the amount. The transaction there was directly between the debtor and creditor; and, although in that regard much more favorable to the claims of the creditor than here, yet it was held that the creditor had lost his remedy against the debtor, although he had received the check of one of the parties to the draft in payment thereof.

The case here presented is also clearly distinguishable from those arising directly between the debtor and creditor. In those cases there is no question as to the power of the debtor to authorize the continuance of his original liability, and in any transaction having in view the payment of his obligation it is required that it shall be actually paid in order to discharge it, or that something shall be received by the creditor from the debtor under an express agreement that it shall operate as payment.

The case of *Turner v. Bank of Fox Lake*, 42\* N. Y. 425, also cited by the relator, is not an authority in its favor. There the creditor sued upon a bill of exchange, of which he had possession, but which had been reclaimed by him after having been once surrendered in exchange for the check of the drawee. After payment of the check had been refused,

the holder returned it to the drawee, and received possession of the bill, and caused it to be duly protested for non-payment. It was held that the bill sued upon was given upon a sufficient consideration. In that case it was the check of a person liable as a party to the draft that had been received in payment, and it was received by an agent for collection, and the question was whether the agent had discharged his duty with diligence and fidelity in making the collection.

But little aid, in the solution of the questions here presented, can be derived from cases arising between principals and collecting agents, as, in such cases, the question is usually one of negligence alone, and is governed largely by the usages of trade. Here no custom has been proved, or can be proved, and but little evidence given as to the facts upon which the liability of the parties would be affected by the omission of the relator to present the check promptly. It certainly seems probable that, having received the check on the 6th, it might have caused it to be presented in New York on the 7th, when it probably would have been paid; but, whether so or not, the evidence is not before us to enable us to determine that question. Clearly, the relator has not made a case which exempts it in law from the imputation of laches. In this case the relator accepted the obligation of a third person in payment of its claim against the county, and, having failed to realize the amount of the security taken, without recovering possession of its coupons, seeks to re-establish a debt against the county. We think it is precluded from doing so by the defense of payment.

The order of the general term should be reversed, and that of the special term affirmed, with costs.

(All concur.)

(162 N. Y. 406)

BARBER v. ABENDROTH and others.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

WATERS AND WATER-COURSES—OWNER OF DOCK LIABLE FOR INJURY CAUSED BY DEFECT IN BOTTOM.

The owners of a dock are responsible for damages suffered by a vessel lawfully using the dock, caused by a defect in the bottom known to the owners of the dock, and not known to the master of the vessel; and where plaintiff was authorized by defendant, who knew of the dangerous character of the bottom near the dock, to bring a cargo of sand to it, and inquired of a watchman on duty where he should moor his boat, placed it in the spot indicated, and, the tide falling, the boat was broken in the middle, *held*, that defendant was liable, although it was not part of the watchman's duty to direct boats where to moor, as they should have had some one there for that purpose.

Appeal from judgment general term supreme court, First department.

*D. B. Ogden*, for appellants, Abendroth Bros.

*J. A. Hyland*, for respondent, Dennis G. Barber.

RAPALLO, J. The plaintiff was lawfully using the defendant's dock at the time of the injury complained of. The defendant is a corpora-

<sup>1</sup>Affirming 34 Hun, 628, *mem.* See N. Y. Daily Reg. December 23, 1884, for opinion of court below.

tion, and owned the dock, which was opposite its foundry, and was about 300 feet long. It had contracted for a cargo of sand to be shipped to it, and to be delivered at the dock in question. The sand was shipped on the canal-boat George A. Bennett, owned by the plaintiff, and consigned to the defendant, deliverable along-side of its dock at Port Chester, New York. The boat, with its cargo, arrived at the mouth of the Byram river on the twenty-fifth of August, 1881, at between 8 and 9 o'clock P. M., and was then attached to a tug. The tide being then low, the tug anchored, and waited till the tide rose enough to take the boat to Port Chester. She arrived there at about 12 o'clock that night. There was a watchman on the dock, and the plaintiff asked him where he should moor his boat, and he said he did not know. The plaintiff then asked him where the last load had been landed, and he pointed out a place, and the plaintiff then moored at the place designated, throwing his lines to the watchman, who took them, and made them fast. When the tide fell, the boat rested on the bottom, which was bare at both ends of the boat, but there was a depression in the center, which caused the boat to settle about a foot in the center, and thus injured her. The bottom was hard sand.

At the close of the testimony, the judge, at the request of the defendant, charged the jury that the plaintiff could not recover unless the jury believed that the defendant had notice that the bottom of the river, at the point in question, was unsafe, and was guilty of negligence in not warning the plaintiff, and the plaintiff was not guilty on his part of any negligence which contributed to the accident. This charge was in accordance with adjudged cases, and the converse of the rule laid down is sustained in the same manner. The jury having found for the plaintiff, the verdict must be assumed to have been based upon the facts supposed in the charge.

In *Sawyer v. Oakman*, 1 Low. 134, the rule was laid down by the district court of the United States that the owners of a dock are responsible for damages suffered by a vessel lawfully using the dock, caused by a defect in the bottom known to the owners of the dock, and not known to the master of the vessel. This decision was affirmed in the circuit court of the United States by WOODRUFF, J., in 7 Blatchf. 290. The same rule was applied in *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216, where the owner of a private wharf procured a vessel to bring a cargo to it, to be there discharged, and suffered her to be placed at high water at a place apparently safe, but in fact unsafe; there being a sunken rock at the adjoining wharf, of which the defendant had knowledge. The plaintiff might have moored safely at defendant's wharf, but did not know of the rock. As an illustration, the court, in the case cited, instanced an unsafe entrance to a man's house, whereby a carrier coming there at night should sustain damage. See, also, *Leary v. Woodruff*, 4 Hun, 99; S. C. affirmed, 76 N. Y. 617.

In the present case the defendant had authorized the cargo of sand to be sent to it, to be delivered at the wharf in question, and knew that it was coming, although it did not know at what precise time. It was

bound to know, however; that it could only be delivered at high tide, which would, on the day in question, be either about noon or about midnight, the bottom being bare at low tide. The jury must be deemed to have found that the defendant knew the dangerous condition of the bottom, and to have found that the defendant was negligent in not making provision to warn a vessel coming in by the night tide, especially as it had a watchman there who might easily have been instructed. Both of these questions were submitted to the jury at the defendant's request, and found adversely to them. We do not think that the directions given by the watchman made the defendant liable—*First*, because it was not part of his duty to give them, he being there to watch the building, and guard against fire; and, *secondly*, because he did not assume to have authority to give directions, as he said he did not know where the plaintiff should moor. But the inquiry made by the plaintiff showed that he took such precautions as the circumstances afforded, and that, in making fast at the place where he was told the last cargo had been landed, he exercised prudence which tended to absolve him from the charge of negligence. There was evidence tending to show that the place selected by the plaintiff was not the proper place, but we think that, taking the whole evidence together, it was sufficient to sustain the verdict.

The judgment should be affirmed.

(All concur.)

(102 N. Y. 690)

SAMSON and others v. FREEDMAN.

(Court of Appeals of New York. June 1, 1886.)

SETTLEMENT—ACCOUNT STATED.

Plaintiffs, doing business in England, dealt with defendants, in New York, on credit. On July 1, 1880, there was a balance due plaintiffs, and they shipped him nine cases of goods which were stored in the New York custom-house on August 9th. The goods were invoiced to defendant at a certain price, and he took them from the custom-house in different lots, the last on November 5, 1881. Soon after January 4, 1881, defendant had received a written statement of plaintiffs' account, in which he was charged with balance due July 1, 1880, and the invoice sent July 27th, and credited with two payments made in August and November, and showing a balance due of £1,169. This was inclosed in a letter, in which plaintiffs requested defendant, if found correct, to carry balance forward to new account, and return the "confirmation inclosed." Defendant did not sign or return the confirmation, but sent £1,000, in two payments, and wrote them: "There are still a few pounds due you, providing the goods still on hand \* \* \* are up to the contract. I shall withdraw them shortly, and determine about it." March 28d, defendant notified them that the goods were inferior to samples, and demanded £847 as damages. *Held*, that plaintiffs' statement of January, 1881, was an account stated, and that the balance claimed was *prima facie* presumptively due plaintiffs.

Appeal from an order of general term court of common pleas of New York, reversing the judgment entered upon report of referee, and granting new trial to respondents.

Melville H. Regensburger, for appellant, Joseph Freedman.

James Dunne, for respondent, Henry Samson and others.

EARL, J. This action was brought to recover a balance claimed to be due upon an account stated. The answer to the complaint is substan-

tially a general denial. There is not much dispute about the facts, and they are substantially as follows: The plaintiffs were partners, carrying on a business in England, and the defendant was a merchant doing business in the city of New York. At various times during the years 1880 and 1881 the plaintiffs and defendant had dealings with each other, consisting of sales of merchandise by plaintiffs to defendant on credit, and of sundry payments to plaintiffs by defendant on account thereof. On the first of July, 1880, there was a balance due the plaintiffs from the defendant, upon their dealings, of £1,440 11s. 4d., and on the twenty-seventh day of the same month the plaintiffs shipped to the defendant upon his order nine cases of goods, which reached New York on the ninth of August, and were put into the custom-house. These goods were invoiced at the agreed price of £679 8s. 6d., and were taken from the custom-house by the defendant as follows: Four cases October 4, 1880; and one case at each of the following dates in 1881: May 25th, August 27th, September 6th, October 5th, and November 5th. On the fourth day of January, 1881, the plaintiffs sent to the defendant by mail a written statement of their account against him, in which he was charged with the balance due plaintiffs July 1st, and the invoice of goods shipped July 27th, and some items of interest and expenses, and he was credited with two payments of £500 each, made in August and November, and which showed a balance due the plaintiffs of £1,169 8d. The account was inclosed in a letter, in which the defendant was requested, if he found it correct, to carry the balance forward to the new account in conformity, and to return the confirmation inclosed, which was as follows:

"I beg to acknowledge the receipt of your account current showing a balance of £1,160 0 8 per thirty-first December, 1880, in your favor, which I transfer to the new account in conformity. [Date and signature.]"

The defendant received these papers by mail in due course, but did not sign or return the proposed confirmation. Subsequently the agent of the plaintiffs in the city of New York called upon the defendant in reference to the account, and on one of the occasions the defendant told him that he had remitted the whole amount of the account, except about £40 due for interest, and that he had requested of plaintiffs a statement. After receiving the account, on the fifteenth day of January, 1881, the defendant sent to the plaintiffs £500, which he requested to have placed to his credit. On the twenty-first day of February he sent to them another sum of £500, and requested to have the same placed to his credit, and, in his letter inclosing the draft, he said:

"There are still a few pounds due you, providing the goods still on hand (and I have quite a lot there still from your shipments) are up to the contract. I shall withdraw them shortly, and determine all about it."

On the twenty-third day of March he wrote a letter to the plaintiffs, notifying them that, upon investigation, the entire invoice of goods shipped July 27th was inferior to the samples upon which the goods were bought, and that he demanded as damages £847 14s. 1d., and that the goods were held subject to their order on the payment of that



sum. The defendant at no time disputed the correctness of the account, and never made any objection thereto except the one stated in his letter of March 23d.

The sole question for our determination is whether there was an account stated. We think the court at general term did not err in holding there was. The goods had been subject to the control and inspection of the defendant for five months before he received the account. He had had four cases of them in his actual possession for three months. The account was a short one, composed of few items. Immediately after its receipt he paid £500 thereon, a portion of which was necessarily applicable to the goods last shipped. More than a month later he sent another payment upon the account, in which he acknowledged that there was a balance still due, provided the goods still on hand were "up to the contract." There was no express agreement upon the account by a mutual looking over the same. But the law raises from such facts an implied agreement to the correctness of the account. *Lockwood v. Thorne*, 18 N. Y. 285, 292; *Stenton v. Jerome*, 54 N. Y. 484; *Quincey v. White*, 63 N. Y. 370, 377; *Young v. Hill*, 67 N. Y. 162, 172; *Sharkey v. Mansfield*, 90 N. Y. 227. An account thus stated is not conclusive upon either party, but is simply *prima facie* presumptively correct, and may be impeached for any error induced by fraud or mistake. Even by what was said in the letter containing the last payment, the defendant assented that the account was correct, and the only right he reserved was to impeach it if the goods were not up to the contract. That right he would have had if it had not been expressly reserved. If he could show that upon subsequent examination he discovered for the first time that the goods were not up to the contract, he could have alleged the facts in his answer, and have recovered his damages. The plaintiffs did not place the defendant at a greater disadvantage by suing him upon an account stated than they would if they had sued him upon an open account for the goods sold, claiming the balance due, because by neither form of action could they cut off his counter-claim for breach of warranty, which was the only defense left to him, the goods having been received by him.

A stipulation appears in the record, allowing the defendant to amend his answer by setting up his damages, or to commence an action to recover his damages; plaintiffs' attorney agreeing to accept service of process in such action; that action and this to be tried at the same time, before the same referee. The defendant did not avail himself of that stipulation, and it is therefore a just inference that he had no cause of action against the plaintiffs, and that, therefore, no injustice has been done to him by holding that there was a stated account, and thus that the balance claimed was *prima facie* presumptively due the plaintiffs.

We think the order of the general term should be affirmed, and judgment absolute ordered against the defendant, with costs.

(All concur.)

(102 N. Y. 423)

## DWINELLE v. EDEY.

(Court of Appeals of New York. June 1, 1886.)

STATUTE OF LIMITATIONS—SEALED INSTRUMENT—N. Y. CODE, § 90—CODE CIVIL PROC. § 881.

In April, 1869, the plaintiff and defendant formed a partnership by an agreement under seal. It was provided that "all losses happening to the said \* \* \*, and all expenses of the business, shall be borne by the said parties in equal proportion." The business proved unprofitable, and was wound up in December, 1869. The plaintiff, on or before June, 1870, paid and expended moneys for said firm in its business. Before this action, payment of one-half of these disbursements was demanded by plaintiff from defendant, and was refused. The complaint served October 24, 1882, asked an accounting and judgment for one-half the sum paid by plaintiff. The court of common pleas dismissed the bill, holding the claim barred by statute of limitations. The general term reversed its decision and ordered new trial. *Held* no error; that it was not a covenant running to the creditors, but an express agreement to reimburse the partner paying in excess of his share, and, the action being founded on an instrument under seal, was governed by the limitation of 20 years.<sup>1</sup> RAPALLO and ANDREWS, JJ., dissent.

Appeal from judgment of general term court of common pleas, granting a new trial, and reversing a judgment of the special term of that court in favor of defendant.

*Jno. M. Bowers*, for appellant, Albert R. Edey.

*Herbert G. Hull*, for respondent, William H. Dwinelle.

FINCH, J. We are content with the determination of the general term that the written agreement of the parties created a copartnership from its date, and that such relation was not postponed, or intended to be postponed, until a period when the business profits had fully reimbursed the plaintiff for his advances. While all such profits were at first applicable to the debt, the latter was a debt of the firm due to one of its members; the advance was to the copartnership, and for its business purposes; and the contract which limits its duration to three years plainly indicates the moment of its beginning by the words "three years from this date."

The further question in the case, as to the statute of limitations, and what lapse of time is a bar to the action, depends upon a correct interpretation of the provisions of the Code, and upon the substantial character of the action. The contract of copartnership was under seal. It fixed and settled the respective interests of the parties in the capital stock, and contained an express covenant that "all losses happening to said firm, whether from bad debts, depreciation of goods, or any other cause or accident, and all expenses of the business, shall be borne by the said parties in equal proportions." This language is criticised as not amounting to a covenant to pay losses to the partner who has been compelled to overpay his share. But that is an interpretation quite too

<sup>1</sup> For a full discussion of the question of the statute of limitations, and within what time an action must be brought, see *Perry Co. v. Railroad Co.*, (Ohio,) 2 N. E. Rep. 854, and note, 857-870; *Wright v. Kleyla*, (Ind.) 4 N. E. Rep. 16; and *Falmouth & L. T. Co. v. Shawhan*, (Ind.) 5 N. E. Rep. 408.

technical and narrow. Each party covenanted with the other to bear his specified proportion of the losses; and that he does not do when he omits to pay his just share to the partner who has been compelled to overpay. The covenant amounts to an express agreement to reimburse to the paying partner the excess above his share; for, when the creditors have been paid by one, a proportion of the losses can only be "borne" by the other through a payment to the partner who has advanced the whole. In the emergency which happened, the covenant amounted to an express agreement to reimburse the partner paying in excess of his share. Upon this covenant the complaint founded the cause of action pleaded. After averring the partnership agreement, it alleges its expiration by the terms of its own limitation; that all the property and assets of the firm had been applied to and exhausted in the payment of debts; that all of these, except the sums due to the plaintiff, had been paid by him, with the aid of the partnership property; that the business had resulted in large losses; and that the defendant had "failed to pay one-half of the losses and expenses incurred in said business, as he agreed to do in and by said copartnership agreement." The relief demanded is an accounting, and the payment of the sum to be so ascertained, which the complaint alleges is in excess of \$27,000; so that, on the face of the pleadings, there was stated as the substantial cause of action a covenant under seal, its breach, and damages resulting beyond a certain amount, to ascertain which an accounting was needed. The pleader rested the plaintiff's right upon the covenant and its breach, claiming the resultant damages as an absolute right, and seeking the aid of equity only that the amount might be more conveniently ascertained.

We concur in the opinion of the general term that this was a cause of action founded upon a sealed instrument, within the meaning of the limitations prescribed for the commencement of actions. Code, § 90; Code Civil Proc. § 381. The argument to the contrary rests mainly upon the theory that the action was an equitable one for contribution, and founded, not upon the sealed agreement, but upon the doctrines of equity operating upon a given relation, and reaching a just result out of regard for justice, and irrespective of any contract of the parties to that effect. The fact of the partnership is said to be alone material, and it is not of the least consequence whether that fact be evidenced by a sealed contract, an unsealed writing, or a verbal consent. The argument is very strong if the action may be correctly treated as one for contribution. But that action fitly reaches an emergency not here existing. It takes care of a case in which the parties have not fully taken care of themselves. From the partnership relation it evolves certain unexpressed and uncovenanted duties as mutually intended by the fact of the relation, and is at least needless where the parties themselves have stipulated as to all such duties in detail, and bound themselves by express covenants for their performance. When that occurs, and the action may rest upon an express covenant purposely made, and is brought explicitly upon it, there seems to be no sound reason for turning it into an action for contribution merely. That is not needed to sustain a recovery, and, in face

of the sealed covenant, and the plain choice of the plaintiff to stand upon it, we think it ought not to be treated as an action for contribution, such as the appellant claims. The cases cited to that effect were those in which, without the aid of doctrines peculiar to equity, there was no cause of action.

The subject was very fully discussed in *Peters v. Delaplaine*, 49 N. Y. 362, which was an action for specific performance. In such an action equity acts or withholds its aid upon grounds peculiar to itself. A covenant to convey does not give an absolute right to a conveyance; and an action seeking that relief depends upon other circumstances than the covenant, and lies in the equitable discretion of the court. In the present case, however, the covenant and its breach gives the absolute right to a recovery of the resultant damages, and it is only in the mode of ascertaining them that equitable aid is found useful. The substance of the action is to recover damages for a breach of covenant, and is founded upon the sealed instrument. The illustration suggested by the learned trial judge of the nature of the action between joint obligors in a bond where one has paid the whole debt may serve still further to elucidate our conception of the true rule. He says very correctly that the liability *inter sese* does not depend upon any covenant or contract between themselves. Their sole expressed contract is to pay the obligee. But, suppose that in the bond there was inserted an express covenant, running, not to the obligee, but to each other, to bear, respectively, one-half of the debt. In such a case their mutual liability would depend upon no equitable doctrine, but be fixed by an express covenant, which would by itself sustain and support the right of action. The covenant here is of that character. It is not one running to the creditors, as is the covenant of the ordinary bond, but one running to each other, and establishing their rights and duties as between themselves. The general term, therefore, were correct in saying that the limitation of 20 years was applicable to the action.

The judgment should be affirmed, and judgment absolute rendered for the plaintiff upon the stipulation.

RUGER, C. J., EARL and DANFORTH, JJ., concur. RAPALLO and ANDREWS, JJ., dissent. MILLER, J., absent.

(102 N. Y. 500)

MORGAN v. CITY OF BINGHAMTON.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

DRAINS AND SEWERS—NUISANCE—INJUNCTION AGAINST CONSTRUCTION.

An injunction should not be granted against the construction of a sewer by a city, where the injury complained of is that, in the course of two or three years, the sewerage discharged therefrom into a river may be so increased as to be deposited upon low grounds belonging to petitioner, lying along the river, and so poison and infect the air.

Appeal from a judgment of general term supreme court, Third department, entered upon the trial of the action by the court without a jury.

<sup>1</sup> Reversing 32 Hun, 602.

*A. D. Wales*, for appellant, City of Binghamton.

*G. L. Sessions*, for respondent, Julius P. Morgan.

FINCH, J. The findings of fact of the trial judge are conclusive, for all the purposes of this appeal. If the evidence leaves any of them doubtful, the deficient proof may have been supplied by his personal examinations, since he went over the route of the sewer, and took careful observation of the locality, with the consent of both parties, and doubtless aided by their suggestions. The sole question before us, therefore, is whether, upon those findings, the plaintiff was entitled to so far defeat the plan of sewerage adopted by the common council as to prevent and restrain the connection of other sewers with that running through Carroll street.

It is not contended that any of the sewers, as planned, will discharge their contents upon plaintiff's land, or in any manner touch or interfere with his premises; and all the cases in which equity has interfered to prevent the discharge of sewerage upon private property have no application. The prevailing opinion at general term indulges in that misapprehension, and has been criticised upon the argument in that respect. The injury apprehended is not that, but something very different. Instead of a direct trespass, it was a consequential damage which is threatened. The theory of the findings is that in one or two, or, very surely, in three, years after the branch sewers are emptied into the Carroll-street sewer, and have become largely connected with premises along their lines, the discharge at the mouth of the Carroll-street sewer into the river will be strewn along its banks, and stranded upon low lands, and tend to produce offensive and unhealthy odors, tainting the air, and planting the seeds of disease; and that the premises of the plaintiff are so situated as to be peculiarly exposed to these dangers by reason of proximity. The evil will reach the plaintiff, if at all, through the poisoning and infection of the air, and not from any discharge of sewerage upon his lands, or any deposit of it there by the river currents.

The findings plainly disclose two characteristics of the apprehended danger. It is not imminent; and it is wholly contingent, and not inevitable. No immediate danger exists. It is found to be possible, within one or two years, but not certain to occur sooner than in three years. Every finding which prognosticates threatened evil is qualified by the phrase "in time," which limits it to some indefinite future period; and when the findings seek to fix that, they postpone it, as a certain danger, for three years. But they leave it then merely a contingency depending, as the findings express it, upon the condition that the branch sewers "should be mainly used by the inhabitants" of the adjoining streets. Nobody knows when they will be so "mainly used." Houses which have their own cess-pools and privy-vaults may not, for many years, be fitted with modern closets and sewer connections. Such improvements are beginning to be questioned for their own evils and dangers, and may come slowly, and no evidence or finding indicates the probable period. The contingency as to time is further made to "depend very much upon the

quantity of water used in the sewer." The twenty-sixth finding of the trial judge explicitly declares that "the pernicious effects of the depositing sewer matter at this point, and the time when such will be felt, are dependent upon various uncertain future events;" and this shows that the evil itself, as well as the date of its appearance, are alike contingent, and not inevitable. The danger, therefore, which can alone support this injunction, is in the air of an uncertain and indefinite future. Its possible coming rests upon opinion and speculation. It is both doubtful and remote. Experience only can test the question satisfactorily, and meantime a carefully planned system of sewerage, meant to secure health and cleanliness to a growing city, is maimed and disjointed.

Such a result, it seems to us, ought not to be sustained. The restraining force of a court of equity should very rarely, in the absence of fraud or bad faith, set itself above the discretion and judgment of administrative officers to whom the law commits a decision, (High, *Inj.* § 1270;) and this for the evident reason that a reversal of their judgment is but saying that the court judges differently upon what has been intrusted to another discretion, and simply confronts that opinion with its own. And where the evidence is conflicting, and the injury doubtful, eventual, or contingent, the tribunal intrusted by the law with the plan and execution ought not to be overruled. *Hil. Inj.* 305; *Swett v. City of Troy*, 62 Barb. 630. "Injury, material and actual, not fanciful or theoretical, or merely possible, must be shown as the necessary or probable results of the action sought to be restrained." *People v. Canal Board*, 55 N. Y. 397. The injury described in the findings before us is problematic, distant, merely possible. Consistently with all their averments, it may never occur, and is only prophesied upon the basis of the happening of certain contingencies which may or may not arise. Meantime a plan of improvement looking to the health and comfort of the city and its inhabitants, adopted in good faith by the municipal authorities, with the aid of an engineer not claimed to be incompetent or unskillful, is stopped and dismembered, and the branch sewers left useless, to the inconvenience of all desiring their benefit. For three years, at least, and very probably for a longer period, the findings leave it certain that no evil will result; and if, upon actual experiment, it is found that sources of danger exist, it must be presumed that the constituted authorities will do their duty, and adopt some plan to remove it. Such a plan the court below suggests, involving a very serious increased expense. That ought not to be forced upon the city until some present necessity shall compel. To sustain this judgment would push our authority beyond its limits, and hamper official bodies, making public improvements, beyond reason.

So much of the judgment of the general term as is appealed from should be reversed, the injunction dissolved, and a new trial granted, costs to abide the event.

(All concur.)

(102 N. Y. 323)

REILLEY v. PRESIDENT, ETC., DELAWARE &amp; HUDSON CANAL CO.

(Court of Appeals of New York. June 1, 1886.)

APPEAL—SUPREME COURT—CODE CIVIL PROC. § 1842—NO REVERSAL ON EXCESSIVE DAMAGES ALONE.

The general term of the supreme court has no power to reverse the judgment of an inferior court on the ground of excessive damages, but can only review questions of law decided by those courts.

Appeal from judgment of general term, Third department, reversing a judgment of Albany county court, and granting new trial.

Amasa J. Parker, for appellant, John Reilley.

Edwin Young, for respondent, President, etc., Delaware & Hudson Canal Co.

RAPALLO, J. This action was brought in the county court of Albany county, to recover damages for ejecting the plaintiff from defendant's cars. The plaintiff had a verdict for \$1,000 damages. At the close of the trial the defendant's counsel moved the county judge, on the minutes, for a new trial, on the grounds that the damages were excessive, and that the verdict was against the weight of the evidence. The motion was denied, and an exception taken. No order denying the motion was entered. Judgment was entered in the county court upon the verdict, and an appeal from the judgment, and from the decision of the county judge denying a new trial, was thereupon taken to the general term of the supreme court, where the judgment was reversed, and a new trial ordered, on payment by the defendant of the costs of the trial, on the sole ground that the damages were excessive. From that judgment of the supreme court plaintiff now appeals to this court, on the ground that the supreme court had no power to reverse the judgment of the county court on the ground that the damages were excessive.

It has been several times decided by this court that the general term of the supreme court had no power, under the Code of Procedure, to reverse the judgment of an inferior court on the ground of excessive damages, but could only review questions of law decided by those courts. *Thurber v. Townsend*, 22 N. Y. 517. It was said in that case that it was only errors of the court, and not of the jury, which the supreme court had the power to correct; and that the only way in which such errors could be corrected was by motion in the inferior court for a new trial, and that the decision of that court upon the subject would be final; the setting aside of a verdict on account of excessive damages being discretionary. To the same effect is the case of *Baker v. Remington*, 45 N. Y. 323, where an appeal was taken to the supreme court from an order of the city court of Brooklyn granting a new trial on the ground of newly-discovered evidence, (see, also, *Wavel v. Wiles*, 24 N. Y. 635; *Smith v. Platt*, 96 N. Y. 636;) and the general rule is well settled that the decisions of one court resting in discretion are not reviewable in another, unless such review is specially authorized by law.

The respondent contends, however, that the rules laid down in the

cases are changed by section 1342 of the Code of Civil Procedure, which provides that "an appeal may be taken to the supreme court from an order affecting a substantial right, made by the court or a judge in an action brought in a court specified in the last section but one," (which includes a county court.) Even if this provision could be held to authorize a review by the supreme court of an order of a county court denying a motion for a new trial on the ground of the excessiveness of the damages, it would not avail the respondent on this appeal, because no order was entered in the county court denying the motion for a new trial, (*In re New York Cent. R. Co.*, 60 N. Y. 112; *Bradley v. Van Zandt*, 3 Code Rep. 217; Code Civil Proc. § 1343,) and the exception taken to the decision denying the motion on the minutes was not an exception to a ruling upon the trial, and presented no point for review. The judgment of the general term now appealed from purports to reverse the judgment of the county court, and grant a new trial. But we do not think that, even if an order had been entered in the county court, and appealed from, the provision of the Code of Civil Procedure changed the former rule, or was intended to give jurisdiction to the supreme court to review the exercise of the discretion of an inferior tribunal.

The judgment and order of the general term should be reversed, with costs.

(All concur.)

(102 N. Y. 713)

#### HOUSE v. EISENLORD, Adm'r, etc.<sup>1</sup>

(*Court of Appeals of New York.* June 1, 1886.)

#### MORTGAGE—FORECLOSURE—COSTS IN COURT OF EQUITY IN DISCRETION OF COURT.

Plaintiff's agent received \$70, part of interest due upon a mortgage, saying that defendant might take his time to pay \$17.50 still due. Plaintiff received the \$70, and credited and allowed it as part payment of six months' interest, but soon after foreclosed for the full amount of principal and interest under usual "interest clause." The trial court held that plaintiff was bound by her agent's act; but as \$17.50 was due, and mortgagor had made no tender, gave decree of foreclosure for \$17.50, but gave no costs to either party. *Held* no error; that while, under the circumstances, a court of equity, in the exercise of its discretion, might have dismissed plaintiff's complaint, it was not bound to do so.

Appeal from judgment of general term supreme court, Third department, affirming one at special term, and was brought by Ambrose J. Eisenlord, but on his death was continued by the present appellant, his administrator.

*J. E. Dewey*, for appellant, James O. Eisenlord, Adm'r, etc.

*N. C. Moak*, for respondent, Anna M. House.

EARL, J. There was no valid extension of time for the payment of the small balance of interest, and there was no waiver or estoppel which precluded the plaintiff from bringing this action. While, under the circumstances of this case, a court of equity, in the exercise of its dis-

*Affirming* 30 Hun, 50.



cretion, might have dismissed plaintiff's complaint, it was not bound to do so, and hence there was no error of law in refusing to do so. Whether the defendant should have costs was in the discretion of the court below, and that discretion is not subject to review here. The rights of the defendant were sufficiently protected by the denial of costs to the plaintiff, and by the form of the foreclosure judgment entered.

The judgment should be affirmed, with costs.

(All concur.)

(44 Ohio St. 279)

**CRAWFORD v. RAMBO and others.**

(*Supreme Court of Ohio. June 1, 1886.*)

**1. WATERS AND WATER-COURSES — EMBANKMENT — LIMITATION OF RIGHT TO ERRECT.**

The owner of land situate upon a river, or other running stream of water, has the right to construct embankments thereon for the purpose of protecting it from currents of the stream, or otherwise benefiting it, subject to the duty of so constructing the same as not to occasion material injury to the lands of others situate upon the stream, where the same may be avoided by the exercise of ordinary care, intelligence, and foresight.

**2. SAME — DEGREE OF CARE REQUIRED — INJURY TO ADJOINING PROPERTY.**

It is his duty, in the first instance, to exercise such prudence and care as an ordinarily careful and intelligent man might have exercised, as to whether his proposed embankment would cause material injury to the lands of his neighbor at the time of such floods as might reasonably be anticipated at any season of the year.

**3. SAME — EXTENT OF INJURY.**

By "material injury" must be understood an injury resulting in damages of a substantial nature, — not merely nominal, and which are, in some cases, awarded to prevent a wrong from ripening into a right by lapse of time. The use of streams and their water is, among riparian proprietors, a matter of common right, and an invasion of the individual right of one cannot be appreciated until some act is done by another in excess of the common right.

**4. SAME — OWNER, WHEN LIABLE — REMEDY OF ADJOINING OWNER.**

Where such owner constructs an embankment for the protection of his own lands, and the same occasions substantial injury to the lands of his neighbor, and the same might have been reasonably anticipated as one of the probable results of its action upon the currents of the stream at the time it was constructed, and would have been anticipated by a man of ordinary prudence and intelligence, he is liable in damages for the injury so occasioned, otherwise not; unless, where it appears from its subsequent action upon the current of a flood, that might reasonably be expected to reoccur in the course of the seasons, that it does and will continue, at the time of such floods, to occasion substantial injury to his neighbor; for it then becomes his duty to abate or so modify it as to avoid such injury; and, if he fail to do so, he must, from the time its tendency to do injury became apparent, respond in damages for the loss thereby occasioned; or it may be abated or modified by the order of the court, and damages awarded for the injury occasioned from the time just stated.

Error to district court, Muskingum county.

The original action was brought by the plaintiff to recover of the defendants damages to his lands, caused by the construction of an embankment by them on their own lands to prevent the same from being overflowed and injured by the water of the Muskingum river, on which the lands of the parties are situated. The common pleas sustained a demurrer to the petition, on the ground that it did not state sufficient facts;

the judgment was, on error, affirmed by the district court; and this proceeding is prosecuted here to obtain a reversal of both judgments. The petition sets forth, at great length, the relative situation of the lands of the parties on the river; the mode and manner in which the embankment has been constructed; that the effect of it, since its construction, has been, and is, to divert the flow of the water from the lands of the defendants, over which it has always heretofore flowed in times of floods, to and upon the lands of the plaintiff. The effect of the overflow upon the lands of the plaintiff, he avers, "was to, and the same did, increase the volume of water on plaintiff's said lands, and inundated and overflowed a large portion of said plaintiff's lands; and drowned and injured crops and grass thereon, and created rapid and whirling currents thereon, none of which would have happened but for the erection of said embankment by the defendants as aforesaid; and said last-mentioned water did wash a considerable portion of the soil off plaintiff's said lands, thereby rendering them less valuable for cultivation, and washed gullies and holes in said lands, and floated, lodged, and deposited trees, logs, stumps, brush, trash, and gravel thereon, and prevented a considerable portion of the silt or sediment which would otherwise have been deposited on said lands as aforesaid, and the formation and accumulation of accretions along the bank of said river on the south side of plaintiff's said land, as aforesaid, from being so deposited, formed, or accumulated, and undermined and washed away a considerable portion of the banks of said river on the south side of said plaintiff's lands, as aforesaid, and washed out trees that were growing on the bank of said river on the plaintiff's said lands, which said bank and growing trees formed a natural protection to the bank of said river on said plaintiff's lands against the wash of the water of said river in its natural course and flow." For which he claims damages in the sum of \$5,000. As a second cause of action he makes, in substance, the same averments, and asks for an abatement of the nuisance to his lands.

*R. M. Voorhees and E. W. James*, for plaintiff in error.

*A. W. Train and F. H. Southard*, for defendants in error.

MINSHALL, J. The question in this case is whether the owner of land upon a natural stream of water, so situate that in times of floods it is overflowed by the superabundant water, may, to benefit his own lands, construct an embankment thereon, the natural and probable consequences of which must be, and is, at times of ordinary floods, to cause the swollen current to overflow, erode, and destroy the lands of another proprietor thereon. We have so stated the question in this case because, as we think, the question as to surface water is not involved in it.

The premises of the parties are situate upon a bend of the Muskingum river,—those of the plaintiff being upon the exterior, and those of the defendants upon the interior, of the bend; the included lands being divided between Rambo on the one side, and the Littles on the other, by a line running a little east of south. It is upon this line, beginning at a point about 180 feet south of low-water mark on the interior bend of

the river, and extending some 2,900 feet thereon, that the embankment has been constructed by the defendants. It serves to protect the lands included by the bend from the violence of the current that flows across the same when the river is swollen by a flood; and was constructed, by the united labor and expense of the defendants, for their mutual benefit. It necessarily acts as a partial dam to the current when the river is swollen by floods; and, as averred, causes the flood water to flow over and upon the lands of the plaintiff with destructive violence, doing him great damage at such times.

It is difficult to see upon what principle the flood waters of a river can be likened to surface water. When it is said that a river is out of its banks, no more is implied than that its volume then exceeds what it ordinarily is. Whether high or low, the entire volume at any one time constitutes the water of the river at such time, and the land over which its current flows must be regarded as its channel; so that when, swollen by rains and melting snows, it extends and flows over the bottoms along its course, that is its flood channel, and when, by droughts, it is reduced to its minimum, that is its low-water channel. Surface water is that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined channel in which it is accustomed to and does flow with other waters, whether derived from the surface or springs, and it then becomes the running water of a stream, and ceases to be surface water. So that, as we think, it is not material to inquire in this case what the law is as to surface water, for the facts stated in the petition do not present such a case; and the question is as already stated.

The maxim, *sic utere tuo ut alienum non laedas*, would seem to apply with peculiar propriety to a case like this. Each proprietor on a river has a right to the enjoyment of its water as it flows by his premises, and the right, also, to modify and limit its current upon his own property as will best subserve his own convenience and notions of propriety, and he may therefore construct and maintain embankments thereon for the purpose of protecting any part of his lands from being injured by the overflow of the river in times of high water; but it is equally clear that this right to deal with the river, and to control its currents, must be exercised with a just regard to the rights of others. He cannot, by the construction of embankments or otherwise, divert the waters of the river from his own lands, and cause them to flow over and upon those of his neighbor, to the substantial injury of the latter, however beneficial it may be to his own lands, without violating this elementary maxim of justice. There is little or no difference in the authorities upon this subject.

Thus, Angel, in his work on Water-courses, (section 333,) says: "A riparian proprietor may in fact legally erect any work in order to prevent his lands being overflowed by any change of the natural state of the river, and to prevent the old course of the river from being altered." "But," he adds, at section 334, "a riparian proprietor, for his greater convenience and benefit, has no right to build anything which, in times of or-

dinary flood, will throw the water on the grounds of another proprietor so as to overflow and injure them." To this may be added what is said by Wood, in his work on Nuisances, section 350: "While it is true that a riparian owner may erect bulwarks to protect his property from injury by the stream, yet they can only do this when it can be done without injury to others, either to an owner upon the opposite side of, or to those above or below him on the stream." He then cites the case of, *Gerrish v. Clough*, 48 N. H. 9, where the defendant had erected a break-water upon his bank of the river to protect it from injury by the water, but the effect of this was to throw the water against the plaintiff's land, upon the opposite side, and in high water his land was washed away, and the injury was held to be actionable. And so in *Valley Ry. Co. v. Franz*, 43 Ohio St. 623, S. C. 4 N. E. Rep. 88, it was held by this court that "a railway company, like an individual, may, on its own land, lawfully cut a new channel for a stream of water, and turn the stream into such new channel, if thereby no damage is caused to another; but when it so controls and directs the course of the stream, the water is thrown across the old channel, and against and upon the land of another, and thereby causes damage to such other, the company is liable for such damage."

The difference arises as to surface water. In some of the states the rule of the civil, and in others that of the common, law prevails. The former requires each tenement to submit to the conditions imposed on it by nature, so that the owner of a lower tract cannot divert the water that flows to and upon his own from a higher one, to the injury of the latter. This rule was recognized by this court in *Butler v. Peck*, 16 Ohio St. 335, and was adopted as the rule of its decision in *Tootle v. Clifton*, 22 Ohio St. 247. The civil law acts upon the maxim that water is descendible by nature, and that its usual flow should not be interfered with, so that its burden, if it be one, should be borne by the land where it naturally flows, rather than by land where it can only be made to flow by artificial means. The common law does not recognize this principle as to surface water, but permits any one to protect his own premises from it as he may choose to do, without becoming liable to others injured thereby; or, more properly, it does not regard it as an injury to do so, whatever inconvenience or loss may result to others therefrom. It is not necessary, as we have said, to discuss the merits of either system in this case, as the injury complained of does not arise from an interference with the flow of surface water.

The maxim of the civil law, *aqua currit et debet currere ut currere solebat*, applies generally to running water in the common, as well as in the civil, law, subject to such reasonable qualifications as the interests of agriculture require, and the enjoyment of private property will permit. *Parkley v. Wilcox*, 86 N. Y. 140. As each owner has the right to protect his own lands from the violence of the current, or to improve the same, by the erection of embankments, and, as a rule, this cannot be done without increasing to some extent the flow upon the opposite side, it follows that this must be permitted to some extent by all owning lands upon the stream, or the right cannot be exercised by any one of them. Such a

rigid application of the principle of the maxim would materially impair the interests of agriculture in some, if not all, of the most fertile valleys of the state, without any necessary requirement on the part, if not to the detriment, of private property. It is true, as a rule, that every invasion of a private right imparts an injury for which the law will allow a recovery of nominal damages at least, for the purpose of maintaining the right, and preventing the wrong from ripening into a right by lapse of time. *Tootle v. Clifton*, *supra*; Sedg. Dam. c. 2.

As a rule, the infringement of a right can be determined without regard to the damages that may have been occasioned; the injury and the damage being plainly separable. But this is not so plainly the case among riparian proprietors. They have a common right in and over the waters of the same stream, and the invasion of the individual right of one in the subject of their common enjoyment cannot be determined until some act is done by another that is in excess of the common right of all in the same subject; so that in such cases, before an action can be brought by one riparian proprietor against another for an infringement of the former's right as such proprietor, he must show that he has been substantially damaged by the act of the latter. This was the rule applied to the deepening of waters in stream by mill-dams, in the cases of *Cooper v. Hall*, 5 Ohio, 320, and *McElroy v. Goble*, 6 Ohio St. 187; and was applied, by analogy, to the corrupting of the air by smoke, in *Gaslight Co v. Freeland*, 12 Ohio St. 392. And we see no good reason why it should not be applied, in cases like the present, when an embankment is constructed by one for the protection of his land upon a stream; all others owning lands upon it having, for the same purpose, a like right, and the public having the same general interest in the encouragement of agriculture that it has in mills. The principles of every enlightened system of jurisprudence should be made to vary with circumstances, and be so applied as to meet the wants and conditions of a people. It is with these qualifications that, as has been said, the common law has been adopted in this state.

But the argument of the learned counsel for the defendant, drawn from the interest of agriculture, goes too far when, as he seems to claim, one private owner upon a stream may, for his own benefit, erect an embankment that will cause its water, in times of ordinary floods, to overflow and destroy the lands of his neighbor. Unless this right to erect an embankment be limited as above stated, what limit could be set to the exercise of a similar right in any other case? The right of private property, so carefully guarded in the fundamental law against public encroachment, might be wholly destroyed by that of individuals. If the general interests of agriculture require the taking of private property for the construction of levies, there is ample power in the legislature to authorize this to be done by some general statute making provision for compensation to owners for damages sustained. But, as the effect of a certain embankment acting upon the waters of a stream, when at its flood, cannot be known with certainty by a man of ordinary knowledge and skill until the experiment has been made, it must follow that, where

a proprietor constructs an embankment for the benefit of his own land, he should not be held liable for its unforeseen results to his neighbor, if, at the time he constructed it, he exercised the care and skill of an ordinarily skillful and intelligent man. It was upon this principle that the case of *Railway Co. v. Carr*, 38 Ohio St. 448, was decided. The duty, however, of a land-owner upon a river, in making changes thereon for his own benefit, to exercise reasonable care and caution not to injure others, "both in the inception and execution of the work," and his liability to the party injured for his omission to do so, is fully recognized in the first two propositions of the syllabus.

After, however, the occurrence of an ordinary flood has shown the tendency of the embankment at such times to occasion injury to an adjacent proprietor, and that its effect, at each recurring flood, will be to cause additional injury, the duty on his part at once arises to obviate the cause of the injury; and if he fails to do so his liability from such time must, upon principle, be the same as it would have been could he have foreseen the result in the first instance. He cannot, by the exercise of care and diligence in the first instance, acquire the right to continue a nuisance to the lands of his neighbor. Care and diligence in constructing the embankment can only exonerate the party building it from such damages as were unforeseen at the time. The liability that may arise from a continuance of the cause of injury, after its character becomes apparent, was not presented in *Railway Co. v. Carr*, *supra*, as that action was simply brought for the damages that had been occasioned to the crops of the plaintiff below at the flood of August 1, 1875.

As to whether the plaintiff is entitled to relief upon his second cause of action, it is sufficient to say that in a proper case, on a final hearing, a decree may be entered for the abatement of a nuisance. But it necessarily depends upon a variety of circumstances whether such a decree will be entered. In the first place, equity requires that the plaintiff shall have acted with promptness in objecting, and in taking steps to enforce his objections, upon receiving notice of the defendant's structures and erections which are sought to be abated, if the circumstances are such that the defendant would be unnecessarily prejudiced by the plaintiff's delay; and the injury must be of a substantial and permanent nature, and not capable of an adequate compensation in damages. 3 Pom. Eq. Jur. § 1359. It is sufficient, however, in this regard, that the damages are of such constant and frequent recurrence that no adequate compensation can be made hereby. Wood, Nuis. § 778.

Judgment of the district and of the common pleas court reversed, and cause remanded to the circuit court, with directions to overrule the demurrer to the amended petition, and for further proceedings.

(44 Ohio St. 312)

## MASON v. ALEXANDER.

## INGERSOLL v. SAME.

(Supreme Court of Ohio. June 1, 1886.)

## 1. CORPORATIONS—ACTION TO ENFORCE LIABILITY OF STOCKHOLDERS—APPEAL—JURISDICTION—WAIVER.

In a suit to enforce liability of stockholders, brought prior to the enactment of section 3260, Rev. St., by a creditor of an insolvent corporation organized under the act entitled "An act to enable associations of persons for building hotels, and for other purposes, to become bodies corporate," passed April 5, 1866, as amended April 16, 1867, in a county where some of the stockholders reside and are summoned, but not in the county where the corporation is situate and has its principal office or place of business; where the stockholders served out of the county in which the action is pending interpose a plea to the jurisdiction as to their persons, which, upon demurrer, is held against them, and they then consent to a reference of the case to a referee for trial; appear at trial; after report filed, except to same; give notice of appeal to the district court from a judgment rendered against them; perfect the appeal to that court; and there, after consenting to a reference of the case to a referee for trial, and after report made to the district court by the referee, file exceptions to such report,—it is too late to question the jurisdiction of the appellate court.

## 2. SAME—ASSIGNMENT OF STOCK—CONTINUANCE.

In such case, (it having been shown that the indebtedness of the corporation is greatly in excess of the capital stock,) where it is made to appear that a defendant, prior to the beginning of the action, had transferred his stock to a solvent holder within the jurisdiction, who owned it during the time a portion of the debts accrued, but who is not a party to the suit, it is not error, to the prejudice of either stockholders or creditors, for the court to adjudicate as between other stockholders who are parties and creditors, and continue the case for further proceedings as to liability of the vendor and vendee of the stock as between themselves, and as between them and creditors; nor is the court's jurisdiction to determine the liability of such vendor at a subsequent term ousted, although the order of continuance does not in terms provide that the case is continued as to him.

## 3. SAME—JUDGMENT—INTEREST.

In such case it is not error to include in the judgment rendered interest from the date of the beginning of the suit, although the amount of recovery may thereby exceed the stockholder's original liability.

## 4. SAME—COSTS—COUNSEL FEES.

In such case the court has power to order reasonable counsel fees to plaintiff's attorneys, to be paid out of the proceeds of the judgments.

## 5. SAME—CHARGING ASSIGNOR OF STOCK WITH DEFICIENCY.

If, in such case, by reason of insolvency or residence without the jurisdiction, the amount due from any stockholder is not collectible, the assignor of the stock, up to the time the liability attached, may be charged with the deficiency. *Brown v. Hühcock*, 36 Ohio St. 667, followed.

Error to district court, Lake county.

On the twentieth of January, 1877, George W. Steele filed a petition in the court of common pleas of Lake county, against the Little Mountain Association, (corporation,) and some 40 persons as stockholders, some of whom resided in Lake county; alleging, among other things, the recovery of a judgment against the association; that it was insolvent; that the defendants (stockholders) were such stockholders at the time the indebtedness arose, and were indebted to plaintiff, and to other creditors of the association, for an amount equal to the amount of stock held by

each, respectively; praying the court to find who are the other creditors, the amount due the plaintiff, and to each creditor, which stockholders are solvent and within the jurisdiction, and which, if any, are insolvent or beyond the jurisdiction; also that the court adjudge that each defendant pay the amount due from him, and that plaintiff and the other creditors have such full and ample relief as the nature of the case requires. Service was made upon the association in Cuyahoga county, and upon divers stockholders in Lake, Cuyahoga, and other counties of the state. A joint answer on the part of the association and certain stockholders, who are plaintiffs in error, was interposed, alleging want of jurisdiction on the ground that the corporation was situate and had its principal office and place of business in Cuyahoga county. To this a demurrer was filed, which being sustained the defendants excepted, and took leave to answer. Issue being joined on part of some of the defendants, (several creditors having also become parties, and filed answers,) the cause, by consent, was sent to a referee for trial. The parties appeared, and a trial was had before the referee. His report being filed, and exceptions thereto heard, and in part sustained and in part overruled, a trial was had, and judgments rendered against the defendants, (stockholders.) From these judgments they severally gave notice of appeal to the district court, and in due time perfected their several appeals. The association did not appeal. Among the facts found by the referee was that the sum of the debts was far in excess of the capital stock. This was at no time disputed.

In the district court at the March term, 1881, by consent of all the parties, the cause was referred to George E. Paine, Esq., as referee and special master, to determine and report the liability of each of the stockholders, the amount of stock held by each, the time during which they held the same, and who, if any, are insolvent or beyond the jurisdiction; also to determine and report who are creditors of the association, to whom the money recoverable is due and payable, and the amount to each, when the indebtedness to each accrued, and the amount which each of said stockholders (defendants) are liable to pay. Subsequently, the death of the plaintiff being suggested, his executor, John W. Alexander, was made plaintiff, and the action was ordered to stand revived. Hearing before the referee, due notice having been given, was commenced on the thirteenth January, 1883, and adjourned from time to time until March 5th. At the adjourned hearing, February 3, 1883, counsel for the defendant objected to the further taking of testimony, or proceeding further with the hearing, on the ground that the estate of George B. Senter, deceased, was not before the court; also on the ground that one S. A. Fuller, a stockholder, had not been made party. These objections were overruled, exceptions taken, and the hearing proceeded.

Report of the referee was made to the court at its March term, 1883. The referee found, among other things, that H. C. Blossom, one of the defendants, as alleged in his answer filed February 15, 1877, held and owned \$500. of the stock from March 3, 1869, to the fall of 1872, when, on or before December 31, 1872, he assigned and trans-



ferred the same to one S. A. Fuller, who still holds and owns the same, and that he is within the jurisdiction of the court, has not been served with process, and is supposed to be solvent; also that defendant H. C. Nellis acquired \$500 of stock February 28, 1872, and held the same until March 19, 1873, when he transferred it to one Calvin, who afterwards transferred it to one Loomis, who is the present owner; that Loomis is insolvent, and Calvin beyond the jurisdiction. By bill of exceptions taken before the referee it is shown that George B. Senter, a stockholder who owned \$500 of stock, was deceased; that his executor, Grannis, who had been made a party and served, deceased prior to the hearing, and that the estate of Senter was not before the court or referee, though said estate was solvent and within the jurisdiction.

To the referee's report the plaintiff in error filed divers exceptions, (some of the parties appearing in the capacity of stockholders, and some as creditors,) among others that the referee erred in overruling the objection to proceeding until Fuller was brought in; that the referee erred in proceeding when the estate of Senter was not before the court. The case coming on for hearing upon the plaintiff's motion to confirm the report of the referee, and exceptions of stockholders and creditors, and evidence, the court sustained the exceptions as to the holding in regard to Fuller, to the extent of directing that he be made defendant by supplemental petition and summons; also, as to the Senter estate, by like direction; and thereupon the general exceptions were overruled, to which defendants excepted. Thereupon the defendants filed a motion stating objections to proceeding further until Fuller was made defendant, moved for an order compelling the plaintiff to make Fuller a party, and, if that should be overruled, then that they have order to make Fuller a party before taking further action. Which motion was overruled, and the court refused to order except as before ordered, to which defendants severally excepted. The court thereupon approved and confirmed the report except as modified, to which the defendants severally excepted. The defendants then, on leave, withdrew their answers to the merits, and the cause was heard and submitted to the court upon the demurrer to the answer to the jurisdiction filed in the common pleas. This demurrer was sustained, to which the defendants severally excepted. They then, on leave, refiled their general answer, and the cause was heard and submitted on the pleadings and testimony. The court thereupon found the whole indebtedness was a sum much in excess of the capital stock; that the defendants, (stockholders,) except Blossom, were liable as stockholders in several amounts as to each, which included interest from the commencement of the suit, and rendered judgment accordingly; also ordered that from the sum to be realized from collection of the judgments the clerk pay the costs, including a counsel fee of \$1,000, to plaintiff's attorneys, and that the residue be paid to the creditors *pro rata*, according to the amount of their several claims as found by the referee. Thereupon, as to Fuller and the Senter estate, the cause was ordered continued for further proceedings. No judgment for or against, or order of any kind, was made as to Blossom.

Separate petitions alleging error in the proceedings of the district court were filed in this court by stockholders and creditors; some of the latter class being also stockholders. They were heard and submitted together.

*J. E. Ingersoll and Alvord & Alvord*, for plaintiffs in error.

*Perry Bosworth and J. B. Burrows*, for defendants in error.

SPEAR, J. Attention is called to several alleged errors in the record: (1) That the district court had no jurisdiction of the person of the plaintiffs in error; (2) that the proper parties were not before the court when the judgment was rendered, and that a stockholder, served and in court, was relieved of liability, and no one charged in his place; (3) that interest was erroneously charged against the defendants below; (4) that fees were erroneously ordered paid to plaintiff's attorneys; (5) that, under the facts as to Homer C. Nellis, no liability existed against him. They may be considered in order.

1. For the purpose of making the question, the demurrer of the plaintiff admits that the home of the Little Mountain Association was in Cuyahoga, and not in Lake, county. The association was a necessary party to the suit, though it was, in this case, but a nominal party, as no relief was asked against it. Therefore the question whether the court of common pleas had, at the inception, jurisdiction of those parties who raised, by answer, the question of jurisdiction, depends on whether the corporation could be held to answer, in a case of this character, in a county other than the one in which it was situate, and in which was located its principal office or place of business. We are favored with an ingenious brief to support the negative of this proposition. But we are inquiring rather as to the jurisdiction of the district court at the close of the litigation, than of that of the common pleas at its beginning. To determine this question it is but necessary to keep in mind certain subsequent facts disclosed by the record. It will be noticed that every one of the plaintiffs in error who sought to raise the question of jurisdiction in the common pleas consented to a reference of the case for trial to a referee, and, after rendition of judgment there, gave notice of appeal to the district court, and perfected their appeals severally, either by the giving of bond in the amount directed by the court, or otherwise, in conformity to the statutes. There, too, they consented to a reference of the case to a referee for trial; appeared at the trial; when his report was filed, promptly interposed their general exceptions to it; and appeared and were heard in the district court upon them. True, they occasionally raised the voice of protest, but it was done incidentally, and not in a way to invoke action of the court, until after the case had come on for trial. Can they now be heard to say that that court had not jurisdiction of their persons?

We are not aware that the precise question, upon equivalent facts, has been judicially determined in this state, nor have we been able to find, outside of Ohio, a case presenting exactly this question. Adjudications in other states, however, are not likely to aid in the proper solution, because the practice in Ohio is essentially different from the practice in

other states in removing cases from general trial courts to appellate courts. While in many of the states, and perhaps in all except our own, an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record as to facts as well as law, does not hear additional or other evidence, but confines its adjudication to errors appearing upon the record, in Ohio the appeal itself vacates, without reversal, the whole proceeding as to findings of fact as well as law, and the case is heard upon the same as other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action *de novo*, in respect to pleadings, necessary parties, trial, and judgment, in like manner as if the cause had never been tried below. (For further discussion of these distinctions, see opinion of SWAN, J., in *Grant v. Ludlow*, 8 Ohio St. 28.) The issues and questions, therefore, tendered in the appellate court, are those presented as though for the first time, and it can make no manner of difference that the court below erred as to some preliminary question, or, indeed, as to any question. As the issues are presented when the case gets to the appellate court, unless amendment be there permitted, the court takes them up and disposes of them. The question, therefore, of whether the common pleas had jurisdiction of the persons of the plaintiffs in error was not of consequence, provided the appellate court had such jurisdiction.

Recurring to the record, we find that the first move made in the district court by defendants was, by those who were creditors, to dismiss the appeal. This was for alleged want of jurisdiction of the action, not for want of jurisdiction of their persons. Then followed consent to a reference for trial, and the further steps already stated. Not until the case had proceeded to trial in the district court did they present to that court the question of jurisdiction over their persons. Independent of the question of the effect of taking the case to that court by appeal, it would seem that these parties had given abundant jurisdiction of their persons.

But we are not without authority which, in our opinion, bears upon the question. The case of *Fee v. Big Sand Iron Co.*, 13 Ohio St. 563, approved in *Shafer v. Hockheimer*, 36 Ohio St. 219, is authority to the point that where, after judgment by default against a defendant not within the jurisdiction, the defendant appears in court to give notice of appeal, and has it entered, he cannot be allowed afterwards to deny the jurisdiction,—that is, jurisdiction of the court below; and the reason he is held to have submitted to that jurisdiction is that, by giving notice of appeal without questioning the jurisdiction of his person, he has entered an appearance. How different does a party stand in the appellate court to which he has taken the case by appeal, where he, by consent to a reference, by motion and otherwise, makes an appearance there, before he seeks to challenge the jurisdiction of that court as to his person! *Allen v. Miller*, 11 Ohio St. 374, is to the effect that where a defendant, in connection with a plea to the merits, interposes a plea to the jurisdiction as to his person, and that being first heard, and decided adversely,

then proceeds with the trial, is not thereby prevented from averring want of jurisdiction. At first blush this case might seem to be inconsistent with the holding in the later case, though the opinions are rendered by the same judge. But a reference to the language of the opinion (page 379) would appear to relieve it of seeming inconsistency. It is that "the defendant, Miller, embraced the first occasion which offered, to-wit, in his answer, to assert his objection to the jurisdiction of the court; nor did he waive that objection by any subsequent act on his part." In the case of *Fee v. Big Sand Iron Co.* the defendant entered his appearance first, and objected afterwards, and that case is more nearly analogous to the case at bar. *Allen v. Miller* seems to rest upon the effect of making objection to the jurisdiction at the first opportunity. The present case is one where the defendants *did not* make objection to the jurisdiction at the first opportunity, but they appeared first and objected afterwards. We do not perceive that *Allen v. Miller* is an authority against the position we are seeking to maintain.

It will be borne in mind that we are not dealing with a case where the lower court had not jurisdiction of the subject-matter of the action, though, even in such case, if it be one where the appellate court would have original jurisdiction, and the party defeated below appeals to it, and there appears, without objection pleads to the merits, and enters upon a trial, he cannot afterwards be heard to question the court's jurisdiction of the subject-matter of the action, (*Harrington v. Heath*, 15 Ohio, 483; *Bisher v. Richards*, 9 Ohio St. 495; *Wood v. O'Ferrall*, 19 Ohio St. 427; *Thomas v. Pennrich*, 28 Ohio St. 55. See, also, an important holding in *Adams Exp. Co. v. St. John*, 17 Ohio St. 641;) *a fortiori*, if the question is one simply as to the person. And how, in principle, does such a case differ from one where the appellate court has rightful jurisdiction of the subject-matter by an appeal?

But why did not the appeal itself by these plaintiffs in error give the appellate court jurisdiction of their persons? They were not required to appeal. Had they desired to challenge the ruling of the common pleas upon their answer to the jurisdiction, and present the question so made to this court, they should have forborne an appeal, and proceeded by petition in error. The process is a simple one, and the remedy, if they had been wronged, would have been ample. By appealing they voluntarily took the case to the district court, and asked that court to try the case, and adjudicate their rights, not upon questions of law alone, but upon all the facts and upon all the issues in the case. Why was this not, as to their persons, a voluntary appearance in that court, and how can they now say that court could not do precisely what they asked it to do, for want of jurisdiction of their persons? How can they be permitted to speculate on the chance of a favorable judgment, and then turn around, and deny the jurisdiction, as to their persons, of the tribunal to which they have appealed, and thus submitted their persons? Why should they be allowed to resort to that court, have their appeal docketed, compel all the other parties to follow the case there, and then say to the court, "We did not mean anything; we were not in earnest about this; we are not

in court, and you have no jurisdiction over us?" See language of READ, J., in *Harrington v. Heath*, 15 Ohio, 483; of SUTLIFF, J., in *Bartges v. O'Neils*, 13 Ohio St. 75; of GHOLSON, J., in *Bisher v. Richards*, 9 Ohio St. 498; and of BRINKERHOFF, J., in *Wood v. O'Ferrall*, 19 Ohio St. 427.

It is unnecessary to consider whether, at the outset, the common pleas had or had not jurisdiction. The jurisdiction of the district court cannot be successfully questioned.

2. The complaint under this head is that S. A. Fuller, a stockholder, was not a party at the time the case was heard before the referee of the district court, nor when the decree under review was entered; also that the administrator of George B. Senter, a deceased stockholder, was not in court at the same time, and that Blossom, the assignor of Fuller's stock, was exonerated, and thereby the other stockholders were prejudiced.

As to the alleged error by reason of delay in making new parties. Should the plaintiffs in error now be heard to make this complaint? The case was ordered, by consent, to a referee in the common pleas, was by him heard and reported upon, and a trial and judgment and appeal followed, and yet no such objection was interposed. Again, at March term, 1881, of the district court, by consent of all parties, the case was referred to the gentleman who heard it as referee. The court's attention was not called to any defect of parties, although the record shows that the plaintiff in error Blossom, and his attorneys, who also represented all defendants who objected before the referee and in the district court, and are now making complaint under this head, knew the facts disclosed by Blossom's answer as to Fuller's connection with Blossom in regard to the stock, and the record showed that Fuller had not been brought in. Blossom was a creditor of the corporation, as well as a stockholder, and, with all other creditors, had just as full right as had the plaintiff to bring Fuller in; and, if not content with the vigilance being exercised by plaintiff, it was his duty then to inform the court of the condition of the record. The action was being prosecuted no more for the interest of the plaintiff than for that of every other creditor, except that the amount due plaintiff may have been larger than the amounts claimed by some of the others. Still another term of the district court intervened (March term, 1882) before the hearing to the referee commenced, and yet no sign was made to the court that other persons were necessary parties in the case. Not until the lapse of 22 months after the reference, and just as the parties had gathered for trial under an order of reference consented to by these plaintiffs in error, did they make objection to further proceedings until other parties should be made defendants. This tardiness, apparently deliberate, is suggestive, at least, and the parties who were so slow to object when the absent ones could have been brought in without delaying the case, cannot now well ask *special* consideration at the hands of the court. Unless it be made quite clearly to appear that they have been prejudiced in some *substantial* manner, a reviewing court will hardly give willing ear to their complaints, and interfere with the action of the trial court in the premises. We

are not, in a case like this, inclined to search for pin-heads; nor are we on the lookout for unsubstantial and unimportant errors.

But, should this view be waived, does the record, upon the whole ground here being considered, show even technical error? It is argued that Blossom had the right to demand that Fuller, his assignee, should be present as a party, so that on that trial all his rights, as respects Fuller, and all of Fuller's rights, might be then and there finally adjudicated for the very purpose of avoiding further litigation, for Fuller stands in the relation of indemnitor to Blossom; that no judgment was rendered against Blossom, and he is out of the case; so that, if Fuller shall not be held, those shares of stock assigned escape assessment altogether; and that the action of the court in this regard was prejudicial to the rights of Blossom and of all creditors, and was error. But is Blossom out? The assumption is that as no judgment was rendered against Blossom, that it was equivalent to a judgment in his favor; and that, as the journal entry is so drawn as to order a continuance as to Fuller and the Senter estate, and does not, in terms, order the cause continued as to Blossom, he is necessarily out of court. With deference to the learned counsel, we cannot concur in their assumption. If the case was continued at all, it was, without question, continued, as to Blossom, in his relation of creditor. He therefore remained in for one purpose. Why not for other purposes of the case not before accomplished? No finding having been had, a judgment rendered for or against him on the claim of plaintiff, the issue, as to him, was undetermined. Unless the defendants (stockholders) were jointly liable, so that a judgment against some would work a release as to the others, the judgment was not a final judgment as to Blossom in either relation; and if that be so, the court's jurisdiction over him is not lost; for, where jurisdiction is once acquired, unless the action be ended by the parties, the jurisdiction continues until final judgment in the case. *Bolles v. Stockman*, 42 Ohio St. 445. We know of no principle upon which it can be claimed that where the stock is held in severalty, the statutory liability of stockholders to the creditors of the corporation is joint, nor of any practice that would warrant the recovery of a joint judgment. On the contrary, the case cited by the counsel, *Umsted v. Buskirk*, 17 Ohio St. 113, is authority, were authority needed, to the effect that the judgments to be rendered are several, though the suit is prosecuted for the common and equal benefit of all the creditors. We conclude, therefore, that the district court's jurisdiction over Blossom was as unquestionable after the term at which judgments were rendered against his co-defendants as before. If error is to be discovered, it must be found with reference to some other feature of the case.

It was proper, under section 5006, Rev. St., to bring in Fuller and Senter's administrator *de bonis non*, in order to a full determination of all the questions involved. But, under section 5013, Rev. St., in a case where no equities between stockholders were to be adjusted, why might not the court determine the controversy before it without prejudice either to the rights of those already in court, or of those yet to be brought in? The judgments rendered and to be rendered being several, if each stock-

holder liable at all was liable to the full amount of his stock, no reason is perceived why, by virtue of section 5311, Rev. St., the court had not full power to render judgment against one or more defendants, leaving the action to proceed against the others. Not only is this right given by statute, but it is well-recognized practice in chancery cases. See *Dougherty v. Walters*, 1 Ohio St. 201.

This view is not in conflict with the cases of *Umsted v. Buskirk*, *supra*, *Wheeler v. Faurot*, 37 Ohio St. 26, and *Bullock v. Kilgour*, 39 Ohio St. 543, cited by counsel, when those cases are properly considered.

It will be noticed that in *Bullock v. Kilgour* a judgment had been rendered against one of the defendants in 1870, for an amount certain, as being the extent of his statutory liability. In March, 1882, the plaintiff, by supplemental petition, sought to recover an additional amount upon a liability which existed when the first judgment was rendered, and the trial court gave judgment as prayed. This court held the first judgment to be a final judgment, and that the issue was *res judicata* between the parties. In the case at bar no judgment of any kind as to Blossom had been rendered.

In *Wheeler v. Faurot* two defendants (stockholders) set up by answer that they had sold their stock to solvent purchasers amenable to process, and prayed that they might be made parties, and brought in by summons. This the trial court refused to do.

This court, recognizing the doctrine of *Umsted v. Buskirk*, to the effect that, for the purposes of general account among the stockholders, and to enforce from them contributions in proportion to their shares of stock, and to a complete determination of all the equities involved, the other stockholders should be brought in, and that any defendant had the right to insist upon their being made parties, held that the action of the trial court was erroneous, and reversed it. Here the district court did not refuse to have remaining stockholders brought in. On the contrary, it made an order to that effect. But there was no necessity that the case should be delayed on that account; for, as to all affected by the judgment, there was not, nor could there be, accounting or contribution between the stockholders; and the cases above cited are very far from being authority in support of the claim that, where such a condition of the case appears, the court's hands are tied, and it can do nothing until every solvent stockholder living and within the jurisdiction, and the representative of every one deceased, is brought in. The position would be different if it were necessary to order contribution, an adjustment of equities, and an equalization of burdens among stockholders. But that necessity, we have found, does not exist here. The liability of no stockholder against whom a judgment was rendered could possibly be increased or diminished by the disposition of the issues to be determined later. The debts of the corporation, as found by both referees, and not disputed, far exceeded the capital stock; so that, in any possible event, every stockholder who could be holden at all was liable for an amount equal to his stock. Now, can the creditors complain? They could as well share in the proceeds of judgments rendered against Blossom or Fuller and the

Senter estate at a subsequent term as though the amounts had been earlier ascertained. At most, delay could not aid them. We see nothing in the way of the district court, where issues should be made between Blossom and Fuller, adjudicating between them, and, if it be found that Fuller is not liable, proceed to adjudicate as between Blossom and the creditors. Should Fuller not be held liable on final trial, no prejudice would accrue to Blossom which could have been accrued by a delay of the whole case; and, as to effects of delay generally, as already found, he was as much responsible as any other party.

What might be regarded as proper practice under section 326Q, Rev. St., we are not called upon to determine. That section, having been enacted since the commencement of this suit, would not, under section 79, Rev. St., apply in this case. The plaintiffs in error were not prejudiced by the omission to render judgment against Blossom, nor by the refusal of the district court to delay, nor did the absence of Fuller or Senter's representative deprive the court of jurisdiction.

3. It was held by the district court that interest should be charged against the stockholder as of the date of the commencement of the suit. The contention on part of plaintiffs in error is that in no case can the stockholder be liable for a sum beyond the amount of his stock, to be determined at the time the liability is finally fixed by judicial decree; in other words, that the liability is one created by statutory enactment under the constitution, to be enforced by decree, and interest cannot be added except by virtue of the decree of the court declaring the liability, and no interest can accrue against the stockholder until the liability is thus declared. On the other hand, the claim is that while the liability is created by the constitution and the statute, yet the stockholder places himself under liability by contract when he subscribes or acquires the stock; and, resting as well upon contract as upon statute, the interest follows the maturing of the obligation, which is at the time when the corporation becomes insolvent and refuses to pay.

We agree with the counsel that the question is one which, upon principle, is of very considerable difficulty; but we do not feel disposed to enter upon a discussion of it here, inasmuch as it was involved in the case of *Wehrman v. Reakirt*, (decided in the superior court of Cincinnati in 1871,) 1 Cin. Rep. 230, by Judge TAFT, in a well-considered opinion. It is stated by Judge HAGANS, of that court, in *Hooker v. Kilgour*, 2 Cin. Rep. 350, that the case was brought to this court on motion for leave to file petition in error, which was refused. The district court, in holding the stockholders for interest after the commencement of the suit, evidently followed the law of that case; and, inasmuch as it has been generally acquiesced in as furnishing the true rule, we are not prepared to say it is not the law in this state. The necessities of the case do not require us to go further. Support for the proposition advanced by counsel for defendant in error will be found in the cases of *Corning v. McCullough*, 1 N. Y. 58; *Burr v. Wilcox*, 22 N. Y. 551; *Baker v. Bank*, 9 Metc. 182; and *Terry v. Anderson*, 95 U. S. 628.

4. As to the allowance of attorney's fees. It is argued that there was



no power in the court to make any allowance at all. The proceeding was in equity. Its purpose was to bring into court a fund for distribution among creditors. Quoting from the brief of counsel for plaintiffs in error: "The action is for the equal benefit of all the creditors. No one creditor can ever obtain any advantage or preference over the remaining creditors. All are to share in the fund recovered from the stockholders *pro rata*." The labor of the plaintiff's counsel being, therefore, for the equal benefit of all the creditors, why should the whole expense of attorney's fees be borne by the plaintiff? Should the other creditors, sitting by and observing counsel do work which inured as much to their benefit as to that of plaintiff, be heard to say that, in good faith and fairness, they should not contribute to a reasonable recompense? Indeed, there is much reason for the claim that the circumstances raise a presumption of a promise to pay on their part. But, however that may be, the court, in the exercise of its power over the fund, and in the direction of doing full and exact justice to all the parties, had ample power to order paid from the fund reasonable counsel fees, the same as power to order payment of costs. It is insisted that such allowance is unfair to the other creditors, inasmuch as they were required to pay counsel for like services. Doubtless they were required, so far as they answered, to employ counsel for that purpose. Beyond this it is not perceived that any labor in the interest of creditors was performed by counsel other than those representing plaintiffs. It happens that many stockholders were likewise creditors, and the same counsel appeared for them in both capacities. The proceedings bristle with evidence of their efforts in defense of the stockholders; but traces of their labor in behalf of creditors, as such, have, some way, been omitted from the printed record. We see no hardship. As to the amount of such allowance, the trial court was in better position to judge what sum would be reasonable than is this court; and, as no showing is made that the amount allowed was excessive, this court does not feel called upon to reduce it.

5. As to Homer C. Nellis. This defendant disposed of his stock to parties who were insolvent, or beyond the jurisdiction. During the time he held it certain debts accrued against the corporation, and upon this showing a judgment was rendered against him for his proportion of the same. To hold this to be erroneous would require a review of the judgment of this court in the case of *Brown v. Hitchcock*, 36 Ohio St. 667, a responsibility which we are not prepared at this time to assume; and discussion of the question is unnecessary.

Upon the whole case, we are disposed to look at the alleged errors presented as technical, at best, and not substantial. And we are the more reluctant to disturb a judgment of this character because of the well-known difficulty which surrounds the enforcement of the constitutional liability of stockholders for the debts of corporations. By reason of the great number of stockholders, the frequent transfers of stock, the decease of parties, and of other causes, delays, vexatious, expensive, and almost interminable, seem to be inevitable in all such proceedings; so much so, indeed, that such liability has grown to be looked upon as furnishing

next to no security at all for the debts of corporations. The present case well illustrates it. Commenced in January, 1877, it was not until March, 1883, that a judgment available to the creditor was reached. Judgment affirmed.

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(44 Ohio St. 346)

NEWBERRY, Adm'r, v. ALEXANDER, Ex'r, and others.

(*Supreme Court of Ohio*. June 1, 1886.)

CORPORATIONS — ACTION TO ENFORCE LIABILITY OF STOCKHOLDERS — MASON v. ALEXANDER, ANTE, 435, FOLLOWED.

Error to district court, Lake county.

BY THE COURT. The questions involved in this case are disposed of by the disposition of *Mason v. Alexander*, ante, 435, at the present term, except as to the matter of consolidation. The plaintiff in error is administratrix *de bonis non* of Henry Blair, deceased. Elizabeth Blair, administratrix, was made party in the original case of *Steele v. Little Mountain Ass'n* in the common pleas, and duly served with process. In that court she joined in the consent to refer the case for trial to a referee, and subsequently filed exceptions to the referee's report, but deceased before they were disposed of. Her death being suggested, the present plaintiff in error was ordered brought in by summons. Before this was done judgments were taken against the other stockholders, and the case, as to them, appealed. At a later term the plaintiff in error answered to the jurisdiction. This was found against her, and a judgment rendered. From this she appealed to the district court. In that court, the original case still being pending there, at the March term, 1881, on motion, the two cases were ordered consolidated, and afterwards were tried together. We see no error in the order of consolidation. The two cases were properly joined at the outset, and their separation meantime, while it may have been an irregularity, did not so change the character of either as to prevent a joinder. The district court, having acquired jurisdiction of the person of the plaintiff in error by the appeal, and the steps taken to perfect it, and the two cases being in that court for trial, it was but the exercise of familiar jurisdiction to bring them again together, and no substantial prejudice accrued to the plaintiff in error by such consolidation. Judgment affirmed.

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(44 Ohio St. 347)

WHITE, Treasurer, etc., v. WOODWARD and others.

(*Supreme Court of Ohio*. June 15, 1886.)

TAXATION—ASSESSMENT OF PENALTIES FOR NON-PAYMENT OF TAXES.

Error to circuit court, Clermont county.

*Fraser & Roubidush*, for plaintiff in error.

*John M. Pattison and Alfred Yaple*, for defendants in error.

BY THE COURT. Sections 2844 and 1053 of the Revised Statutes, when construed together, and with the exactness that all statutes imposing penalties should be, only authorize the imposition of a penalty of 15 per cent. on the non-payment of

the taxes assessed and levied upon a tract or lot of land for the first default in the payment of the same; and do not permit the assessment of a penalty on the same taxes, or the penalty thereon, in any succeeding year or years, by reason of the continued non-payment of such taxes and penalty.

Judgment of the circuit court affirmed.

(44 Ohio St. 245)

STATE *ex rel.* HERRON and others v. SMITH and others.<sup>1</sup>

(*Supreme Court of Ohio. June 29, 1886.*)

1. CONSTITUTIONAL LAW—ENACTMENT OF LAWS—RIGHT OF LEGISLATORS TO SEAT—EVIDENCE.

Where the journal of each house of the general assembly shows that a law received the concurrence of the number of members required by the constitution for its adoption, and that it was publicly signed in the presence of each house by its presiding officer, as required by section 17, art. 2, of the constitution, its authenticity cannot be impeached by parol evidence that one or more of the members in either house, recorded as concurring in its adoption, had, prior thereto, been seated, upon the determination of a contested election, by less than a constitutional quorum, although the concurrence of such member or members was necessary to the number of votes required by the constitution for the passage of the law.

2. SAME—COLLATERAL ATTACK.

The members so seated are, at least, *de facto* members of the house to which they belong, and the validity of the title by which they occupy their seats cannot be inquired into by the courts for the purpose of affecting the validity of laws enacted by the Legislature in which they hold seats.

3. SAME—LEGISLATIVE POWER—ACT OF MAY 17, 1886, FOR GOVERNMENT OF CITIES OF FIRST CLASS.

The act of the general assembly passed May 17, 1886, entitled "An act to establish an efficient board of public affairs in cities of the first grade of the first class," (88 Ohio L. 173,) is within the legislative power conferred on the general assembly by section 1, art. 1, and the requirement of section 6, art. 8, of the constitution; and does not, by its provisions vesting the appointment of the board in the governor of the state, impair any of the undelegated powers which, by section 20, art. 1, are declared to "remain with the people." Whether laws so enacted for the government of cities and villages are wise or unwise is left, by the constitution, to the wisdom of the legislature, and the courts have no power to hold them invalid, although they may differ with the legislature as to the policy of such laws.

OWEN, C. J., and FOLLETT, J., dissenting.

*Quo warranto.* The facts are stated in the opinion.

John F. Follett, Isaac M. Jordan, and W. W. Boynton, for plaintiffs.

J. A. Kohler, Atty. Gen., J. W. Warrington, and Thos. McDougall, for defendants.

MINSHALL, J. On May 17, 1886, the general assembly passed an act entitled "An act to establish an efficient board of public affairs in cities of the first grade of the first class." 88 Ohio L. 173. It abolished the board of public works created by an act passed March 3, 1880, and, among other things, provided that the members of the board of public affairs should be appointed by the governor, and should have all the powers, perform all the duties, and be the successors of the board of public works. The members of the board of public affairs for the city of Cincinnati, the respondents in this action, were appointed by the governor, qualified as required by law, entered upon the duties of their board, and the performance of the same as far as they were permitted by the re-

<sup>1</sup>See concurring and dissenting opinions, 12 N. E. Rep. 839, 840.

lators, and were continuing to do so, whereupon the relators, who constituted the board of public works of said city at the time of the passage of the act of May 17th, commenced this proceeding, setting forth their title as members of the board of public works for the city of Cincinnati, and asking that the respondents should be required to show by what title they usurped the functions of the board of the relators, and that they might be ousted therefrom by the judgment of this court.

The respondents in their answer admit that they have assumed, and claim the right to perform, the public duties that were heretofore incumbent on the relators as the board of public works of Cincinnati, but say that the act that created the board of the relators was repealed by the act of May 17, 1886, creating the board of the respondents, and that thereby the board of public works was abolished, and that the board of public affairs was made and became its successor, and that the performance of all its powers and duties was conferred on the board of the respondents; and ask that the relators be restrained from interfering with them in the performance of their duties as such board of public affairs.

The relators reply, and, in the first, second, third, and fourth paragraphs of the pleading, in substance deny (1) that the act creating the board of the respondents was on the seventeenth of May, 1886, or at any other time, passed by the general assembly of the state, or that it ever became a law of the state; and (2) aver that, if it was passed, the legislature had no power to confer the appointment of the board on the governor, and that it is unconstitutional and void. In the fifth and last paragraph it is, in substance, averred that the adoption of the act of May 17th was the result of a conspiracy between the president of the senate and 17 members, entered into for the purpose, among other things, of abolishing the board of public works, and establishing, in the language of the pleading, "the so-called board of public affairs;" that in pursuance of this conspiracy, while John O'Neill and 19 other members of the senate were absent from the senate chamber, and while only 17 members, less than a quorum, were present, the president of the senate, with the advice and consent of the 17 members then present, in violation of the constitution of the state and rules of the senate, corruptly caused the clerk of the senate to enter upon its journal a resolution that John Brashers and three others, naming them, were not duly elected, and that George W. Hardacre and three others, naming them, were duly elected, and entitled to seats therein; that the vote was not taken by yeas and nays, and that the majority of the members were at that time temporarily absent from the state; that afterwards, without being sworn, the four so admitted claimed to be members of the senate, and on the seventeenth of May, during the continued absence of the members before named from the state of Ohio, the said pretended act of May 17, 1886, was declared passed, and signed by the president of the senate; and it is then averred "that the president of the senate, the speaker of the house of representatives, and the secretary of state, at the time of the signing and filing of said pretended act of the general assembly of the state of Ohio, well knew that the same had not been passed, but that the same

was fraudulent and void;" and that there was at no time from the eighth of May until the adjournment of the legislature a quorum of duly-elected members present in the senate to do business.

A demurrer has been interposed to the first four paragraphs, and a motion made to strike out the averments contained in the fifth one. The demurrer raises the question of the constitutionality of the law, and the motion, the validity of its passage.

1. If the facts averred in the motion may be considered by a court on the question whether a statute that appears upon the journals of both houses of the legislature to have received the requisite concurrence of their members, as provided in section 9, art. 2, of the constitution, that is duly attested as a law by the presiding officer of each house, as provided in section 17, art. 2, of the same instrument, and has been enrolled and filed in the office of the secretary of state as a law, as provided by statute, (section 128, Rev. St.,) is not what it is thus authenticated to be, then this motion should be sustained; otherwise it should be overruled.

It seems to be well settled that courts will take judicial notice of all that is necessary to the authentication of a statute. It is said by Wharton, in his work on Evidence, (volume 2, § 295:)

"Courts will take judicial notice of the modes by which domestic laws are authenticated. Hence an English court is supposed to be judicially acquainted with the rules, practice, and prerogatives of parliament; an American court with the rules, practice, and prerogatives of the federal and state legislatures to which it is subject. So, as we have seen, a court will take judicial notice of the journals of a legislature to determine whether an act is constitutionally passed, or whether it has passed by reason of not having been returned in proper time by the governor."

There is, then, no need of stating what appears upon the journals of a legislature relative to the passage of a law; such matters are judicially noticed without averment, and the same effect given them as if averred. Bliss, Code Pl. 188. As no issue of fact can be taken upon what a court is required as a court to know, such averments in a pleading are redundant and irrelevant, and on motion should be stricken out. Pom. Rem. § 551. Therefore, unless courts may hear parol testimony offered to affect the passage of a duly-authenticated statute, the matter contained in the fifth paragraph of the reply should be stricken out as redundant and irrelevant; as it appears from the journals of the two houses of the general assembly that this act received the requisite concurrence of the members, and was duly attested by the presiding officer of each house, and it has also been duly enrolled and filed in the office of the secretary of state, and published in the Laws of Ohio.

Counsel have exhibited unusual industry in looking up the various cases upon this question; and out of a multitude of citations not one is found in which any court has assumed to go beyond the proceedings of the legislature, as recorded in the journals required to be kept in each of its branches, on the question whether a law had been adopted; and, if reasons for this limitation upon judicial inquiry in such matters have

not generally been stated, it doubtless arises from the fact that they are apparent. Public policy requires that the authenticity of laws should rest upon public memorials of the most permanent character. They should be public, because all are required to conform to them. They should be permanent, that rights acquired to-day upon the faith of what has been declared to be law shall not be destroyed to-morrow, or at some remote period of time, by facts resting only in the memory of individuals.

One of the earliest cases on the subject was that of *The King v. Arundel*, Hob. 109. It involved the question whether a private statute had been enacted. The court there held that the act could only be tried by itself,—its enrollment in the chancery; the chancery being then, as the office of secretary of state is with us, the depository of the laws. The court said, "When the act is passed, the journal is expired." Many cases follow this decision, adopting the attested enrollment of the law as conclusive on the question of its passage. *Pangborn v. Young*, 32 N. J. Law, 29, is an instructive case on the reason and policy of the rule. See, also, *People v. Devlin*, 33 N. Y. 269; *People v. Highway Com'rs*, 54 N. Y. 276; *Eld v. Gorham*, 20 Conn. 8; *Sherman v. Story*, 30 Cal. 253; *Lottery Co. v. Richoux*, 23 La. Ann. 743; *State v. Swift*, 10 Nev. 176; *Speer v. Plank-road Co.*, 22 Pa. St. 376.

But in many of the states, and without doubt in our own, the journals are to be regarded. They are required by the constitution to be kept. The language is:

"Each house shall keep a correct journal of its proceedings, which shall be published; \* \* \* and on the passage of any bill the vote shall be taken by yeas and nays, and entered upon the journal; and no law shall be passed in either house without the concurrence of a majority of all the members elected thereto." Section 9, art. 2.

Now, in the time of Hobart, the journals were not regarded as records. They were "remembrances for forms of proceedings to the record;" that is to say, the enrolled bill.

In this state what appears on the journals affecting the passage of a law has been noticed by this court; but in no instance has attention been given to anything not appearing upon the journals, though it be the omission of a requirement of the constitution.

In *Fordyce v. Godman*, 20 Ohio St. 1, the question was whether a certain statute allowing what is known as the "Morgan-raid Claims" had received the vote required by section 29, art. 2, of the constitution; namely, two-thirds of the members elected to each branch of the general assembly. The law was held invalid, not by going outside of, but because it appeared from, the journal that the bill had not received the requisite vote. The attestation of the presiding officers is not, under our constitution, sufficient in any case to convert into a law a bill that has not received the requisite vote; for by section 9, art. 2, on the passage of any bill the vote must be taken by yeas and nays, and entered on the journal; and, if this be omitted, the bill cannot become a law, whether it receive the requisite vote or not. There is no such provision

as to the seating or unseating of members. In *Miller v. State*, 3 Ohio St. 475, one of the questions was whether the bill had been read on three different days in each house, as required by section 16, art. 2. The court, THURMAN, J., delivering the opinion, was inclined to treat the provision as directory; but said:

“Whether the constitution, in the particular under consideration, is merely directory or not, it cannot be gainsaid, it seems to us, that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution requires, the presumption is that it was so read; and this presumption is not liable to be rebutted by proof.”

And in *State v. Moffitt*, 5 Ohio, 363, it was determined by this court, as early as 1832, that the journal cannot be contradicted by parol proof. And so, in *Koehler v. Hill*, 60 Iowa, 545, S. C. 14 N. W. Rep. 738, and 15 N. W. Rep. 609, the supreme court of Iowa held that parol evidence is not competent to supply a correction in the record of the journal; that is to say, that an amendment to the constitution of the state submitted by one general assembly was the same in form and words as that agreed to at the subsequent assembly.

There are numerous cases in the decisions of the different states to the effect that the journals of a legislature may be noticed by courts on the question whether a bill became a statute or not. *Judicial Opinion*, 52 N. H. 622; *Id.*, 35 N. H. 579; *People v. Mahaney*, 13 Mich. 481; *Moody v. State*, 48 Ala. 115; *Grob v. Cushman*, 45 Ill. 119; *Board of Sup'rs v. Heenan*, 2 Minn. 330, (Gil. 281); *In re Roberts*, 5 Colo. 525,—the latter presenting an extensive collection of the cases. But, as before stated, none are to be found in which the courts have, for any purpose affecting the validity of a statute, gone beyond such permanent memorials of its enactment.

The case of *State v. Francis*, 26 Kan. 724, is cited and relied on by counsel for relators. But it does not sustain them. There the house of representatives of Kansas had, by law, but 125 members; it had in fact 129. Four of these had by law no seats in the house, and could in no event be entitled to participate in its proceedings. They were simply supernumeraries. The journal showed that the concurrence of three, at least, of these supernumerary members was requisite to the passage of the law in question, and that all of them voted for it. The court took notice of these facts appearing upon the journal, and of the further fact that, as a matter of law, the house then consisted of 125 members only, and held that the bill did not become a statute. In no case, however, is the rule that limits judicial inquiry on questions of this kind to the journals of the legislature, and excludes all parol testimony, more strongly stated. The language used is as follows:

“In our opinion, the enrolled statute is very strong presumptive evidence of the passage of the act and of its validity, and that it is conclusive evidence, unless the journals of the legislature show, clearly, conclusively, and beyond all doubt, that the act was not regularly and legally passed. If there is any room to doubt as to what the journals of the legislature show, if they are merely silent or ambiguous, or if it is possible to explain them upon the hypothesis that the enrolled statute is correct and valid, then it is the duty

of courts to hold that the enrolled statute is valid; but in this state, where each house is required by the constitution to keep and publish journals of its proceedings, we cannot wholly ignore such journals as evidence."

That the invalidating facts must clearly and beyond reasonable doubt appear from the journal, is sustained by *Osburn v. Staley*, 5 W. Va. 85.

In *Evans v. Browne*, 30 Ind. 514, the proof, as offered from the journal in connection with parol testimony, was to the effect that the act in question had passed the house after it had been reduced to less than a constitutional quorum by the resignation of 42 of its members. The court refused to take notice of the averments; following the rule in those cases that adopt the attested enrollment of the law as the indisputable evidence of its authenticity. The case is an instructive one on the policy of the rule that rejects an issue of fact on the question whether a statute was adopted and became a law or not.

In *Wise v. Bigger*, 79 Va. 579, it was claimed that an act apportioning the congressional representation in that state, having been vetoed by the governor, had not repassed the senate by the requisite affirmative vote; that there were at least 29 members present when the question was put, "Shall the bill pass notwithstanding the objections of the governor?" and that 19 voted aye, and 9 nay,—the constitution requiring that it should be affirmed by two-thirds of the members present; but the court held that the journal did not show that there were more than 28 present, and that it imparted absolute verity. And to inquire into the veracity of the journal of the senate, in which it had recorded its proceedings, the court said, "would be to violate both the letter and spirit of the constitution, to invade a co-ordinate and independent department of the government, and to interfere with the separate and legitimate power and functions of the legislature."

As to the averment that the passage of the act was part of a conspiracy entered into between the president of the senate and 17 of the members, carried into effect in the absence from the state of a majority of the members of the senate, it is sufficient to say that such suggestions have frequently been made for the purpose of inducing judicial inquiry into the conduct of legislative bodies, but the inquiry has as frequently been declined by the courts, as not only indecorous, but as subversive of the independence of the legislature as a co-ordinate branch of the government. There is no authority for it in the constitution and laws of this state, and it is opposed to the practice and polity of our system of government. *Slack v. Jacob*, 8 W. Va. 613; *McCulloch v. State*, 11 Ind. 431; *Wright v. Defrees*, 8 Ind. 298; *Evans v. Browne*, 30 Ind. 514; *Railroad Co. v. Cooper*, 33 Pa. St. 278; *Harpending v. Haight*, 39 Cal. 202.

In *Miller v. State*, 3 Ohio St. 484, it is said by THURMAN, J.: "A disposition to disregard it [the constitution] is no more to be imputed to the legislature than to the judicial department, and ought not to be imputed to either."

"And," it is said by Cooley, "although it has been sometimes urged at the bar that the courts ought to inquire into the motives of the legislature where fraud and corruption were alleged, and annul their action



if the allegations were established, the argument has in no case been acceded to by the judiciary, and they have never allowed the inquiry to be entered upon." Const. Lim. 187.

The possible consequences of limiting judicial inquiry to what is shown by the journal is much exaggerated. It is not perceived how any limited number of members, without the acquiescence, or such indifference as would amount to acquiescence, of the majority, could make up a journal that would revolutionize the legislature, and deprive the people of their duly-elected representatives. The supposed case of less than a majority of this court causing a judgment to be entered of record is not apropos; for, if it were done, the only remedy would be in this court, for the reason there is no other tribunal or department of the government that could afford one; and, by parity of reasoning, the only correction that can be made in a legislative journal is by the body that caused it to be made. The suggestion that fraud or bad motives in those who caused it to be made, might defeat the remedy, would apply to the one case as well as to the other. But confidence must be reposed somewhere, and why not in a legislative body as to the keeping of its journals, as well as in this court, as to the keeping of its records? Besides, the people is the final tribunal before whom, as a rule, such delinquencies must be settled, (Cooley, Const. Lim. 168;) and, in the case of legislators, the return to the people being at comparatively short intervals of time, it is difficult to see how such abuses, if they exist, can be of very long standing. And in such cases it is "better to bear the ills we may have than flee to others we know not of."

2. The claim is that the act of May 17, 1886, creating the board of public affairs, did not pass the senate and become a law, because at that time there was not a constitutional quorum in it; and this is based on the claim that there was none present on May 8, 1886, when the four members from Hamilton county were seated in the place of the four that were ousted. Now, if this were conceded, it does not follow that the act itself is invalid. No doctrine is better settled in the jurisprudence of the English speaking people than that the validity of an act done by one in a public office or station is not, as a rule, to be tried by the title of the person to that office.

One of the best-considered cases on the subject is that of *State v. Carroll*, 38 Conn. 449. It contains an exhaustive examination of the numerous cases in which the doctrine has been discussed and applied, and points out an error in the report of the case of *Rex v. Lisle*, as made by Strange, 1090, that, as is shown, has been the source of error in some of the subsequent cases. The result of the investigation made by the learned judge is that competent authority in the appointing or electing body is not requisite to make a *de facto* officer.

The doctrine has been applied in a number of cases by this court. Thus in *State v. Alling*, 12 Ohio, 16, the appointment of a clerk of the court of common pleas made by associate judges who were simply such *de facto* at the time of the appointment, having been previously legislated out of office by an act of the legislature, was held to be a valid one.

This decision was made after the judges had been ousted from office on a proceeding in *quo warranto*. *Seeley v. State*, 11 Ohio, 504.

In *State v. Jacobs*, 17 Ohio, 143, the appointment of a county treasurer by a board of county commissioners, two of whom were *de facto* commissioners only, their legal titles having been destroyed by the division of Auglaize county, was held valid. The fact that they were recognized by the county auditor, who recorded their proceedings, and, with the other commissioner, had the control of the books and papers, made, in the opinion of the court, a strong case of an officer *de facto*.

In *Ex parte Strang*, 21 Ohio St. 610, the ground on which the sentence of an acting police judge was claimed to be invalid was that the law under which he was appointed, was unconstitutional. This question the court deemed unnecessary to decide, for the reason, as stated, that, if he was a judge *de facto*, his judgments would be as unquestionable by a proceeding in *habeas corpus* as if he were a judge *de jure*. It was then assumed that the legislature could not constitutionally authorize the mayor to appoint a police judge; but, as he was assuming to discharge the duties of the office under the appointment when he pronounced the sentence on Strang for a violation of an ordinance of the city, the court, after a full examination of the question in the light of the authorities, held that the acting police judge was a judge *de facto*, and sustained the sentence. WHITE, J., delivering the opinion, said:

"The true doctrine seems to be that it is sufficient if the officer held the office under some power having color of authority to appoint; and that a statute, though it should be found repugnant to the constitution, will give such color."

It may then be asked whether members of a legislature, seated by a vote of a number less than a constitutional quorum, have less color of title to their seats than a judge who holds his place by the appointment of one acting under an unconstitutional statute. In either case it may be said there was no constitutional warrant for the act on which the title rests; and, if the judgments of the one are valid, laws enacted by the body in which the others sit, and whose presence alone make a quorum therein, should also be held valid. Like reasons of public policy and convenience apply in either case.

In *Scovill v. Cleveland*, 1 Ohio St. 126, the validity of a certain assessment was questioned, *inter alia*, on the ground that the ordinance under which it had been made on the property of the plaintiff was not passed by a number of legal councilmen equal to the majority of a legal council. To this RANNEY, J., says: "If it were so, we are still equally clear that, while they continued to act *de facto* in virtue of their election, their proceedings would be valid and binding."

If the validity of every law passed by a legislature were made to depend upon the existence of a quorum at the time of its passage in each house, whether the fact appears from the journal of the proceedings therein or not, the inconvenience that would result would be intolerable. 30 Ind. 520. To the private embarrassments that would ensue in the matter of contracts and dispositions of property made upon the faith of what, by

the public records, appeared to be a law, must be added the effect that would necessarily be produced upon the public credit. If such were the law, no loan could be obtained short of the most ruinous rates of interest. We observe that a number of public loans have been authorized by statutes passed since the eighth of May, 1886. Now, if any of these loans have been made, can it be that the security of the public creditor must depend upon whether, as a fact, there was a quorum present in the senate on that day? It is difficult to perceive how it could be claimed that, if one statute is invalid because there was no quorum at that time, the same reason would not affect the validity of other statutes passed since the same time.

What appears of record is certain and accessible to all; and all may with reason be held to have notice of such matters. That which rests in parol is perishable, uncertain, and, in the nature of things, limited to the actual knowledge of a limited number. The necessity for certainty and publicity in the laws needs no higher reason for the exclusion of parol testimony, offered to affect their authentication, than the perishable and uncertain nature of such testimony.

The case of *Braid v. Theritt*, 17 Kan. 468, has been cited and relied on by counsel for the relators. It is not in point. It was an action by Theritt to restrain Braid, the alleged intruder, from interfering with him while discharging his duties as a member of the city council. It does not present, nor decide, that an ordinance passed by the vote of Braid would have been invalid. The court was careful to confine its decision to the question of title arising between the two parties. Nor is it in point on the question as to whether the four members of the senate, seated by less than a quorum, if such was the fact, are not *de facto* members. Braid intruded into the council by his own act; Theritt having been returned elected. Here the contestants were seated by the members present, acting as a senate, and it is this act of those present, exercising the functions of a senate, that gives, at least, a color, if not a legal title, to those seated.

We are, then, of opinion that the motion to strike out the fifth paragraph of the reply should be sustained; and as the act appears, from the journals of the legislature, to have been duly passed, has been duly attested and filed in the office of the secretary of state, and has been published as a law, the writ must be refused, unless it in some way clearly contravenes the provisions of the constitution.

3. This question is raised by the demurrer to the reply. It is claimed that the law is unconstitutional because it authorizes the governor to appoint the members of the board created by the act. It has been argued with great zeal and ability by counsel for the relators; but, with due deference, we think it can hardly be regarded as an open question in this state since the decision in *State v. Covington*, 29 Ohio St. 102, sustaining the act under which the respondents in that case had been appointed by the governor. That case was followed in *State v. Baughman*, 38 Ohio St. 455, sustaining the law authorizing the court of common pleas to appoint police commissioners for the city of Xenia. The question was

fully examined by McILVAINE, J., in the *Covington Case*, and we are entirely satisfied with the reasoning upon which the judgment was placed. Ample power is conferred on the general assembly for the government and organization of cities by general laws. The legislative power of the state is vested in it by section 1, art. 2, of the constitution; it is required by section 6, art. 13, to exercise this power by the enactment of general laws for the organization of cities and villages; and it is in the exercise of this power by the general assembly that the entire system of municipal government for cities and villages has been created in this state. The entire details of the system that may be devised, and the public agencies that may be employed for administering it, and whether they shall be elected or appointed, is left by the constitution to the wisdom of the legislature.

The constitution expressly provides that certain officers shall be elected, and among these includes "such county and township officers as may be necessary," (section 1, art. 2;) and then, in section 27, art. 2, it is provided that the election and appointment of all other officers not otherwise provided for in this constitution "shall be made in such manner as may be provided by law." This is not only significant in itself, but seems to preclude the claim that there is any general spirit pervading the constitution opposed to vesting the appointment of municipal officers in the government or elsewhere. Whatever effect may be claimed for section 20 of the bill of rights, it can in no way affect the election or appointment of officers whose election is not provided for in the constitution. The power conferred on the general assembly to provide for the election and appointment of officers is subject only to the limitations imposed by the instrument conferring the power. "The true rule for ascertaining the powers of the legislature is," as stated by McILVAINE, J., in *State v. Covington*, *supra*, "to assume its power, under the general grant, ample for any enactment within the scope of legislation, unless restrained by the terms or the reason of some express inhibition." To this may be added what is said in *State v. Constantine*, 42 Ohio St. 442, that "the manner of filling an office by appointment is unrestricted, save only that it cannot be by 'an election,' which is pointed out by the constitution as a different mode of filling an office."

Much reliance is placed upon certain cases decided by the supreme court of Michigan. The case of *Board of Park Com'rs v. Detroit*, 28 Mich. 238, has little or no application to this case. It involved the question only whether the legislature could compel a city to incur an expenditure, as for a park, against the consent of its council. Nothing of the kind is contemplated by this act. The board of public affairs may supervise and control the making of public improvements by the city, but it cannot initiate or compel expenditures for such purposes without the approval of the city council. It may act, and was probably designed, as a salutary check upon public extravagance, and may afford a wholesome administration of the affairs of the city.

The case of *People v. Hurlbut*, 24 Mich. 44, is in point. It involved the validity of an act establishing a board of public works for the city of

Detroit. The appointment was made by the legislature in the act creating the board. It seems there is no express inhibition in the constitution of that state against the appointing power being exercised by its legislature, as in our own. Section 27, art. 2. The law was held invalid, not because it violated any express provision of the constitution,—for it was admitted that it did not,—but because it was thought to contravene certain principles of local self-government that the court, by way of inference, regarded as part of their system of government. And still another distinction was taken, resting upon mere inference, and much relied on in the subsequent case, between the public and proprietary characters of a municipal corporation. Supreme control by the legislature over its public character is conceded, while it is thought that, in its latter character, it has or should have the same independence in the management of its proprietary interests that is conceded to a private corporation. These distinctions are found to be illusory, and without any well-founded distinction in principle. 1 Dill. Mun. Corp. § 67. They have not been adopted to any extent by other courts. *People v. Draper*, 15 N. Y. 533, per DENIO, J.; *Darlington v. Mayor, etc.*, 31 N. Y. 193; *Hudson Co., etc., Co. v. Seymour*, 35 N. J. Law, 47; *State v. Valle*, 41 Mo. 29; *Daley v. St. Paul*, 7 Minn. 390, (Gil. 311.) Well-settled rules of construction forbid courts from assuming the liberty of declaring an act void because, in their opinion, it is opposed to a *spirit* supposed to pervade the constitution, but not expressed in words. In the language of Judge COOLEY:

"The courts can enforce only those limitations which the constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of justice of their representatives." Const. Lim. 128, and also 171.

Over the wisdom or policy of this legislation this court has no control. In the language of Judge BLACK, in *Sharpless v. Philadelphia*, 21 Pa. St. 162: "There is no shadow of reason for supposing that the mere abuse of power was meant to be corrected by the judiciary." The remedy in such cases is with the people.

Being persuaded that this act in no way violates any provision of the constitution, the writ is refused.

OWEN, C. J., dissenting from the judgment, and especially from the action of the majority of the court in sustaining the motion to strike out the fifth paragraph of the reply, filed the following dissenting opinion:

The plaintiffs allege in the fifth paragraph of their reply:

The act under which the members of the board of public affairs claim their offices is null and void; that the pretended passage, signing, and filing the same with the secretary of state is part of a conspiracy entered into between the president of the senate and 17 members thereof; that such conspiracy was carried out by the parties to it in the following manner, (the names of the 37 senators who were duly elected to the senate are here given.) It is alleged that on the eighth of May, 1886, while 19 members of the senate (naming them) were absent from the senate chamber, and while only 17 senators, being less than a quorum of the duly-elected senators, were present, the president of the senate, with the advice and consent of these 17 senators, and in

the absence of the majority of the senators, knowingly, unlawfully, fraudulently, and in violation of the constitution of the state and the rules of the senate, caused the clerk of the senate to enter upon what purports to be the journal of the senate, but which was not such in fact, the pretended adoption of a resolution declaring that four of the senators, Brashears, Hopple, Kuehnert, and Wilson, were not duly elected as members of the senate, and not entitled to seats therein, and that Hardacre, Richardson, Kirschner, and McGill had been duly elected members of such senate, and were entitled to seats therein; that only 17 senators were present and voted for such resolution, and the vote was not taken by yeas and nays, as required by the rules of the senate, and a majority of the senators did not vote, who were temporarily absent from the state, with the intention of returning, and with no intention of vacating their seats or surrendering their rights as senators; that the president of the senate and said 17 senators (naming them) fraudulently and corruptly conspired and caused what purported to be the journal of the senate to be so falsely and fraudulently made and kept as to show that such pretended resolution had been adopted; that after this said Hardacre, Kirschner, McGill, and Richardson, without being sworn, claimed to have been admitted to seats as members of the senate; that in furtherance of such conspiracy, and during the continued absence from the senate of the 19 senators before named, the pretended act of date May 17, 1886, under which the pretended board of public affairs claims to have been created, was declared passed and signed by the president of the senate, and only 17 senators were present or voted at the time of the alleged passage of such act and the signing of the same by the president of the senate, yet said president of the senate and 17 senators corruptly and fraudulently caused the pretended journal to be so falsely and fraudulently made, kept, and signed as to show that the pretended act had been passed by the senate, and signed by the president in its presence; that the president of the senate, speaker of the house of representatives, and secretary of state, at the time of the signing and filing of such pretended act, well knew that the same had not been passed, and was fraudulent and void; that at no time from May 5, 1886, until the alleged adjournment of the senate, was there ever a quorum of members present for the transaction of business; and that neither a quorum nor a majority of the members elected to said body ever assented or agreed to such resolution or concurred in the passage of the pretended act above mentioned.

There can be no serious discussion of the legal effect of a motion to strike out. It is an admission, for the purposes of considering the questions involved, of the truth of the facts alleged. The averments of this paragraph are equivalent to an offer to prove the facts so alleged. The legal effect of a motion to strike out matter from a pleading for irrelevancy was considered in *State v. Harper*, 6 Ohio St. 611. BOWEN, J., speaking for the court, said:

"The 118th section of the Code authorizes irrelevant matter, inserted in any pleading, to be stricken out, on motion of the party prejudiced thereby. \* \* \* The motion, in such case, took the place and served the office of a demurrer."

What is the office of a demurrer? "A general demurrer admits the truth of facts as stated in the pleading." McILVAINE, C. J., in *Mitchell v. Treasurer Franklin Co.*, 25 Ohio St. 153.

While it is true that facts not well pleaded, and mere conclusions of law, are not admitted by a demurrer, there is no pretense that the averments in this paragraph of the reply are mere conclusions of law, or that

the facts are not well stated. The claim is that the facts stated, if established, would be immaterial, irrelevant, and constitute no valid ground of objection to the act in question. To contend that these averments are not admitted by the motion because they are irrelevant and immaterial is to assume the very point in controversy. It follows that, for the purposes of the questions raised by this motion, it is admitted that the president of the senate and 17 members entered into a conspiracy to subvert and evade a plain provision of the constitution of the state, ordaining that "a majority of all the members elected to each house shall be a quorum to do business; but a less number may adjourn from day to day, and compel the attendance of absent members," etc. Article 2, § 6. That this conspiracy comprehended a scheme to cause what purported to be, but was not, the journal of the senate, falsely to show such business to have been done as could not constitutionally be transacted under that provision of the constitution, which was sought to be subverted. That is, by these averments it is offered to prove, and by this motion it is admitted, that a number of members less than a quorum, and who were wholly unauthorized to do more than adjourn from day to day and compel the attendance of absent members, fraudulently conspired to proceed with such unauthorized business, to vote out four members, and vote in four other persons to take their places, and to cause a false and spurious journal to be so fabricated as to conceal the absence of a quorum, and thus to accomplish by a deliberate conspiracy against the constitution what its plain provisions expressly prohibited. And this court is appealed to, to ratify and sanctify this assault upon the constitution, and upon representative government, by declaring that the averments by which it is brought to our notice are irrelevant, immaterial, and scurrilous. How the proof was to be made does not appear. How far this pretended journal would establish it is not disclosed. It is idle to say that this court will take judicial notice of a senate journal; for no document purporting to be such journal has been before the court in any form, nor have we been made acquainted with its contents beyond what is disclosed in this reply, and intuitive knowledge of its contents will not be ascribed to the court or any member of it. It follows that the question of "going behind" the senate journal, which has so prominently engaged the discussion of this case, is not before us. By the averments of this reply there was no senate,—simply a number of its members wholly without power to act. There was no senate journal, but a false and fraudulent pretense of one; and, for aught that appears in this case, this pretended journal might, if offered in evidence or brought before us, be relied upon to establish, in part, the facts averred. It thus appears that the claim that these facts are immaterial because they would contradict a legislative journal is absurd; and the following language of THURMAN, J., in *Miller v. State*, 3 Ohio St. 484, which is cited by the defendants, has no application to the question before us. He said:

"It seems to us that where the journals show that a bill was passed, and there is nothing in them to show that it was not read as the constitution re-

quires, the presumption is that it was so read, and this presumption is not liable to be rebutted by proof."

He was here discussing the *mode* of passing an act prescribed by the constitution, as distinguished from the *authority* to pass it. But this eminent jurist used the following language, which, in the light of the present case, seems prophetic:

"By the term 'mode' I do not mean to include the *authority* in which the law making power resides, or the *number of votes a bill must receive to become a law*. That the power to make laws is vested in the assembly alone, and that no act has any force that was not passed by the number of votes required by the constitution, are nearly or quite self-evident propositions. These essentials relate to the authority by which, rather than to the mode in which, laws are to be made."

See *Fordyce v. Godman*, 20 Ohio St. 17, where this view is approved by SCOTT, J.

In the case at bar it stands admitted that there was no authority to do any business as a senate. The averment is that but 17 senators voted for the act.

The attempt to sustain the act in question by the rule relating to officers *de facto* is a palpable misapplication of a familiar doctrine. Among other cases relied upon is that of *Ex parte Strang*, 21 Ohio St. 610. It was there held that, where an act of the general assembly in form authorized the mayor of a city to appoint a police judge, such appointee was a judge *de facto*, and that his acts were binding, *when questioned collaterally*, although the act authorizing such appointment was not warranted by the constitution. It is declared in that case that "it is sufficient if he derives his appointment from one *having colorable authority to appoint*; and an act of the general assembly, though not warranted by the constitution, will give such authority." Here was the form of a law passed by the general assembly, fully authorized to act; and in strict pursuance of its terms the appointment was made, and the appointee proceeded to act. Here was certainly color of authority to appoint. But in the case before us there was not the slightest color of authority to constitute the persons members of the senate who are relied upon to give vitality to the act. Their title to their seats has never risen higher than a deliberate plot to circumvent the plain command of the constitution. But it must be remembered that the averment of the reply is that less than a quorum (17 members) were present when this act was passed.

There is another principle which is fatal to the view here contended for, and adopted by the majority. There is no form of direct attack upon the authority of these pretended senators to act, recognized by law. The present is the only available form of attack upon their proceedings. *Quo warranto* would not lie to call in question their authority to exercise the functions of senators. The present is to be treated as a direct attack, for the reason that no other form of attack can be made. The principle is well established that where a direct attack upon a proceeding cannot, for any reason, be made, it may be collaterally questioned. *Vose v. Morton*, 4 Cush. 31, and cases there cited.



In the case of the police judge there is no question but *quo warranto* proceedings would lie to oust him from the use of his office; and for this reason, until this is done, his acts are binding as against collateral attacks.

In *Opinion of the Justices*, 56 N. H. 370, the supreme court of New Hampshire was called upon for an opinion concerning the right of Priest and Proctor to retain seats in the senate. It was held that when the senate, in pursuance of its power to "judge of the election, returns, and qualifications of its own members," have adjudged that a person claiming a seat as senator was duly elected and possessed of the requisite qualifications, their judgment is final, and cannot be questioned by the executive or judicial departments of the government. But the opinion concludes with this very significant statement:

"The foregoing opinion is based entirely upon the facts stated in the preamble to the resolution, and upon the assumption that, when the senate undertook to act as final judges of the qualifications and elections of Messrs. Priest and Proctor, *there was a constitutional quorum present.*"

It is noticeable that no case is cited by counsel or by the majority sustaining the view that acting members of a legislative body, seated without authority, are to be regarded as *de facto* members. The authorities upon this question are well summed up in McCrary on Elections, (section 517,) where the able author says:

"The cases in which the official acts or votes of members of a legislative body who are such *de facto* only, and not *de jure*, have been held valid, *are all cases in which there was no question as to the legality of the body in which they sat.* They are cases in which the body admitting such persons was, in doing so, acting within its jurisdiction, and in such cases the courts will not inquire into the title of such members to their seats. The courts, in such cases, will go no further than to inquire as to the legal *status* and authority of the body as a whole," etc.

The italics are the author's.

This effectually and conclusively disposes of all that has been said for the misconceived theory that an executed conspiracy between the presiding officer and a number of members less than a quorum of a legislative body to remove some of its members, and induct other persons as members, constitutes the latter *de facto* members of such body. It will be observed that the proceedings of the persons who assumed to be a senate are not attempted to be justified by the absence from the senate and state of a majority of the senators. If seventeen members could transact such business so could seven, or any less number. Indeed, let it once be established that a plain provision of the constitution can be subverted or wholly disregarded by such means as it is here admitted were employed, and it is vain to speculate upon what may not be accomplished in an effort to contravene the organic law of our state.

In this case the court is called upon to consider a radically new question. It is creditable to the legislative departments of the states that no court of last resort of any one of them has ever before been required to deal with such a question. The industrious research of counsel has

failed to produce a case, and it will be observed that not one is cited by the majority of the court which tends in the slightest degree to support the extraordinary proposition which is here contended for. To apply the cases cited and relied upon it is necessary to assume an entirely different state of facts from those which appear in this case. Cases are found supporting the principle that courts will not inquire into the motives which prompted the enactment of a law. Their soundness will not be questioned. They all presuppose full authority to act. Here there was entire absence of authority.

If the position reached by the majority be tenable, these startling conclusions follow: When both branches of the general assembly, possessing undoubted authority to act, and acting in good faith, overstep in the slightest degree the limitations of the constitution in the attempt to enact a law, this court is clothed with abundant authority to overturn it and declare it a nullity; but where less than a quorum of a single branch, utterly without authority to act, by a scheme of conspiracy and fraud, unparalleled in the history of legislation, overthrow and disregard a plain command of the constitution, and cause a false, spurious, and pretended journal to make that appear which was not and could not be done, this court,—the court of last resort in the state,—which has ever been regarded as the last refuge of a broken constitution, is compelled to confess itself helpless and powerless to do more or less than ratify and sanctify the great public wrong by pronouncing upon it its solemn approval.

The fallacy of attempting to apply to this case the sentiment—sometimes mistaken for a principle—that the judicial department of the state owes entire immunity to its co-ordinate branches is obvious. There is no pretense that there was a senate authorized to act. One of the eminent judges constituting the majority, speaking for himself in a dissenting opinion in *Dalton v. State*, 43 Ohio St. 682, S. C. 3 N. E. Rep. 704, said:

“It is a fundamental principle that every citizen and every public officer, however high his grade, is amenable to judicial control. It was but a few years since that the governor of this great state was arrested by the sheriff of an adjoining county, and compelled to stand at the bar of the court and plead as a common criminal. He did not claim, nor could he claim, exemption from obedience to the mandates of the court.”

This was a co-ordinate branch of the state government, not a mere usurper of its functions. No question of conspiracy to subvert the constitution was involved. So far as we are advised, no question of irrelevancy, immateriality, or scurrility availed to prevent inquiry into the manner of exercising the executive functions of the state.

The cases which are relied upon to establish the sacredness of legislative journals from collateral inquiry or contradiction all proceed upon the assumption that (1) there was authority to act, and to make a journal; and (2) there was a legal journal. Here there was neither.

The contention that this conspiracy was so comprehensive in its workings—was carried to such extravagant limits, and assumed such formidable proportions—that (though it be conceded that every step taken in

its progress was over a broken constitution) it would create discord or disaster to call it in question now, is a novel argument.

Without questioning in the slightest degree the sincerity of conviction which has prompted the conclusion reached by the majority, it would be vain for the writer of this dissenting opinion to attempt an expression of his measureless regret that the disposition of this case has been allowed to rest upon the admission which, in legal effect, is involved in this motion to strike out. Whether the plaintiffs would have been able to prove the facts alleged in this reply it is idle to speculate. For the purposes of this case they stand as proved and established facts. But it was due to the people of the state; it was due to the presiding officer and these 17 members of the senate, who are strangers to this proceeding, and who have had no opportunity to be heard in a matter which so gravely involves their official conduct; it was due to them as eminent citizens and officials of the state,—that this motion to strike out be overruled, and that the plaintiffs be called upon to prove the truth of these startling charges. If, upon a hearing, they had proved unfounded, all good citizens would rejoice. If they had proved true in fact, it is due the state and this court that the great crime against the constitution and against representative government be rebuked and redressed. But as it is, this unfortunate admission, and the announcement that there is no remedy in this court for the acts admitted, are left in this record—an abiding menace to our institutions—to breed popular distrust of the stability of our constitution, and of the power of this court to shield it from schemes and conspiracies to undermine and subvert it.

FOLLETT, J., concurs in the dissenting opinion.

(117 Ill. 468)

BIEDERMAN v. O'CONNOR.

(*Supreme Court of Illinois. March 27, 1896.*)

1. EVIDENCE—PAROL EVIDENCE—INADMISSIBLE TO VARY CONTRACT IN WRITING—ADMISSIBLE TO PROVE NON-DELIVERY.

While it is a general rule that parol evidence is inadmissible to vary the terms of a written contract, it is admissible to prove that there was no delivery of the same.<sup>1</sup>

2. SAME—PRESUMPTION—DELIVERY OF CONTRACT—ORAL TESTIMONY ADMISSIBLE TO REBUT.

The possession of a contract in writing, by one of the parties thereto, raises the presumption of its delivery by the other; but such presumption may be rebutted, and the possession explained by oral testimony.<sup>2</sup>

3. PLEADING—GENERAL ISSUE—EVIDENCE—CONTRACT—DELIVERY.

The delivery of a written contract being essential to its validity, evidence tending to establish its non-delivery is admissible under the general issue.

4. CONTRACT—CONSIDERATION—CASH PAYMENT—EXTENSION OF TIME—VALIDITY OF—OBLIGATION OF PERFORMANCE.

Where one of the parties to a contract requires a cash payment before its execution by him, which the other party is unable to make, and agrees to extend the time within which the cash payment is to be made, such an agreement is not void for want of consideration, and will be held binding.

<sup>1</sup>See note at end of case, part 1.

<sup>2</sup>See note at end of case, part 2.

**5. INFANTS—LIABILITY ON CONTRACT WHEN SUING ADULT FOR BREACH.**

An infant who contracts with an adult cannot insist upon its performance by the latter while failing to perform his own part of the agreement.

Error to appellate court, Second district.

*Willoughby & Dougherty*, for plaintiff in error.

*McKenzie & Calkins*, for defendant in error.

SHOPE, J. This was a suit brought in the Knox circuit court by plaintiff in error, against defendant in error, to recover damages for his failure to deliver 10,000 bushels of corn according to the terms of the following contract in writing:

"GALESBURG, ILL., June 5, 1882

"Mr. O'Connor promises to deliver Mr. H. A. Biederman 10,000 bushels of good corn this fall, of 1882, at 20 cents per bushel. M. O'CONNOR."

The defendant filed the general issue and several special pleas, upon all of which issue was taken. A trial resulted in a verdict for defendant. Motions for new trial and in arrest were severally overruled, and judgment rendered on the verdict, and against the plaintiff for costs. The case was taken by appeal to the appellate court of the Second district, where the judgment of the appellate court was affirmed, and the present writ of error is prosecuted to that court by the plaintiff below.

Very many of the errors assigned have been eliminated from the case by the judgment of the appellate court.

The plaintiff in error insists that each of the special pleas presented an immaterial issue, and that for that reason the judgment should have been arrested. Without pausing to discuss the correctness of the practice indicated, it will be sufficient to say that the general issue filed, presented a material issue, and therefore no such practice would have been warranted.

It is also insisted that the court erred in admitting in evidence, over the objection of plaintiff, conversations preliminary to and contemporaneous with the signing of the instrument sued on; and many authorities are cited to sustain the position that all such contemporaneous matters are merged in the writing, and are not admissible to vary its terms. These authorities undoubtedly state the law correctly, but have no application to this case, for the reason that evidence offered and admitted was admitted for no such purpose, and produced no such effect.

Authorities are also cited sustaining the position that no agreement made at the time of the delivery of a contract in writing, in respect to its delivery, repugnant to the legal effect of the instrument, or for its redelivery upon conditions, is competent to be proved by parol, and therefore it is insisted the court erred in admitting the attending conversations and circumstances at the time of the signing of said writing. We have no disposition to depart from the rule laid down in these cases; but it will be found, in each of the cases cited, there was a delivery in fact of the instrument in writing, or the maker had so acted in respect to the instrument that the rights of third persons would be prejudiced if he was permitted to insist upon its non-delivery, and was therefore estopped from insisting thereon.

Mere possession by the vendee or obligee will raise the presumption of delivery, but it has never been held to be conclusive, and it is the well-settled doctrine that evidence tending to prove fraud in obtaining possession of the writing, or to show that it was not in fact delivered, is always admissible. Under the general issue the defendant might introduce in evidence any which tended to show that plaintiff never had cause of action. 1 Chit. Pl. 478. Delivery of the writing being essential to its validity as a contract, evidence tending to establish its non-delivery would be competent under that issue. In this view, it will be unnecessary, in considering the relevancy or competency of the evidence objected to, to consider the issues raised by the special pleas.

The evidence objected to is that of the defendant and his daughter, who, with the plaintiff, were the only persons present at the time of the alleged making and delivery of the contract. This evidence was, in substance, that in the evening of the fifth day of June, 1882, plaintiff had called at defendant's house, and, while there, the defendant came in, and in general conversation plaintiff expressed the opinion that the unfavorable weather would cut short the corn crop, and corn in consequence would command a high price. The defendant replied that there was a good stand of corn, and there would be plenty of it; that he would not be afraid to contract a man all he wanted at 20 cents a bushel. The plaintiff said, "I would like to take 10,000 bushels at that price," and proposed drawing a contract, to which defendant replied, "If you will pay me \$1,000 cash down, you may draw up a contract." Plaintiff said he would do it, and immediately drew the writing sued on. The defendant reached over and signed it, and said, "Now, where is your \$1,000." The plaintiff replied that he did not have "any thousand dollars," but said, "Mike, I can give you my check, but I haven't any money in the bank," or "haven't that much in the bank." The defendant immediately said, "I don't want your check; I want the money." The plaintiff thereupon, instead of producing the money, picked up the writing and put it in his pocket. The defendant protested, and said, "I didn't sign that to have you snatch it up and take off in that way." The plaintiff kept the writing, and it was finally agreed that, if he brought the \$1,000 in money by 8 o'clock the next morning, it was to be a contract; otherwise not. The next morning the plaintiff came to the defendant's house, and again tendered a check, which was refused by defendant, who demanded the destruction of the writing. It is evident that the defendant did not, at any time, consent to the plaintiff taking the writing, but at all times insisted upon the payment of the \$1,000 as a condition precedent to the contract taking effect. This he would have a right to do, and without his assent to the delivery of the contract it could not become binding or effective, and the possession thereof, if taken as shown by this evidence, was fraudulent. It will require the citation of no authority to maintain the position that this evidence was admissible as tending to show that the writing was not in fact delivered.

Indeed, there is much in the record to sustain the view that there was no intention on the part of either plaintiff or defendant to make a binding contract. The conversation started in badinage. When the defendant was about to sign the contract, the evidence shows that the daughter advised her father not to sign it; and, when pressed by plaintiff's counsel for her reason for so doing, testified that she did so because she was afraid Henry (the plaintiff) might have \$1,000. The plaintiff's visit was a mere friendly call, with no intention of buying corn; yet he agrees to pay \$1,000 down, when he knows he has not got it; offers his check on a bank, when he has no funds; and finally consents it shall be "no contract" unless he is there with the sum of \$1,000 in money by 8 o'clock the next morning,—fully an hour, as his counsel admits, before any bank in the city would be open. It is true that some of this evidence is disputed by plaintiff; but he is wholly uncorroborated, while the defendant and his daughter substantially agree. No further attention seems to have been paid to this alleged contract by either party after the morning of the sixth of June until the latter part of November, when plaintiff wrote a letter to defendant, demanding the corn, and designating a place of delivery. It is not pretended that a tender was ever made of the \$1,000, or any other sum, by plaintiff, until between the sixth and tenth of December, when the plaintiff claims to have tendered the defendant \$1,000 in gold. But here, again, he is contradicted by the defendant, who says no tender was made, but that the plaintiff had a bag in which he said he had \$1,000, and said to defendant, "I want to show you I could make you a tender." The defendant is corroborated by the witness Inness, who is shown to have been present at the time of the alleged tender.

The finding of the jury being with the decided weight of the evidence, and every important question involved arising under the general issue, it will not be important in this case, nor profitable in any other, to take up and discuss in detail the objections to the various instructions given for defendant, or the modification or refusal of those asked by the plaintiff. Special pleas presenting almost every conceivable issue, material and immaterial, were filed, and issue taken on them, and at the trial each party asked instructions upon the theories raised by these pleas. We have carefully considered the whole series, and, while many are objectionable, we find no error for which the cause should be reversed. A number of instructions are given for each party, laying down the rule of law as to wagering contracts, which, if correct in other respects, should have been refused, because there is no evidence on which to base them; and the same can be said of others of the series. Upon the question presented, and material to the determination of the case,—that is, whether a contract was made by the parties, and, if so, whether the plaintiff had complied on his part,—the law went to the jury substantially correctly.

It is urged that if the agreement was that the \$1,000 was to be paid by 8 o'clock the next morning, that there are two reasons why the defendant could not set that up:

*First.* That such agreement on the part of the plaintiff was without consideration, and therefore void. This is untenable. The contract was to pay \$1,000 down. This plaintiff was unable to do; and, being unable, the right to pay it the next morning was a simple extension of time to him in which to make the payment. It might as well be said there was no consideration for the promise to pay in the first instance.

*Second.* It is said that the plaintiff was a minor, and therefore not bound by his promise. Infancy was properly replied: This position cannot be maintained. He had agreed to pay \$1,000 as consideration for the execution and delivery of the contract by defendant. He cannot be permitted to shield himself from performance on his part, and hold the defendant to do that which he was to do only upon the plaintiff's performing on his part. Not a dollar had been paid. No right of the plaintiff was in jeopardy. The agreement was to become binding upon the infant's paying the money, and not until then; and he cannot relieve himself from performing, and insist upon the validity of the contract.

Upon the whole case, we think the judgment clearly right, and that substantial justice has been done, and the judgment of the appellate court will be affirmed.

#### NOTE.

1. PAROL EVIDENCE TO VARY WRITTEN INSTRUMENT. Parol evidence is inadmissible to vary or reform a written agreement. *Rice v. Lewis*, (Pa.) 4 Atl. Rep. 810.

In the absence of an allegation, and of proof and finding, that there was either fraud or mistake, an instrument must have force and effect according to its terms, and cannot be varied, explained, or contradicted by parol evidence. *Marsh v. McNair*, (N. Y.) 1 N. E. Rep. 640.

A stranger to a written instrument is not estopped from offering parol testimony to vary the same, and prevent the fraudulent operation of it upon his own interests. To this end parol testimony of a party to the instrument is admissible. *Hightstone v. Burdette*, (Mich.) 27 N. W. Rep. 852.

Where a contract is perfectly clear, without patent or latent ambiguity, it states the language of the parties, and parol evidence is inadmissible to add to or take from its meaning. *Long v. Millerton Iron Co.*, (N. Y.) 4 N. E. Rep. 735.

Where a contract has been reduced to writing, parol evidence is inadmissible to contradict or vary the terms of the written instrument, and it is error for the court to admit such evidence. *Daly v. W. W. Kimball Co.*, (Iowa,) 24 N. W. Rep. 756.

In an action on a written contract, parol evidence of stipulations not in it is inadmissible. *Baker v. Morehouse*, (Mich.) 12 N. W. Rep. 170.

Contemporary parol agreement cannot be set up in violation of express written contracts. *Gram v. Wasey*, (Mich.) 7 N. W. Rep. 84.

A written contract cannot be varied by proof of previous verbal agreements. *Hotchkiss v. Carney*, (Mich.) 12 N. W. Rep. 182.

Parol evidence of a prior agreement is not admissible to vary or contradict a written contract. *Barhydt v. Bonny*, (Iowa,) 8 N. W. Rep. 164.

Parol evidence is not admissible to alter the terms of a written contract. *The Golden Rule*, 9 Fed. Rep. 334; *Esepy v. Blanks*, Id. 432; *Courtright v. Burnes*, 13 Fed. Rep. 817.

Where the meaning of the terms of a written contract is clear, evidence of extrinsic circumstances is inadmissible for the purpose of varying such meaning. *Sias v. Roger Williams Ins. Co.*, 8 Fed. Rep. 187.

When the parties, without any fraud or mistake, have deliberately put their engagement in writing, the law declares the writing to be not only the best, but the only, evidence of the agreement; but this does not prevent parties to a written agreement from proving that either contemporaneously, or as a preliminary measure, they had entered into a distinct oral agreement on some collateral matter, or an oral agreement which constitutes a condition on which the performance of the written agreement is to depend. *Michels v. Olmstead*, 14 Fed. Rep. 219.

It is said in *Stoops v. Smith*, 100 Mass. 63, that, in an action on a written contract to pay "fifty dollars for inserting business card in two hundred copies of his advertising chart, to be paid when the chart is published," etc., parol evidence is admissible to show

that at the time the contract was made the plaintiff agreed to make the chart of certain material, and to publish it in a certain manner.

In a contention between a party to an instrument and a stranger to it, either may give parol evidence differing from the contents of the instrument. *McMaster v. Insurance Co.*, of N. A., 55 N. Y. 222.

The rule which forbids the introduction of parol evidence to contradict, add to, or vary a written instrument, does not extend to evidence offered to show that a contract was made in furtherance of objects forbidden by statute, by common law, or by the general policy of the law. *Martin v. Clarke*, 8 R. I. 389.

A written lease of a hotel having been executed, parol evidence is competent to establish a contemporaneous oral agreement by the lessor, in consideration of the lease, not to engage in a rival business in the same city. *Welz v. Rhodius*, 87 Ind. 1.

In *McKim v. Aulbach*, 130 Mass. 481, where a contract called for early rose potatoes, evidence that mixed potatoes, consisting mainly of early rose, were generally known as early rose potatoes, is inadmissible.

In *Eberle v. Girard Life Ins. Co.*, (Pa.) 4 Atl. Rep. 808, where a tenant, in an action of replevin against his landlord to recover goods distrained for rent upon a lease under seal, offered to prove by parol an agreement entered into between him and the landlord, upon the faith of which the lease was signed, by which the landlord agreed to put the premises in a more tenable condition by repairing a leaking roof, it was held that there was no error in rejecting such evidence, which did not tend to establish fraud, mistake, or a trust, but proposed to establish a contemporaneous parol agreement to change the effect of a written contract.

Where the description of land in a deed under which the plaintiff claims is definite and certain, and no latent ambiguity is discovered, extrinsic evidence to vary its terms is inadmissible. *Holcomb v. Mooney*, (Or.) 11 Pac. Rep. —.

2. PRESUMPTION OF DELIVERY FROM POSSESSION. Respecting the presumption of delivery of a written instrument from its possession and production, see *Buttrick v. Tilton*, (Mass.) 6 N. E. Rep. 563, and note, 566.

(116 Ill. 649)

### MILLARD v. MARMON.

(*Supreme Court of Illinois.* May 14, 1886.)

#### 1. JUDGMENT—CONCLUSIVENESS OF—ACTION ON JUDGMENT.

Errors in the course of proceedings leading to a judgment, when not jurisdictional, cannot be reviewed in an action upon the judgment. The rule is inflexible that a judgment cannot be collaterally assailed for errors not jurisdictional.

#### 2. SAME—JUDGMENT AGAINST MINOR—NO GUARDIAN AD LITEM—JUDGMENT VOIDABLE ONLY.

A judgment rendered against a minor, where no guardian has been appointed, is not void, but only voidable by a direct proceeding. Such omission will not vitiate the judgment on a collateral attack.

Error to appellate court, Third district.

*Geo. B. Graham*, for plaintiff in error.

*Moore & Warner*, for defendant in error.

CRAIG, J. This was an action of debt, brought by William W. Marmou, in the circuit court of De Witt county, against Decatur C. Millard, on a judgment which the plaintiff had recovered before a justice of the peace on the eighth day of December, 1877, against Millard and one Edminster, since deceased. To the declaration the defendant interposed a plea of infancy, as follows:

"And for further plea in this behalf, defendant says that the plaintiff ought not to have his aforesaid action against him, the defendant, because he says that, at the time of the rendition of the judgment in the plaintiff's declaration mentioned, he, the said defendant, was an infant, within the age of 21 years, to-wit, of the age of nineteen years; and, that said cause of action



upon which said judgment was rendered, did not originate or accrue to plaintiff by reason of any tort committed by said defendant, nor for any necessities furnished to defendant; and that no guardian *ad litem* was appointed for him by said court in which said cause was pending, tried, and judgment rendered, to appear for him, and set up his lawful defenses to said action; and this the defendant is ready to verify. Wherefore, he prays judgment," etc.

The court sustained a demurrer to the plea, and a judgment was rendered in favor of the plaintiff. The ruling of the court on the demurrer is the only question presented by the record. The justice of the peace before whom the judgment was rendered against Millard had jurisdiction of the subject-matter; it having been conferred by statute. Jurisdiction over the person was acquired by service of summons. The justice, therefore, when the judgment was rendered, had jurisdiction of the subject-matter and of the person; and, when such is the case, it is a principle of law well settled that the judgment, though erroneous, is valid until reversed or vacated in a direct proceeding. Cooley, in his work on Constitutional Limitations, (section 408,) says:

"When it is once made to appear that a court has jurisdiction both of the subject-matter and of the parties, the judgment which it pronounces must be held conclusive and binding upon the parties thereto and their privies, notwithstanding the court may have proceeded irregularly, or erred in the application of the law to the case before it. It is a general rule that irregularities in the course of judicial proceedings do not render them void, \* \* \* and, if a party claims to be aggrieved by this, he must apply to the court in which the suit is pending, to set aside the proceedings, or to give him such other redress as he thinks himself entitled to; or he must take steps to have the judgment reversed, by removing the cause for review to an appellate court, if any such there be. Whenever the validity of the proceedings arises in any collateral suit, he will be held bound by them to the same extent as if, in all respects, the court had proceeded according to law. An irregularity cannot be taken advantage of collaterally; that is to say, in any other suit than that in which the irregularity occurs; or on appeal or process in error therefrom."

The question has often been raised in the courts of the different states as to the validity of a judgment rendered against a minor where no guardian has been appointed to defend for the minor; and, so far as we are advised, the decisions are uniform that such a judgment is not void, but only voidable. *Trapnall v. Bank*, 18 Ark. 63; *Townsend v. Cox*, 45 Mo. 401; *Blake v. Douglass*, 27 Ind. 416.

In *Peak v. Shasted*, 21 Ill. 137, a case where a judgment was rendered against a minor in an action at law, it was held that a minor could only appear and defend by a guardian; and if the minor failed to appear, and have a guardian appointed, it was the duty of the court to appoint one to defend the action. The court also held that a judgment rendered against a minor without the appointment of a guardian was not void, but merely voidable. In *Kesler v. Penninger*, 59 Ill. 134, the rule announced in the case last cited was approved, and it was held to be error to proceed to a trial without the appointment of a guardian.

Here the judgment, having been rendered against a minor without

the appointment of a guardian to defend the action, may be regarded as erroneous or voidable; but we are aware of no well-considered case which holds that such a judgment, when called in question collaterally, as here, is void. As said before, the justice had jurisdiction of the subject-matter and the person; and, although the judgment was erroneous or voidable, it cannot, under any well-settled rule of law, be held to be void in a collateral proceeding.

*Whitney v. Porter*, 23 Ill. 445, has been cited as an authority sustaining the view of plaintiff in error. The validity of the judgment in that case arose collaterally, and it was held to be void; but the decision is based upon the ground that there was no such service as required by the statute, and hence the court in which the judgment or decree was rendered required no jurisdiction of the defendants. Some remarks were made in the decision of the case which would seem to sustain the view of plaintiff in error, but what was said on that subject was not necessary to a decision of the case, and we do not regard it as authority here. If there was no service, of course the court had no jurisdiction of the person, and the judgment would be void. When that was determined, the question involved was conclusively settled. We do not think *Whitney v. Porter* has any bearing here.

It is urged that plaintiff in error ought to have a remedy somewhere to impeach the judgment which was rendered against him. What his remedy is, or in what court it should be insisted upon, are questions which do not arise here, and we do not regard it as a part of our duty to volunteer advice on the subject.

The judgment of the appellate court will be affirmed.

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(117 Ill. 62)

QUEENAN and others v. PALMER and others.

(*Supreme Court of Illinois*. May 14, 1886.)

APPEAL—PREMATURE TAKING OF CASE BY COURT—ORDER TAKING CASE SET ASIDE AND CASE CONTINUED.

Where case on the docket of the supreme court was inadvertently called and taken before the time within which appellees might appear had expired, the order taking the case will be vacated, and the case continued.

Appeal from appellate court, Third district.

*McClelland & Keyes*, *W. E. Loomis*, *R. L. McGuire*, *L. F. Hamilton*, and *S. D. Scholes*, for appellants.

*Stuart*, *Edwards & Brown*, *Palmers*, *Robinson & Shutt*, *J. A. Chestnut*, and *N. M. Broadwell*, for appellees.

SCOTT, J. This case is brought to this court by appeal from the final order of the appellate court of the Third district, made on the fifth day of January, 1886; but the record was not filed in this court until the fifteenth day of January, 1886. No abstract of the record of the appellate court has been filed, as required by the rules of this court. The case was therefore prematurely taken for decision. It was not ready to be taken, nor is there any joinder of error or any briefs prepared for the

supreme court by some of appellees, so that it cannot be known whether appellees are all in court or not. The appeal was taken and allowed after the January term, 1886, of the supreme court had commenced, and appellees were not bound by law to follow the case to that term of court. There is nothing to show that some of appellees have entered their appearance at the present term of this court. The order taking the case will be set aside, and the case continued.

(117 Ill. 11)

CITY OF STERLING v. GALT and others.

(*Supreme Court of Illinois. May 15, 1886.*)

1. MUNICIPAL CORPORATIONS—IMPROVEMENTS—SPECIAL ASSESSMENTS AND SPECIAL TAXATION—AMOUNT, HOW DETERMINED.

Where an improvement by municipal authorities is made by special assessment, the gross amount to be so raised is determined by commissioners appointed for that purpose, and not by ordinance, and is reviewable on appeal. 1 Starr & C. St. c. 24, art. 9, par. 140. But where the cost of a local improvement is to be raised, in whole or in part, by *special* taxation, the ordinance itself must either state the sum, or give *data* by which the commissioners can fix the amount; and when this amount is fixed in accordance with the ordinance, it is not reviewable.

2. SAME—FAILURE OF ORDINANCE TO DETERMINE AMOUNT OF ASSESSMENT.

The failure of an ordinance authorizing a special assessment to determine the gross amount of such assessment is not ground for vacating the assessment; but such omission from an ordinance authorizing a local improvement by special taxation would be fatal.

3. SAME—DESCRIPTION OF IMPROVEMENT IN ORDINANCE.

The requirement of the statute that the ordinance authorizing a local improvement shall specify the nature, character, locality, and description of such improvement (1 Starr & C. St. c. 24, art. 9, par. 135) is mandatory. An insufficiency of description, such as the court finds to have existed in this case, is fatal.

Appeal from county court, Whiteside county.

A. A. Wolfersperger and J. E. McPherran, for appellant.

Manahan & Ward, for appellees Thomas A. Galt and others.

J. D. Andrews, for appellee Colcord.

W. & W. D. Barge, for appellee Chicago & N. W. Ry. Co.

MULKEY, C. J. The city of Sterling, by ordinance, adopted a general sewerage system, and provided for the construction thereof "*by general taxation, and special assessments on property specially benefited.*" The usual steps required by the statute were taken to bring the case to a hearing in the county court. On the day specified in the notice a large number of property owners affected by the assessment appeared, and filed various objections to the proceeding, one or more of which challenge the validity of the ordinance upon which it is founded. The court, after due consideration, sustained the objections questioning the validity of the ordinance, and entered an order dismissing the proceeding, to reverse which this appeal is brought.

The entire ordinance, except so much of it as relates to the location of the sewers, is as follows:

"Section 1. That there be constructed in said city a system of underground sewers having a common outlet, to be known as the 'B-street Sewer System,' to be described as follows, to-wit: Commencing at a point in said city where the center line of B street intersects the bank of Rock river; thence northerly. [Here follows a description of the *location* of the sewers.]

"Sec. 2. That said sewer shall be built, as to size, grade, material, and other details, in accordance with the map, plans, profiles, and specifications of the same made by John D. Arey, civil engineer, and now on file in the office of the city clerk of said city.

"Sec. 3. Be it further ordained, that the sewer be constructed by general taxation, and by special assessment on property specially benefited by the construction of the said system, in pursuance with an act in article nine (9) of an act entitled 'An act to provide for the incorporation of cities and villages,' approved April 10, 1872.

"Sec. 4. Be it further ordained, that said sewer system be for public use, and that property owners in the vicinity thereof, in said city, be permitted to connect private sewers with the same, for the proper drainage and sewerage of such property, under the direction of the city council of said city."

It is first objected that as the cost of the work is to be defrayed by special assessment, as well as by general taxation, the ordinance is invalid because it does not fix the proportion, or give some *data* by which to determine, how much of the expenses of the improvement is to be raised by either of the methods specified in the ordinance. We do not think this objection is well founded, though it must be conceded it finds support in the late case of *Watson v. City of Chicago*, not yet reported, but will be found in 3 N. E. Rep. 431. Whatever conflict, real or apparent, is to be found in the cases bearing on this question, is believed to result from a failure to keep in view the difference between cases of special assessment and of special taxation. Without going into a general review of the decisions of this court bearing upon the question, we will content ourselves with stating, in as few and plain words as may be, what we understand to be the difference. When the cost of a local improvement is to be raised, in whole or in part, by *special* taxation, the ordinance itself must either state the sum, or give the *data* by which the commissioners can fix the amount, to be thus raised; and, when so fixed or ascertained in conformity with the ordinance, it is conclusive on the property owners. In such case the municipal authorities, by ordinance, practically fix and determine in advance the amount the property specially benefited is to pay; and the amount, when thus fixed, is not open to review. This being done, all the commissioners have to do is to assess the property benefited as to raise the required sum. This assessment must be made according to the scheme which has been adopted. Sometimes it is done on the frontage principle. In other cases the value of the property is made the basis of the apportionment or assessment. It is lawful to adopt either of these modes. In cases of special taxation, the municipal authorities, if they think proper, may impose the whole of the burden upon the contiguous property; and although theoretically this is permitted upon the hypothesis that the benefits will be equal to the burden cast upon the property, yet whether it be so or not cannot be inquired into. Or the ordinance might provide that one-half the ex-

penses should be raised by general, and the other by special, taxation. Or, again, it might provide that the contiguous property should pay an amount equal to the special benefits it would derive from the improvement, to be ascertained by the commissioners, and that the balance should be raised by general taxation. The cases here suggested are all governed substantially by the same principle, and it will be perceived the ordinance in each of them practically fixes the amount to be collected from the contiguous property, and, as before stated, when so fixed, the propriety or even justness of it is not open to review, except, perhaps, in cases where the commissioners have acted corruptly. It follows from what we have said that, if this were a case of special taxation, the objection taken to the ordinance would be well founded; for the ordinance wholly fails to fix the amount to be assessed upon the contiguous property, nor does it furnish any *data* by which the commissioners could ascertain the amount.

But the case on hand is not one of special taxation. It is, as the ordinance shows upon its face, one of *special assessment*, and is governed by radically different principles. A special assessment differs from special taxation, namely, in this: that the assessment cannot in any case, or under any circumstances, exceed the benefits it will derive from the improvement; and the owner of the property assessed has the right, if dissatisfied with the assessment, to have this question passed upon by a jury, and, if not content with their finding, to have it reviewed in an appellate tribunal; whereas, in cases of special taxation, the jury have nothing to do with the amount which is by ordinance assessed upon contiguous property. Whereas, in the present case it is proposed to raise money by special assessment for some local improvement, the amount necessary for the purpose is ascertained, in the first place, by a commissioner appointed by the municipality for that purpose. Upon proper application, the county court then appoints three commissioners to make the assessment. The duties of these commissioners are defined with great particularity in section 140, c. 24, Rev. St. (Starr & C. Ed.) That section is as follows:

"It shall be the duty of such commissioners to examine the locality where the improvement is proposed to be made, and the lots, blocks, tracts, and parcels of land that will be specially benefited thereby, and to estimate what proportion of the total cost of such improvement will be of benefit to the public, and what proportion thereof will be of benefit to the property to be benefited, and apportion the same between the city or village and such property, so that each shall bear its relative equitable proportion, and, having found said amounts, to apportion and assess the amount so found to be of benefit to the property upon the several lots, blocks, tracts, and parcels of land in the proportion in which they will be severally benefited by such improvement: provided, that no lot, block, tract, or parcel of land shall be assessed a greater amount than it will be actually benefited."

It is manifest from this section that the commissioners not only apportion the gross amount to be raised on the property benefited, between the lots or parcels of land, as is done in the case of special taxation, but they also determine what this gross amount shall be, by making *what*

they regard an equitable and fair division of the cost of the improvement. This, as we have already seen, they have no power to do in the case of special taxation. The action of the commissioners is conclusive in so far as it fixes the relative amount of the cost of the improvement that is to be respectively borne by the municipality and the owners of the property benefited; but, as already indicated, each lot-owner has the right to show, on the hearing of the cause, that his lot has been assessed for a greater amount than it is benefited, or for more than its proportionate share of the cost of the improvement. Since, in the case of special assessments, the commissioners themselves determine the proportion in which the cost of the improvement shall be borne between the municipality and the contiguous property owners, it was not necessary for the city council to determine that matter by ordinance. It follows from what we have said, the objection to the ordinance on the ground stated is not well founded. The view here taken is fully sustained by the following authorities: *Enos v. City of Springfield*, 113 Ill. 65; *City of Galesburg v. Searles*, 114 Ill. 217; *White v. People*, 94 Ill. 604; *Craw v. Village of Tolo*, 96 Ill. 256.

The ordinance is also assailed on the ground that it does not sufficiently describe the nature and character of the improvements proposed to be made. This objection we regard as well taken. Paragraph 135, c. 24, Starr & C. St., provides:

"Whenever such local improvements are to be made wholly or in part by special assessment, the said council in cities, or board of trustees in villages, shall pass an ordinance to that effect, *specifying therein the nature, character, locality, and description of such improvement.*"

It is obvious from above inspection of the ordinance that, outside of the description of the location of the sewers, there is no attempt in framing the ordinance to comply with requirements of this section of the statute. As has frequently been held, this provision of the statute is mandatory. *Foss v. Chicago*, 56 Ill. 354; *Andrews v. City of Chicago*, 57 Ill. 239; *Lake Shore & M. S. R. Co. v. Chicago*, 56 Ill. 454; *Lake v. City of Decatur*, 91 Ill. 600; *Jacksonville Ry. Co. v. City of Jacksonville*, 2 N. E. Rep. 478. The fact that specifications are referred to as being in the city clerk's office cannot alter the case. That is not a source of information which the law recognizes in these matters. The statute, whether for wise or unwise purposes, has required this information to be inserted in the ordinance itself. That has not been done, or attempted to be done.

The ordinance being fatally defective in the respect stated, it follows the order dismissing the proceeding was proper, and it will therefore be affirmed.

(118 Ill. 32)

## FINLON v. CLARK.

*(Supreme Court of Illinois. May 15, 1886.)***1. EJECTMENT—DEFENSE—EQUITABLE MORTGAGE—EVIDENCE.**

In an action of ejectment in which the plaintiff relies on a deed, evidence in avoidance, that the deed is an equitable mortgage, is not admissible. The remedy of the defendant is in equity, by injunction.

**2. HOMESTEAD—WAIVER OF, NOT NECESSARY WHERE HOMESTEAD IN FACT IS NOT ON LAND CONVEYED.**

A waiver of homestead is not necessary to convey the interest of the grantor, where the homestead in fact is not upon the land conveyed, but upon other land.

Appeal from Will.

*Fairchild & Blackman*, for appellant.

*Munn & Munn*, for appellee.

MAGRUDER, J. This is an action of ejectment; brought by appellee against appellant to recover possession of N. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  section 1, township 37 N., of range 10 E., of third P. M., in Will county. Upon the trial below appellee introduced in evidence a warranty deed, dated December 20, 1858, executed to him as grantee, by appellant and his wife, as grantors, conveying the property in question for an express consideration of \$772, which deed was acknowledged on December 20, 1858. Two questions arose upon the introduction of this deed, both of which were decided against appellant by the trial court, and judgment was rendered in favor of appellee. The rulings upon these two questions are assigned for error.

The first assignment of error is that the circuit court, before whom the cause was tried without a jury, refused to receive in evidence a certain bond, offered by the appellant for the purpose of showing that the deed was a mortgage. It was held to be such by this court in *Clark v. Finlon*, 90 Ill. 245. The offer of the bond was not accompanied by any offer to prove either that the debt secured was not due, or that the same had been paid, or that the decree directed to be rendered by the opinion in 90 Ill. 245, had been entered by the lower court and performed by appellant. The deed showed the legal title to be in appellee. "Legal titles must prevail in an action of ejectment. If a legal title so acquired is challenged, it cannot be adjudicated in a court of law, but a court of chancery must be invoked. *Johnson v. Watson*, 87 Ill. 535; *Oldham v. Pyleger*, 84 Ill. 102. Even if the deed were a mortgage, the mortgagee may bring ejectment against the mortgagor. *Delahay v. Clement*, 3 Scam. 201; *Carroll v. Ballance*, 26 Ill. 9. Proof that the deed was made to secure a debt would not, therefore, be a defense in ejectment. But a court of law, upon the trial of an action of ejectment, will not stop to hear evidence as to whether a conveyance, absolute on its face, was or was not intended by the parties to be a mere mortgage security. The remedy of the grantee in such a deed is in equity. He may there file his bill, and enjoin the ejectment suit, and show the true character of the instrument. A court of chancery has full power to protect his rights.

The refusal of the trial court to receive the offered testimony was not erroneous.

The second assignment of error is that the court refused to find that the deed in question, which contained no homestead waiver, conveyed a part of the homestead of the grantors. The proof shows conclusively that, when this deed was executed, appellant did not live on the 40 acres conveyed by it, but upon another and different tract of land. There was therefore no necessity for a relinquishment of homestead, and the question of a homestead right had no existence in the case. *Symonds v. Lappin*, 82 Ill. 213.

We find no error, and the judgment is affirmed.

(117 Ill. 558)

### HUTCHINSON and others v. AYRES.

(*Supreme Court of Illinois*. June 12, 1886.)

#### TRUSTS—PARTIES—BILL BY CESTUI AGAINST TRUSTEES.

In a bill by a *cestui que trust* against his trustees, for relief, it is necessary that all co-trustees be made parties. The decree in such a case is the foundation for relief to the co-trustees *inter sese*; and if all are not joined, it may prove necessary to litigate the entire matter anew.

Error to First district.

SCHOLFIELD, J. The rule, as laid down in *Perry on Trusts*, (2d Ed. § 876,) is:

"If the *cestuis que trust* bring a suit against the trustees, praying for relief, all the trustees ought to be made parties, in order that, as each co-trustee is liable to the *cestuis que trust*, the court may do complete justice, as far as possible, by taking the accounts once for all, and by adjusting the liabilities of the co-defendants, and thus obviate the necessity of ulterior proceedings and a multiplicity of suits. The co-trustees ought to be made parties, (although the equities between themselves cannot be adjusted,) for the reason that the degree of relief to the *cestuis que trust* is the foundation of the relief to the co-trustees *inter sese*; and if any of the trustees are not parties to the first suit by the *cestuis que trust*, they will not be bound by the decree, and the whole subject-matter will, of course, come under litigation for the second time."

There are exceptions to this rule; as where one of the trustees has declined the office, or been discharged, he need not be made a party; and so where the breach of trust is in the nature of a tort for which there could be no contribution as between the defaulting trustees, they need not all be joined as defendants in a bill for the breach. *Id.* But none of the exceptions are pertinent here. *Hill, Trustees*, 813, \*521.

*Perry v. Knott*, 4 Beav. 179, is almost identical with the present case, except that the question of the want of proper parties was there raised by plea; while here, by the action of the complainants in first including all the parties, and then, after the hearing, dismissing as to Mrs. Hutchinson, the defendant has had no opportunity until now to raise that question. The remarks of the master of the rolls there, in regard to the



complainant and Mrs. Howell, are strictly applicable to the complainants and Mrs. Hutchinson here. He said, among other things:

"One cannot help seeing that in this case the child of Mrs. Howell, who most probably had the benefit of the breach of trust, is by this suit seeking to call upon the co-trustees of Mrs. Howell alone for payment of the money, without giving them the opportunity of recovering the amount from her estate which received it. This does not appear to me to be just or equitable, and certainly is not in conformity with the decision of this court."

See, also, *Rooke v. Kensington*, 39 Eng. Law & Eq. 76; Barb. Parties, (2d Ed.) 740, \*530.

Mrs. Hutchinson being a necessary party, no appeal or writ of error lies upon the decree until there is a final decree as to her. *International Bank v. Jenkins*, 109 Ill. 219; *Thompson v. Follansbee*, 55 Ill. 427.

The case is not analogous to those wherein it has been held that a party may, by a voluntary dismissal, cause a preliminary and interlocutory decision to become final. In those cases the bill seeks both temporary and permanent relief; and where the prayer for permanent relief is abandoned, the decree on the prayer for temporary relief becomes final. In such cases the decree on the prayer for temporary relief is precisely the same that it would be on the prayer for permanent relief. But here the order dismissing, on the complainant's motion, as to Mrs. Hutchinson, is in its effect directly the reverse of the effect of that indicated by the court in the interlocutory decree rendered before the dismissal. No final decree on the merits of the case is rendered against her, nor can be so long as this order remains in force, whatever may be the equitable rights between the parties. If it should be that, in the judgment of this court, Ayres is liable on account of the default of Mrs. Hutchinson, as the record now stands, she will not be concluded by that opinion, and consequently will not be concluded by any decree rendered pursuant thereto. Ayres cannot be deprived, in this way, of the right of insisting that his co-trustee shall be a party with him, and concluded, as well as himself, by any decree that may be rendered in the case.

Inasmuch as no final decree has been rendered in the case, the appeal to the appellate court was premature. The judgment of the appellate court is affirmed.

(117 Ill. 227)

#### BARNES and others v. SUDDARD.

(*Supreme Court of Illinois*. May 15, 1886.)

#### 1. CORPORATIONS—FOREIGN CORPORATIONS—UNIFORMITY OF CONDITIONS AND POWERS WITH DOMESTIC CORPORATIONS INTENDED BY STATUTE.

The intent of the provision of section 28 of the corporations act, (1 Starr & C. St. c. 32, § 28,) that foreign corporations shall be subject to the same restrictions, "and shall have no other or greater powers," than domestic corporations, is to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations, and bring them under the same law.

#### 2. SAME—POWER TO HOLD REAL ESTATE, THE SAME AS THAT OF DOMESTIC CORPORATIONS.

A foreign corporation, having authority by its charter to hold lands, has the power to hold lands in Illinois to the same extent that domestic corporations have.

8. SAME—ULTRA VIRES—UNAUTHORIZED ACQUISITION OF REALTY NOT ASSAILABLE COLLATERALLY.

Where a foreign corporation has the power to acquire real estate, as in this instance, so far as necessary for its business, its acquisition of realty cannot be assailed in a collateral proceeding, as an act *ultra vires*. Such a question can be raised by the state only, and in a direct proceeding.

SHOPE and MAGRUDER, JJ., dissent.

Appeal from superior court, Cook county.

CRAIG, J. This was an action of ejectment brought by George H. Barnes, appellant, to recover two certain lots in Chicago. Both parties claim title under Charles D. Fairbanks as a common source,—the plaintiff under a deed executed by Charles D. Fairbanks, September 24, 1881, recorded October 14, 1881, conveying the premises to Achsoh T. Fairbanks, and the defendant, under a deed executed by Charles D. Fairbanks, October 8, 1879, recorded October 11, 1879, conveying the premises to the United States Steam Feed Company, a corporation organized under the laws of the state of Connecticut, and doing business in the city of Boston. The corporation conveyed the premises to Mary E. Gardner by deed dated December 29, 1879, and the title thus conveyed passed by mesne conveyances to the defendant. The deed made by Fairbanks to the corporation, being first in date, must prevail over the second deed executed by the same party, unless the first deed is invalid.

It is contended by appellant that the corporation had no power to acquire or convey the land, and that the deed made to it by Fairbanks is void; and this is the only question presented by the record. In order to determine whether the Connecticut corporation had the power to acquire and convey the lots in question, it will be necessary to examine its charter, and the law of the state where it was organized, and also our own statute in relation to the powers of foreign corporations in this state.

Section 1 of article 3 of the act of Connecticut under which the corporation was organized, is as follows: "Every such corporation may hold any property necessary for its purposes, and such as shall be taken in payment of or as security for debts due to it." See Rev. St. Conn. 1875, p. 313.

The corporation was organized March 23, 1877, and its certificate of incorporation declares the business of the corporation to be "to make and sell feed for horses and cattle under letters patent No. 98,849, dated January 18, 1870, and analogous articles, and to buy and sell and deal generally in such real and personal estate as may be necessary and convenient in the prosecution of said business."

Section 5 of the Revised Statutes of 1874, entitled "Corporations," provides that "corporations formed under this act shall be bodies corporate and politic for the period for which they are organized; may sue and be sued; may have a common seal, which they may alter or renew at pleasure; may own, possess, and enjoy so much real and personal estate as shall be necessary for the transaction of their business; and may sell and dispose of the same when not required for the uses of the corporation. They may borrow money at legal rates of interest, and pledge

their property, both real and personal, to secure the payment thereof, and may have and exercise all the powers necessary and requisite to carry into effect the objects for which they may be formed." Section 26 of the same act provides that "*foreign corporations, and the officers and agents thereof, doing business in this state, shall be subject to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers.*"

It appears from the evidence introduced on the trial that the corporation sold Fairbanks the right to make, use, and sell feed for horses and cattle under letters patent No. 98,849 in and for the state of Colorado, and that the deed to the Chicago property was made to the corporation for the right thus sold. So far as appears, this is the only business transacted by the corporation in this state.

From the language of the statute and the charter of the corporation we think it is apparent that the corporation is empowered, in the state where it was organized, to acquire and hold at least such real estate as may be necessary for the transaction of its business, and also such as may be taken in payment of or as security for debts. It is also plain that under section 5 of our statute in relation to corporations, that corporations organized under that statute are authorized to hold so much real estate as may be necessary for the transaction of their business. This section of the statute clearly confers the power on domestic corporations to hold lands; and section 26 of the same statute, as we have seen, provides that foreign corporations shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers. What was intended by the legislature in the enactment of this provision of the statute? The answer to this inquiry may be found in what was said in *Stevens v. Pratt*, 101 Ill. 217. The manifest and only purpose was to produce uniformity in the powers, liabilities, duties, and restrictions of foreign and domestic corporations of like character, and bring them all under the influence of the same law. From this it would seem that a foreign corporation doing business in this state possesses the same but no greater powers than a corporation organized under our statute. Indeed, the language of the last sentence of section 26, that foreign corporations shall have no other or greater powers than our domestic corporations, can imply nothing less than they are to have the same powers.

If we are correct in this position, that the Connecticut corporation had the power to acquire real estate in this state necessary for the transaction of its business, or such as may be taken in payment of or as security for debts, as we think it is clear that it had, the remaining question to be determined is whether the deed is void for the reason and upon the ground that the property purchased was not necessary for the transaction of the business of the corporation. It will be remembered that this question arises collaterally, and not in a direct proceeding against the corporation to determine its powers, rights, or privileges.

Dillon, in his work on Municipal Corporations, (section 444,) in the discussion of the question, says:

"Whether a municipal corporation, with power to purchase and hold real estate for certain purposes, has acquired and is holding such property for other purposes, is a question which can only be determined in a proceeding instituted at the instance of the state. If there is capacity to purchase, the deed to the corporation divests the estate of the grantor, and there is a complete sale; and whether the corporation, in purchasing, exceeds its powers, is a question between it and the state, and does not concern the vendor of others."

The rule announced by Dillon has been indorsed by two well-considered cases in Indiana: *Hayward v. Davidson*, 41 Ind. 214, and *Baker v. Neff*, 73 Ind. 68. Other states where the question has been presented adopted the same rule; and the supreme court of the United States, in *National Bank v. Matthews*, 98 U. S. 628, hold to the same opinion.

The question, however, is not a new one in this state. In *Hough v. Cook Co. Land Co.*, 73 Ill. 23, the authorities were cited, and it was expressly held that, where the corporation had the power to purchase and hold real estate for a specified purpose, the title to the land will pass, although the corporation may have exceeded its powers; that whether the corporation has exceeded its powers in making the purchase is a question between the corporation and the state, with which the grantor has no concern. The same question arose in *Alexander v. Tolleston Club of Chicago*, 110 Ill. 65, and it was there held, where a corporation, by the law of its creation, is authorized, in some cases, or for some purposes, or to a certain extent, to take and hold the title to real estate, it cannot be made a question by any party except the state whether the real estate has been acquired for the authorized uses or not, or is in excess of the capacity of the corporation to take and hold. The state alone must assert her policy in that regard. Here the corporation, organized under the laws of the state of Connecticut, was clothed with power to take and hold real estate for certain specified purposes; and, when the deed was executed, the title held by Fairbanks passed; and whether the corporation exceeded its powers in accepting the conveyance is a question which cannot be raised by Fairbanks, or his subsequent grantee, in the trial of an action of ejectment. Had the corporation been clothed with no power to acquire real estate in this state, or if the purchase had been prohibited by statute, or contrary to the manifest policy of our laws, a different question would be presented; and the cases of *Corroll v. East St. Louis*, 67 Ill. 568, and *Starkweather v. American Bible Soc.*, 72 Ill. 50, might properly be invoked as authority; but such is not the case.

We think the judgment of the circuit court is correct, and it will be affirmed.

SHOPE and MAGRUDER, JJ. We do not concur in this opinion.

(117 Ill. 191)

## HOWE and others v. FRAZER.

(Supreme Court of Illinois. May 15, 1886.)

1. SET-OFF AND COUNTER-CLAIM—ITEMS OF, OR COPY OF INSTRUMENT, TO BE FILED—REQUIREMENT MAY BE WAIVED.

The requirement of section 81 of the practice act, (2 Starr & C. St. c. 110, par 82,) that the defendant who pleads a set-off shall file the items, or a copy of the instrument relied on in set-off, is for the information and protection of the plaintiff, and may be waived by the plaintiff.

2. SAME—DAILY CALL—PLACING CASE UPON—WAIVER.

Permitting a case to be placed on the daily call for a given day is an announcement of readiness for trial, and a waiver of the right to require such a filing of items or bill of particulars.

Appeal from appellate court, First district.

*Hodges & Shippen*, for appellants.

*John P. Altgeld*, for appellee.

MULKEY, C. J. The appellants, Arthur Howe and others, brought an action of *assumpsit*, in the superior court of Cook county, against the appellee, E. G. Frazer, to recover the value of certain goods and effects alleged to have been sold and delivered by the plaintiffs to the defendant. To the declaration, which was in the usual form, the defendant filed several pleas of set-off. For the purposes of the question to be determined, it will not be necessary to notice more particularly the pleadings in the case, or the character of the respective claims of the parties. This case was before us at a former term, and is reported in 106 Ill., commencing on page 563, where a full statement of the facts and pleadings will be found. It has also been twice heard in the appellate court, and has been three times tried in the superior court. It was tried the last time in February, 1885. On the twenty-first of the month, while the case was on call, and liable to be called up at any moment, the plaintiff's counsel "moved the court for a rule requiring defendant to file, with his pleas of set-off in this cause, a copy of the instrument and accounts upon which he intended to rely and referred to in his pleas." Counsel for defendant filed an affidavit in opposition to the motion, setting forth, in substance, that the case had been tried twice before; that the evidence relied on by the defendant had been fully taken down by a short-hand reporter, and that the plaintiff could not but know the matter relied on in support of his pleas; that the case had been put upon the call, and set for Wednesday, the 18th, but three days before; that since that both sides had been watching the case, claiming to be ready to proceed as soon as the case was reached; that nothing was said to the defendant about wanting a bill of particulars until the afternoon of the day before; that in order to give exact dates and details of labor performed and money expended, for which the defendant sought to recover, it would probably be necessary to send to Rock Island for defendant's books and papers relating to those matters, which would necessitate a continuance of the case. Under these circumstances, the court denied the application for the rule. The plaintiff then moved the court to strike

from the files the defendant's pleas of set-off, for the reason he had failed to comply with the requirements of section 32 of the practice act, which provides: "If the defendant shall plead or give notice of any set-off, he shall file, with such plea or notice, a copy of the instrument or account upon which he intends to rely." The plaintiffs then asked the court, for the same reason, to rule out and reject all evidence offered in support of the pleas, which the court refused to do.

These several rulings of the court to which exceptions were taken, present substantially the same question; namely, whether the provision of the statute is absolutely imperative so as to give the court no discretion in any case where it has not been complied with, and an application is made for its enforcement. The question is put in this form, for the reason it is too clear to admit of argument that if the enforcement of this provision is, under any circumstances, a matter of discretion with the court, it was clearly so in this; and, assuming such to be the case, we have no doubt it was properly exercised. The filing of a plea of set-off is the commencement of a cross-action, such plea answering to the declaration in the original action; and the proceeding in the cross-action; so far as the question under consideration is concerned, is governed substantially by the same rules and principles that are held to apply to the eighteenth section of the practice act, which requires the plaintiff to file with his declaration a copy of the account or instrument sued on. Under either section, the account or instrument upon which a recovery is sought, should be filed, as therein required. It is a right of the opposite party to have it done. But this right must not be enforced in such a way as to work injustice to the adverse party. Like most other legal rights, it is one that may be waived, and the party entitled to its enforcement must not so act as to lead his adversary to suppose it has been waived until it would subject him to loss or inconvenience to have it then enforced. Such was manifestly the case here, if the allowing of the application would have worked a continuance of the cause, which is quite likely. At the very time this application was first made the case was liable to be called up at any moment. Under all the circumstances, the asking of the rule at that stage of the proceeding looks very much as if it was done for delay merely. Had the plaintiffs in good faith really desired an account filed to enlighten them as to the character of the defendant's claim, they should have applied for the rule before the case was set down for a day certain on the call-docket. By having gone to trial on the merits twice before, and having, without objection, permitted the case to be set for a day certain on the call-docket, the defendant was fully justified in considering the right in question as waived, and it would have been unfair to him, under such circumstances, to have enforced it at that stage of the proceeding. We are therefore of opinion that the several rulings of the court above mentioned were proper, and consequently afford no ground for a reversal. The conclusion here reached we think is sustained by the following cases: *McCarthy v. Mooney*, 41 Ill. 301; *Eddie v. Eddie*, 61 Ill. 134; *Mastin v. Toncray*, 2 Scam. 216. The judgment will be affirmed.

(117 Ill. 527)

## LOMAX v. GINDELL.

*(Supreme Court of Illinois. May 15, 1896.)***1. JOINT TENANTS AND TENANTS IN COMMON—REDEMPTION FROM TAX SALE BY ONE INURES FOR BENEFIT OF ALL.**

A redemption from a tax sale by one of several co-tenants inures for the benefit of all. The redeeming tenant cannot assert any rights thereunder as adverse to the other co-tenants.

**2. SAME—REDEMPTION OF WHOLE AND ACQUISITION OF LEGAL TITLE, SUBJECTED TO TRUST FOR CO-TENANTS.**

If one co-tenant should redeem the entire land from a tax sale, and acquire the legal title to the whole, such title is subject to a constructive trust for the co-tenant, for the extent of his interest. In case of two co-tenants, a decree to convey the undivided half of the land to such co-tenant is therefore sustainable. A decree to convey the undivided half of the interest acquired by the redemption is preferable.

Appeal from Du Page.

*Elbert H. Gary*, for appellant.

*Ellis S. Cheesebrough, Jr.*, for appellee.

MULKEY, C. J. On the twenty-fifth day of April, 1870, John Atkinson, being the owner of the land involved in this litigation, conveyed by quitclaim deed an undivided half thereof to Edwin Walker. On the twentieth of June, 1881, Lewis Ellsworth, Jr., purchased the entire tract at a tax sale. On the twentieth of October, 1882, John H. Lomax, at an execution sale by the United States marshal for the Northern district of Illinois, purchased Walker's interest in the premises, for which he subsequently, on the twenty-third January, 1884, received a marshal's deed. On the twenty-first of June, 1883, the county clerk executed to Ellsworth, Jr., a tax deed, who on the same day quitclaimed his interest in the premises to Lomax. Atkinson, on the twenty-sixth of June, 1884, conveyed by warranty deed his undivided half in the premises to A. E. Guild, Jr., who, on the thirtieth of January, 1885, conveyed the same to appellee, George A. Gindell. It also appears that, for the consideration of about \$15 paid by appellant to Ellsworth, the two, some time before the time for reclaiming the premises from the tax had expired, entered into a contract, by the terms of which the latter was to be permitted to take out a tax deed as though no redemption had taken place, and then convey the premises to appellant, which agreement, as already seen, was fully performed. This transaction, in legal effect, amounted simply to a redemption of the premises from the tax sale. Under this state of facts the appellee filed the present bill against Lomax, asking to redeem from said tax sale upon payment by him of his share of the redemption money, and also to compel Lomax to quitclaim to complainant one undivided half of the land. There was a decree in accordance with the prayer of the bill, and the present appeal is from that decree.

The form of the decree may be objectionable, yet we have no doubt that appellee is entitled to the relief intended to be granted; namely, the establishment of his right to an undivided half of the land, unaffected by the tax sale, and all conveyances made in pursuance thereof, or which

are dependent thereon. By Lomax's purchase at the marshal's sale, he became the owner of Walker's undivided half of the land, subject to the right of redemption from the marshal's sale through which he claimed. By reason of his purchase the law conferred on him, as tenant in common with Atkinson, the right to redeem the entire premises from the maturing tax title,—the time of redemption having yet some eight months to run; yet the same law which conferred upon him this right to redeem Atkinson's interest, as well as his own, annexed to it the qualification that the redemption, when so made, should inure to the benefit of Atkinson, on condition that he, or those claiming through him, would pay to Lomax one-half of the cost of redemption. The money thus advanced for Atkinson in making the redemption became an incumbrance or charge upon his interest in the land in favor of Lomax, which appellee, as a purchaser from Atkinson's grantee, has a clear and undoubted right to pay off and discharge. As the view here taken is fully sustained by the previous decisions of this court, further discussion of the subject is deemed unnecessary. *Chickering v. Faile*, 38 Ill. 342; *McConnel v. Konopel*, 46 Ill. 519; *Busch v. Huston*, 75 Ill. 343; *Bracken v. Cooper*, 80 Ill. 221; *Lewis v. Ward*, 99 Ill. 525; *Hinkley v. Greene*, 52 Ill. 223.

Assuming the law to be as stated, what we have already said is a sufficient answer to all the points raised in appellant's argument, except the last, which goes rather to the form than the substance of the decree. The point, as stated by counsel, is thus made:

"If the court should hold the act of appellant, in acquiring a tax title to the premises, amounts simply to a payment of the taxes, and that appellee is entitled to redeem, then, of course, appellant has no title to the property in question, except the title to an undivided half which he acquired by virtue of the marshal's sale and deed, *and this title the court decrees must be conveyed to appellee.*"

The court below doubtless proceeded upon the theory that inasmuch as the tax proceeding appears to have been regular, and no improper conduct or bad faith is imputed to any of the officers of the law connected with it, the tax deed of the county clerk had the effect to pass the legal title to Ellsworth. By that, by reason of the fraud which appellant was attempting to practice upon Atkinson, to which Ellsworth himself was a party, the law raised a constructive trust in Atkinson's favor, to the extent of his interest in the land. Assuming such a trust to have been raised, it could only be upon the theory that the acquiring of the title in the manner stated was, as to Atkinson and those claiming under him, to be treated in equity as a redemption merely from the tax sale. Taking their view of the matter, there was certainly no inconsistency in directing a conveyance to appellee of one undivided half of the land, as is done by the decree; and, if the theory suggested is the correct one, the decree was entirely proper. Certainly, precedents are not wanting where similar decrees have been rendered in cases much like the present. As the objection, however, may be remedied altogether by a slight change of the language of the decree, it will be so modified in this court, which will obviate the necessity of determining definitely whether



the decree, as rendered, is technically correct or not. An order will therefore be entered in this court so modifying the decree of the court below as to require appellant to convey and quitclaim to appellee one undivided half of any and all interest he may have acquired to the land in question through said tax deed and the conveyance from Ellsworth to himself. Judgment affirmed.

### WABASH, ST. L. & P. RY. CO. v. PETERSON.<sup>1</sup>

(*Supreme Court of Illinois.* June 8, 1886.)

#### 1. ESTOPPEL—WRIT OF ERROR—HEARING ON APPEAL BARS HEARING OF SAME ERRORS—RES ADJUDICATA.

Where the defendant in error pleads to the writ of error, a former appeal in the same cause, and a judgment thereon, such plea is a complete bar, and a demurrer thereto should be overruled. Whatever has been decided on one appeal or writ of error cannot be re-examined and decided on a subsequent writ of error, brought on the same record.

#### 2. SAME—EVIDENCE—RECORD—NUL TIEL RECORD—SUGGESTION OF DIMINUTION OF RECORD NOT ALLOWED—RECORD TRIED BY INSPECTION—PRESUMPTION OF REGULARITY.

Under a replication of *nul tiel record* to the plea of former adjudication, the court will not allow a suggestion of diminution of such record by a misprision of the clerk so that it did not present the issues now presented. The record must be tried by an inspection of the record itself. It imports verity, and the presumption of regularity will be indulged.

Error to appellate court, Third district. On rehearing.

SCOTT, J. A writ of error was sued out from the appellate court of the Third district, to reverse a judgment which Maria Peterson had, at the November term, 1883, of the circuit court of Mason county, recovered against the Wabash, St. Louis & Pacific Railway Company. The writ was made returnable to the November term, 1884, of the appellate court. At that term of court defendant in error appeared and pleaded a plea in bar of the writ. After the formal beginning, the plea continued:

"On November 9, 1883, plaintiff in error prosecuted an appeal to this court from the identical judgment of the court below mentioned in the proceedings in this case, and assigned on the record the same errors assigned in this case; and said appeal, upon the errors therein assigned, came on to be heard in this court at the May term, 1884, \* \* \* and such proceedings were had on said appeal that on the third day of July, 1884, it was considered by this court that neither in said record and proceedings, nor in the rendition of said decision of the court below, was there any error, and that said judgment be affirmed, notwithstanding the matters therein assigned for error, and that said appellee [therein] recover of appellant [therein] costs, as by the record in said appeal case will now appear, which said judgment of this court is in full force, and not reversed. All of which defendant is ready to verify."

A demurrer interposed to this plea was by the court overruled. Afterwards plaintiff in error replied, (1) *nul tiel record*; and (2) by four special replications, in which, in substance, it was averred that the merits of the controversy between the parties were not heard and determined by the

<sup>1</sup>For the original opinion, see 6 N. E. Rep. 412.

appellate court on the appeal, on account of the misprision, omission, and default of the clerk of the circuit court, in this: that, in making up the transcript of the proceedings had in the circuit court, to be submitted to the appellate court, such clerk failed and omitted to transcribe the bill of exceptions, which was a part of the record, into the transcript made, by reason whereof the record of the proceedings now presented to the court was not before the appellate court, and that such court could not, and did not, on such appeal, decide upon and determine the errors herein assigned.

There was no error in the decision of the appellate court in overruling the demurrer to the pleas filed by defendant in error in that court. Conceding the facts alleged in the plea are true, as the demurrer admits them to be, they constitute a complete bar to the present suit.

Nor was there any error in sustaining the demurrer to the four special replications. The matters alleged cannot be proved as an answer to the plea of defendant in error. It has often been decided by this court that whatever has been decided on one writ of error cannot be re-examined on a subsequent writ of error brought on the same record. Other courts have declared the same doctrine. *Chaffin v. Taylor*, 116 U. S. 567; S. C. 6 Sup. Ct. Rep. 518. Conceding it to be true, as alleged in the plea, the identical errors assigned on the record in this suit were assigned on the same record on a former appeal, and the judgment was then affirmed in all things, notwithstanding the errors then assigned, it is obvious that decision is *res judicata*, and the same errors cannot be re-examined in this suit. It cannot be shown by oral testimony the court did not determine the case on its merits, when it appears from the record of its judgment the court did so determine the case. It is but stating a doctrine well understood that the record of a court can never be contradicted, varied, or explained by evidence beyond or outside of the record itself; a contrary rule might be disastrous in its result. A record imports verity, and the rule is, it must be tried and construed by itself. *Harris v. Lester*, 80 Ill. 307. All that these replications contained that was proper to be proved on the trial could be given in evidence under the replication of *nul tiel record*.

Issue having been joined on the replication of *nul tiel record*, the cause was submitted to the court for trial, and the court found the issue "for defendant in error, and that plaintiff in error be barred of its suit," and rendered final judgment against plaintiff in error for costs, and awarded execution for the collection of the same. Nothing appears in this record to show what evidence was introduced in the appellate court on the issue formed, and it will be presumed, in favor of the action of the court, the evidence that was introduced warranted it in finding the issues for defendant in error as was done. Indulging, as the rule is, every reasonable presumption in favor of the regularity of the proceedings in the appellate court, where nothing to the contrary appears, the judgment of that court will be affirmed.

(118 Ill. 73)

## CHICAGO, B. &amp; Q. R. Co. v. BOYD and another.

*(Supreme Court of Illinois. June 12, 1886.)***1. VENDOR AND VENDEE—BONA FIDE PURCHASER—POSSESSION AS NOTICE.**

Where a vendee of property is in possession, and the vendor conveys the property to a third person, the possession of the vendee is notice to the grantee, and to all the world, of all claims of the vendee.<sup>1</sup>

**2. STATUTE OF FRAUDS—ORAL LAND CONTRACT, PARTLY PERFORMED BY TRANSFER OF POSSESSION AND IMPROVEMENTS, ENFORCEABLE.**

An oral contract for the sale of lands, which contract is partly performed by a transfer of the possession of the land to the bargainee, and the erection by him of valuable improvements thereon, is taken out of the prohibition of the statute of frauds.<sup>2</sup>

**3. SPECIFIC PERFORMANCE—LAND CONTRACT, ENFORCED WHERE COMPLAINANT RECEIVED POSSESSION.**

An oral land contract, partly performed by transfer of possession and the erection of improvements, will be specifically enforced in equity. The evidence in this case reviewed, and a decree dismissing the bill reversed.

## Appeal from La Salle.

SCOTT, C. J. The bill in this case was brought by the Chicago, Burlington & Quincy Railroad Company against Joseph Boyd and Freeman Poundstone, and was to enjoin an ejectment suit brought by defendant Poundstone against complainant to recover possession of the tract of land in dispute, and to compel a specific performance of an alleged verbal contract made with complainant by defendant Boyd for the conveyance to complainant of the premises in controversy. Prior to 1870, Boyd owned a quarter section of land, of which the lot in controversy is a part, over which what is called the "Fox River Railroad Company," a corporation existing under the laws of this state, was about to construct its railroad; and, in order to induce that company to locate its depot upon lands of Boyd, and construct the usual buildings for depot purposes, and to construct switches and turn-outs at that point, he offered and agreed to convey to the company a certain amount of lands to be used for depot grounds; and it was also alleged that defendant Boyd offered to convey to the company one acre of land, adjoining the proposed depot grounds, for what is called a "section-house" for the safe-keeping of tools, and upon which to erect a dwelling-house for its section foreman. The object defendant Boyd had in view in obtaining the location of a station, depot, and other buildings upon his land was that he might thereafter lay out a town or village, and sell lots so as to enhance the value of his property. In addition to the land proposed to be donated to the railroad company, defendant Boyd and one Crumrine agreed to give the contractors constructing the road \$1,000 if the depot should be located at the point where they desired to have it. It was decided to locate and construct the depot, switches, and turn-outs upon the land of Boyd; and, so it is alleged, the propositions made by him were accepted by the company. It seems the Fox River Railroad Company became

<sup>1</sup> See note at end of case, part 1.<sup>2</sup> See note at end of case, part 2.

unable to finish the construction of the railroad it had undertaken to build, and afterwards, in 1870, it granted and demised to complainant, in perpetuity, all its property, real and personal, and all the privileges and franchises it had under its charter from the state. That was equivalent to absolute conveyance. Immediately thereupon complainant entered into possession, and commenced the work of finishing the road between the terminal points, as originally proposed by the Fox River Railroad Company; and it is then alleged that Boyd, on being made acquainted with the rights of complainant in the premises, entered into an agreement with complainant to carry out and fulfill the agreement he had made with the former company concerning the location of a station upon his land, and to build a depot thereon; and, moreover, should it build a house upon the one acre of land mentioned and described, and occupy the same by its section foreman, then he (Boyd) would convey, by a good and sufficient deed of conveyance, the real estate above described, including the one acre of land last above described, according to the agreement above set forth. It is then further alleged that the covenants and agreements of Boyd were then and there accepted by complainant, and that it fully and implicitly relied upon such agreements of Boyd, and complainant at once entered into possession of the one acre of land above described, with the full knowledge and consent of Boyd, and at once began to make permanent and valuable improvements upon such tract of land, and inclosed the most thereof with suitable fences, and constructed a well thereon at great expense, being about \$200, and erected a building thereon at a cost of about \$1,000, and also erected such out-buildings, stables, and other necessary buildings, and that the value of the acre of land was but a small part of the value of such premises after the same were improved; that it has been in the continuous and uninterrupted possession of the premises from that time until the filing of this bill, and has, during that time, made valuable improvements thereon, with the full knowledge and consent of Boyd, and he has repeatedly promised to execute a deed of the premises to complainant, but has hitherto failed and neglected to do so.

The one-acre tract of land described, on which the "section-house" and other improvements have been made, is the tract of land involved in this litigation. Long after the complainant had entered into possession, and inclosed the premises, and improved the same by erecting a dwelling-house and other buildings thereon, Boyd conveyed this one-acre tract, with other lands, to his now co-defendant, Poundstone. Of course, complainant's possession was notice to Poundstone of its rights in the property, and in the consideration of the case it will be treated as though the litigation concerned only complainant and defendant Boyd. The answers filed by defendant insist upon the statute of frauds as a defense. Otherwise what they contain is of no importance, further than they put the matters alleged against defendants at issue. On the final hearing the court dismissed the bill, and assessed solicitor's fees for defendant's counsel against complainant on the dissolution of the injunction that had previously been granted.

The point made in support of the decree dismissing the bill, that there is no testimony sustaining the making of the alleged verbal contract set up in the bill, is not well taken. It is insisted it is nowhere alleged in the original bill that any contract or agreement was ever made by and between Boyd and complainant with reference to the donation of the lot in question. This is a misapprehension of the scope of the bill. It is alleged, by way of recital, that, in the first place, Boyd made to the Fox River Railroad Company, perhaps through the contractors to whom the building of the road was let, propositions concerning the location of the depot and other buildings at the station on his lands, to be called "Grand Ridge." But that company did not complete the road, and, after complainant came into possession, he renewed his propositions to complainant; and it is distinctly alleged, if complainant would build a house upon the one-acre tract in dispute, and occupy the same by its section foreman, then he (Boyd) would convey the one-acre tract to complainant. What is said concerning the proposition to the Fox River Railroad Company was simply by way of recitals, and might as well have been omitted. It may now be treated as surplusage, and it is immaterial whether the allegations in that respect are proved or not. A distinct contract is alleged on the part of Boyd to convey the land to complainant upon the performance of certain conditions; and the real question is whether that contract has been proved, and whether it has been so fully performed that complainant can have a specific performance of it decreed in its favor. The statute of frauds set up in the answer can have no application.

There can be no doubt that complainant entered into the possession of the property under some sort of verbal agreement with Boyd for a deed, whether that agreement was absolute or conditional, for a conveyance by deed thereafter to be made; and under that agreement, whatever it was, inclosed the lots, and erected a dwelling-house, and made other valuable improvements thereon. That execution of the contract would relieve it from the operation of the statute of frauds. The only questions, then, that can arise in the case are whether Boyd made a contract with complainant to convey to it the lot in question on condition complainant would make certain improvements thereon, and whether such conditions have been fulfilled and performed. Such a contract, and full and complete compliance therewith, is sufficiently proved to warrant a decree for a specific performance. Of this there can be no reasonable doubt when all the evidence is considered. Indeed, defendant Boyd admits he made a contract with complainant to convey to it the lot in controversy; that he placed complainant in possession under such contract; and no question is made that complainant has made such improvements on the property as it was obligated to do by the contract; but the excuse, and the only excuse, given now for not conveying the property, as he had agreed to do, is that the promise to convey was upon condition he (Boyd) should be permitted to construct shipping-pens for his own use on the south end of a three-acre lot he had or was to convey to complainant adjoining the track of the railroad. A witness, wholly disinter-

ested, and who heard the original contract between the parties, says there was no such condition imposed by Boyd, and none agreed to by complainant. Evidently Boyd is mistaken in what he says as to the terms imposed, that he should have the privilege to erect cattle or shipping pens on the track of the road as a condition precedent or as a part of the contract for a conveyance. The contract to convey the one acre on which the section-house was to be located was made early in 1871, and the contract to donate the three acres upon which he says he was to have the privilege to erect shipping-pens was not made until some time in 1872. Besides that fact in the case, Boyd's testimony in regard to the conditions imposed is not satisfactory at all. He says he was denied the privilege he had contracted for; but who *refused* him, or *when*, he does not pretend to state. On the first occasion when he spoke to any of the principal officers concerning the shipping-pens, he was told he might erect them at any time; but he said he did not then want to do so, or had no use for them, as he was not then shipping stock.

The whole evidence considered, leaves not the slightest doubt the contract was made precisely as it was alleged in the bill. At that time Boyd owned about 400 acres of land in the vicinity of Grand Ridge. He was exceedingly anxious to have the depot erected on his land. In the first place, Boyd and Crumrine had promised the contractors \$1,000 if the depot should be located where they wanted it; but Crumrine it seems refused to carry out the contract after the depot had been located on Boyd's land. There was then considerable talk of moving it to another location. Boyd gave the contractors his note for \$500, which he afterwards paid, to secure the depot on his land. No doubt the donations of right of way and lands for other purposes were made to secure and retain the location of the depot; and, with regard to the improvements to be placed on this one-acre tract, Boyd very sensibly says: "Of course, I did desire to have buildings and improvements put there, so as to render it impossible for the company to move their station. That would be naturally so." The conclusion is well supported by the testimony, the contract to convey this one-acre lot to complainant was absolute and unconditional, except complainant was obligated to make certain improvements upon it, among which was a section-house, to be occupied by the section foreman of its road,—all of which was done many years before the bill in this case was filed. No legal or equitable consideration appears why defendants should not convey the lot in question to complainant, and a decree should pass to that effect.

The decree dismissing complainant's bill, and the decree assessing damages against complainant on the dissolution of the injunction, will be reversed, and the cause remanded for further proceedings conforming to the views expressed in this opinion.

#### NOTE.

1. POSSESSION OF LAND NOTICE OF EQUITIES. Possession of land is notice to subsequent purchasers of all equities of the possessor of such land. *Peasley v. McFadden*, (Cal.) 10 Pac. Rep. 179.

Implied or constructive notice may be as effectual as actual notice, and such constructive notice may arise from possession alone; but such possession must be open,

notorious, exclusive, and unequivocal, and while actual residence is not necessary when there is no actual *pedis possessio*, dominion must be manifested by such open and notorious acts of ownership as will naturally be observed by others, and the acts must be of a character so certain and definite in denoting ownership as not to be liable to be misunderstood or misconstrued. *Hodge's Ex'rs v. Amerman*, (N. J.) 2 Atl. Rep. 257.

Possession of land by parties at the time of the levy of an attachment is notice of their rights and equities in the premises to a purchaser at a sale under such levy, and he takes the property subject to the rights and equities which are capable of being enforced by the party in possession against the judgment creditor. *Story v. Black*, (Mont.) 1 Pac. Rep. 1. To the same effect are *Ray v. Birdseye*, 5 Denio, 628; *Jones v. Marks*, 47 Cal. 242; *McKinzie v. Perrill*, 15 Ohio St. 168; *Hughes v. U. S.*, 4 Wall. 232; *Landes v. Brant*, 10 How. 348. See, also, *In re Howe*, 1 Paige, 128; *Ellis v. Tonsley*, Id. 288; *White v. Carpenter*, 2 Paige, 219; *Buchan v. Sumner*, 2 Barb. Ch. 181; *Lounsberry v. Purdy*, 11 Barb. 494; *Kiersted v. Avery*, 4 Paige, 15; *Averill v. Loucks*, 6 Barb. 27; *Mason v. Wallace*, 8 McLean, 148; *Strong v. Smith*, Id. 362; *Bank of Muskingum v. Carpenter's Adm'rs*, 7 Ohio, 21; *Lake v. Doud*, 10 Ohio, 515.

2. PART PERFORMANCE OF AN ORAL CONTRACT TO SELL LANDS. Respecting part performance of an oral contract to sell lands, see *Irwin v. Dyke*, (Ill.) 1 N. E. Rep. 918, and note; and *Burns v. Daggett*, (Mass.) 6 N. E. Rep. 727, and note, 731.

(112 Ill. 121)

### HANCHETT, Sheriff, etc., v. KIMBARK.<sup>1</sup>

(*Supreme Court of Illinois*. June 12, 1886.)

#### 1. WITNESS—CROSS-EXAMINATION—WIDER RANGE IN CASE OF PARTY OR UNWILLING WITNESS.

While it is well settled that the cross-examination of a witness is restricted to such matters and things as the witness may have been examined upon in his direct examination, yet where a party is a witness, or an unwilling witness is under examination, the trial court may, in its discretion, allow the cross-examination to take a wider range, which will be reviewed only for abuse.

#### 2. JUDGMENT—BY CONFESSION—JUDGMENT ON JUDGMENT NOTE—ASSIGNEE TAKES SUBJECT TO EQUITIES.

Where a debtor, while in failing circumstances, confesses judgment on a judgment note to his brother, which is then assigned to a creditor of the debtor, who, in consideration of his original claim and the judgment so acquired, takes a bill of sale of the assets of the debtor, in a replevin suit to set aside the judgment and sale as fraudulent by other creditors, the judgment will be treated as overdue paper, and the creditor held to take it subject to all equities.

#### 3. SAME—PRIOR DECLARATION OF JUDGMENT PLAINTIFF.

In such case the declaration of the brother, in whose favor the judgment was originally confessed, four days previous to the sale, that the debtor owed him nothing, is admissible against the assignee of the judgment as tending to show the fraud.

#### 4. EVIDENCE—VENDOR'S SUBSEQUENT DECLARATIONS TO IMPEACH VENDOR AS WITNESS.

The admissions of a vendor in disparagement of his title, made subsequent to the sale, are incompetent as against the vendor; but where the vendor becomes a witness in favor of the vendee, and as such witness denies having made such declarations, they are admissible to impeach him.

#### 5. APPEAL—FINDING OF FACT IN APPELLATE COURT.

On an appeal from the appellate to the supreme court, the judgment of the appellate court confirming the judgment of the trial court is final as to the facts so found, and cannot be reviewed in the supreme court. 2 Starr & C. St. c. 110, par. 90, p. 1851.

Appeal from appellate court, First district.

<sup>1</sup>For a report of the opinion of the supreme court at the original hearing of this case, per TUNNICLIFFE, J., filed September 21, 1885, see 2 N. E. Rep. 512. In the present opinion the court reach an opposite conclusion to that there announced.

*Hutchinson & Partridge and Shuman & Defrees*, for appellants.  
*Flower, Remy & Gregory*, for appellees.

CRAIG, J. This was an action of debt brought by the sheriff of Cook county, for the use of Kelley, Maus & Co., on a replevin-bond executed by appellees to the sheriff in an action of replevin brought by S. D. Kimbark, against Kelley, Maus & Co., to recover certain goods which had been purchased by John Morrison from Kimbark, through, as is alleged, such fraudulent representations, as to the financial standing of said Morrison, as to authorize the vendor to rescind the sale and recover the goods. After the goods had been recovered under the writ, Kimbark dismissed his action of replevin, and this suit was brought by the sheriff on the bond to recover the value of the goods. As a defense to the action, Kimbark set up that the purchase of the goods by John Morrison was fraudulent; that the sale from Morrison to Kelley, Maus & Co. was fraudulent, for the purpose of covering up the property for the benefit of Morrison; and that the circumstances under which Morrison sold to Kelley, Maus & Co. were sufficient to charge them with the fraudulent character of his purchase from Kimbark. On a trial of the cause before a jury the issue presented was found in favor of Kimbark, and the plaintiffs recovered only nominal damages. On appeal the judgment was affirmed in the appellate court, and the plaintiff in the action, for the purpose of reviewing the decision of the appellate court, has prosecuted an appeal to this court. When the case was presented at a former term, upon the argument presented we entered an order reversing the judgment, and remanding the cause for another trial. Under the rules of the court, Kimbark presented a petition for a rehearing, which was considered, and a rehearing ordered. The cause has again been argued, and upon further consideration of the case, as presented on the reargument, we have arrived at a different conclusion from that reached when the case was first presented.

In order to determine properly whether the decision of the circuit court on the admission of evidence, and the giving and refusing instructions, which was approved in the appellate court, was correct or incorrect, it seems proper to allude to some of the leading facts in the case, as established by the evidence. In the month of January, 1883, John Morrison, who was engaged in the manufacture of carriages in Chicago, purchased, on credit, of Kimbark, a wholesale dealer in iron, in Chicago, a bill of goods amounting to about \$2,500. The goods were delivered in different quantities, and at different dates, from the time of purchase, during January, February, and the first part of March. At the time of the purchase, Kimbark required a statement from Morrison as to his financial condition, which was given, showing that his liabilities did not exceed \$300, and that he was worth some \$20,000, consisting of a farm in Michigan and property in Chicago. From the time the bill of goods was ordered he continued business in Chicago until April 13, 1883, when, claiming that his safe had been robbed of some \$6,000 in currency, he confessed a judgment in favor of William Morrison, a brother,



for some \$2,500. Execution was issued on this judgment, and levied on Morrison's goods. He then was taking steps to make an assignment, when he was induced by Kelley, Maus & Co., to whom he was indebted in the sum of \$2,500, to make a sale of his goods to them. They at the same time purchased the judgment which had been confessed in favor of William Morrison, and assumed the payment of \$400 or \$500 due Morrison's workmen. When the terms of the purchase were agreed upon, Kelley, Maus & Co. took a bill of sale, and went into the possession of the goods, amounting in value to between \$6,000 and \$7,000. They knew, at this time, that Morrison was in failing circumstances, and that he did not have sufficient property to pay his debts; that a part of the goods contained in the bill of sale had been purchased from Kimbark; that Morrison was attempting to defraud his creditors. There was also evidence introduced tending to prove that, under the arrangement made with Kelley, Maus & Co., Morrison was to have whatever overplus should remain on sale of the goods after the firm debt, and such advances as they made, should be paid.

On the trial, Charles B. Kelley, one of the plaintiffs, was called as a witness on behalf of the plaintiffs for the purpose of proving the value of the property, the expenses incurred in the action of replevin, and that the property was not returned; and his examination in chief was confined to these subjects. On the cross-examination, the court permitted the defendant to interrogate the witness upon other subjects, and this is relied upon as error. There is no doubt in regard to the general rule on this subject. It is well established, by a uniform current of authority, that the cross-examination of a witness is restricted to such matters and things as the witness may have been examined upon in his direct examination. *Stafford v. Fargo*, 35 Ill. 486; *Hurlbut v. Meeker*, 104 Ill. 542. But, while we fully concede the general rule on the subject, cases may arise where a strict observance of the rule will not always be required. More latitude is always allowed in cross-examination, where the witness is one of the parties in interest, or where the person is an unwilling witness, than in the case of an ordinary witness; and we think it safe to say that a circuit court may, in its discretion, where a party in interest is a witness, allow the cross-examination to take a wider range; and, where the cross-examination has not been confined strictly to the examination in chief, it will not be held error, unless it appears that there has been an abuse of the exercise of a sound legal discretion. *Rea v. Missouri*, 17 Wall. 533. Here much latitude was allowed on the cross-examination of the witness; but, so far as appears, no injury whatever was done to the plaintiffs, and we do not think that the judgment ought to be reversed unless it was apparent that the plaintiff had been injured by the ruling of the court.

It is also claimed that the court erred in allowing the defendant to prove by William Huston the declarations of William Morrison, which were made four days before the sale of the goods, to the effect that John Morrison at that time owed him nothing. William Morrison was not a party to the suit, and it is claimed that his declarations were mere hearsay.

say. It will, however, be remembered that William Morrison, at the time the admissions were made, held a past-due note against John Morrison, upon which a judgment was entered by confession four days later for some \$2,500, which was subsequently transferred to Kelley, Maus & Co., and they claimed that the judgment formed a part of the consideration for the purchase of the goods from John Morrison; while, on the other hand, the defendant insisted that the note and judgment were fraudulent. The judgment may be treated as overdue paper, which Kelley, Maus & Co. took subject to all defenses that might be made against it, the same as if it had remained in the hands of William Morrison; and we are inclined to hold that declarations made by him while he held the note and judgment were admissible, under the doctrine laid down in 2 Whart. Ev. § 1163, as follows:

"Where A., the possessor of a chattel or chose in action, assigns it to B., B. takes it charged with equities which could have been maintained against A., supposing that B. has notice, or *ought to take notice, of such equities*; and from this it follows that B., under such circumstances, is as much exposed to the admission against him of A.'s self-deserving declarations, as to such equities, as he would be to the admission of any other legal evidence going to establish such equities."

See, also, *Vennum v. Thompson*, 38 Ill. 144.

It is also contended that the statements made by John Morrison, in the presence of William Huston, after the sale, in regard to the note which he had given to his brother, and in regard to the burglary, were not competent evidence. The admissions of John Morrison, in disparagement of his title to the property after the sale, were not admissible to defeat the title of Kelley, Maus & Co. to the property, under the well-known rule that declarations of a vendor, after the sale of property, are not competent evidence as against the vendee. But when John Morrison was on the stand as a witness, he denied that he had made certain statements in relation to the robbery, and the note given to his brother, at a certain time and place, in the presence of Huston and Miller; and his statements were proven for the purpose of impeachment, and for this purpose the evidence was proper.

It is also argued that the evidence is not sufficient to sustain the verdict. That was a question of fact for the jury, upon which the judgment of the appellate court, affirming the judgment of the circuit court, is conclusive here.

Evidence in reference to the alleged burglary of Morrison, tending to prove that his claim in this regard was false, was admitted; and this is claimed to be error. Kimbark claimed the right to rescind the contract of sale under which Morrison obtained the goods, and upon this branch of the case he had the right to show the circumstances under which the goods were obtained, and the manner in which Morrison disposed of them. *Lockwood v. Doane*, 107 Ill. 236. On the night before the judgment was entered in favor of William Morrison, John Morrison claimed that his place of business was entered, and six or seven thousand dollars in currency taken from his safe. This pretense doubtless

led to the entry of the judgment, and the judgment and contemplated assignment led to the sale of the goods to Kelley, Maus & Co.; and the admitted evidence, in relation to these transactions, was competent as bearing on the intention of Morrison in obtaining the goods.

The court refused all instructions asked by the plaintiff, and embodied all the law thought to be applicable to the case in one charge to the jury, and it is claimed that plaintiff's instructions 2, 8, 9, and 12 were proper, and should have been given. No. 2, in substance, informed the jury that the records of the court introduced in evidence are conclusive as to the facts therein contained, and cannot be disputed by other evidence. This instruction was not proper under the evidence before the jury. The defendant had the right to show that there was no foundation for the Morrison judgment; that it was fictitious, and entered up with a fraudulent purpose; and yet, if the instruction had been given, the jury might have been justified in concluding that the record of the judgment was final and conclusive for all purposes. As to instruction No. 8, its substance, or at least all of it proper for the consideration of the jury, was embraced in the charge which the court gave to the jury. As to the ninth refused instruction, it was bad in one respect, at least, in this: that it required proof of actual notice to Kelley, Maus & Co. of the fraud in the purchase of Morrison from Kimbark. If they had notice of facts sufficient to put a reasonably prudent person on inquiry in regard to the fraud, this was enough to charge them with notice of fraud. As to the instruction No. 12 we think its substance was contained in the charge given to the jury by the court found at the foot of page 33 of the abstract. The charge directs the jury that it is lawful for a debtor to prefer one creditor, and pay him in full, as does the instruction. It also announces the principle that a purchaser, with the intention of satisfying his own claim, when he purchases without notice of fraud, or of facts sufficient to put him on inquiry, is entitled to protection. The instruction declares substantially the same thing in different language; declaring that both parties to the sale must be cognizant of and participate in the fraud. The instruction refused is perhaps somewhat broader in its terms than the charge, but at the same time we think the charge contained all that was required for the jury to comprehend their duty in considering the facts put in evidence on this branch of the case.

It is also contended that certain portions of the charge given by the court to the jury were erroneous; that it was complex, intricate, and voluminous. That the charge is somewhat voluminous we readily concede. The court, however, instead of following the practice which usually obtains, of giving a large number of isolated instructions for each of the parties, gave to the jury in one charge all the law which it was thought the facts of the case demanded; and we are not prepared to say that there is any well-founded objection to a practice of this kind, but, on the other hand, we think it a good one.

The principal objection made to the charge, as we understand the argument, is that there was no evidence that Kelley, Maus & Co. had notice of any fraud in the purchase of the goods by Morrison from Kim-

bark, or notice of any fact sufficient to put them on inquiry, and consequently there was nothing upon which that part of the charge could be properly based. If there was no evidence whatever on that branch of the case, an instruction would have been improper, as all instructions to the jury should be predicated on the evidence. But, when the bill of sale was made, Kelley, Maus & Co. knew that Morrison was indebted to Kimbark for goods then in Morrison's shop. They knew that Morrison claimed to have been robbed; that his account of the robbery was improbable; that he had confessed a judgment in favor of his brother; that he was endeavoring to put his property out of his hands, for the purpose of defrauding his creditors. They, through their attorney, charged Morrison with fraud, and threatened him with an action of attachment if he refused to settle with them. These and kindred facts were known to Kelley, Maus & Co. when they took an assignment of the goods from Morrison, and they were enough, at least, to authorize Kimbark to go to the jury on the question of notice of the fraud in the purchase of the goods by Morrison.

It may be that the charge to the jury is not entirely free from slight error; but, as a whole, we regard it substantially correct, and we are satisfied that the jury was not misled by it. The questions involved in the trial in the circuit court were closely contested, and were questions purely for the determination of a jury; and the finding, approved, as it has been, in the appellate court, cannot be disturbed, unless the circuit court erred in questions of law, which we are not satisfied is the case.

The judgment of the appellate court will be affirmed.

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(117 Ill. 396)

**HEMPHILL and others v. COLLINS and others.**

(*Supreme Court of Illinois. June 12, 1886.*)

**APPEAL—APPEALABLE ORDER—ORDER STRIKING CAUSE FROM TRIAL CALENDAR.**

An order in an attachment suit that a plaintiff has discontinued his attachment by taking judgment on the merits, without filing a replication to a plea to the attachment, and striking the cause from the calendar therefor, is a final and appealable order. 2 Starr & C. St. c. 110, par. 63.<sup>1</sup>

Appeal from appellate court, First district.

*Hodges & Shippen*, for appellants.

*Flower, Remy & Gregory*, for appellees.

SCOTT, C. J. This was an original proceeding commenced in the appellate court of the First district by Joseph Hemphill and George E. Hamlin, petitioners, against Lorin C. Collins, respondent, and is a petition for *mandamus* to compel respondent, one of the judges of the circuit court of Cook county, to forthwith vacate a certain order made in a case lately pending in the circuit court over which respondent presided as judge, wherein petitioners were plaintiffs, and Joanna O'Brien was de-

<sup>1</sup>See note at end of case.

fendant, striking the cause from the docket calendar of such circuit court, and to reinstate the same, and proceed with the trial and determination of the issues pending in the attachment proceeding in due course of law. The appellate court granted leave to file the petition, but, on the final hearing of the cause, dismissed it out of court, and ordered that petitioners pay the costs of the proceedings in that court to be taxed. A majority of the judges of the appellate court being of opinion that questions of law of such importance, on account of principal and collateral interests, were involved in the case it should be passed upon by the supreme court, the prayer of petitioners for an appeal was allowed, which they afterwards perfected by giving bond as required by the order of the court.

It appears from the allegations of the petition that on the sixth day of July, 1885, petitioners brought in the circuit court of Cook county a suit in *assumpsit* against one Joanna O'Brien, upon a promissory note made by her, and on the same day brought, in the same court, an attachment in aid, based upon an affidavit that defendant had, within two years last past, fraudulently assigned her effects, or a part thereof, so as to hinder and delay her creditors; and had, within two years last past, fraudulently concealed or disposed of her property so as to hinder and delay her creditors; and petitioners obtained a writ of attachment, by virtue of which the sheriff levied on sundry goods of defendant, as shown by the writ and return made a part of the petition; that on July 22, 1885, defendant filed her plea in abatement, denying the alleged grounds of attachment, concluding to the country, with general *similiter* added; that on October 5, 1885, petitioners recovered judgment upon the merits in the original action against defendant by reason of her default of a plea; that on December 18, 1885, the circuit court ordered as follows: "It appearing to the court that the attachment herein has been abandoned or discontinued, by taking judgment herein on the merits, without a replication to the plea to the attachment herein, it is therefore ordered, on motion of defendant, that the case be stricken from the trial calendar of this court;" and that on the nineteenth day of December, 1885, petitioners moved the circuit court to vacate such order, and reinstate the case on its trial calendar, which motion was overruled.

The point made is that the circuit court erred in holding that the attachment had been abandoned or discontinued by taking judgment in the original suit on the merits, and also erred in ordering the cause stricken from its calendar, and in refusing to proceed to the trial of the issue in the attachment proceeding, and hence it is insisted petitioners are entitled to *mandamus* to compel the circuit court to correct its alleged error in that respect. Whether the circuit court properly construed section 31 of the attachment act, and decided correctly in holding the attachment proceedings had been abandoned and discontinued by taking judgment on the merits, without a replication to the plea to the attachment, and in striking the cause from the trial calendar, are not questions for discussion on this proceeding. The error in the argument lies in the assumption the order made by the circuit court was interlocutory,

and not a final decision. Such is not the fact. The court did decide that the attachment proceeding had been abandoned and discontinued, and thereupon struck the cause from the trial calendar. That was a final disposition of that branch of the case, from which an appeal or writ of error would lie. But whether the circuit court decided correctly or not cannot be inquired into in a collateral proceeding, as this is. That could only be done on error or upon appeal. It is a principle so well understood that when a court has once decided a cause, it cannot be compelled by *mandamus* to decide it differently, that it need not be discussed. Petitioner's remedy, if any existed, was by appeal or by writ of error to correct the alleged erroneous decision of the circuit court.

The judgment of the appellate court will be affirmed.

#### NOTE.

Respecting appealable orders, see *Farson v. Gorham*, (III.) 7 N. E. Rep. 104, and note, 106-108.

An order punishing contemptuous conduct in the presence of, or with respect to the authority or dignity of, a court, is not an appealable order. If the court has power to punish for contempt, its decision is final. *Dodd v. Una*, (N. J.) 5 Atl. Rep. —.

(119 Ill. 9)

**BENNETT and others v. WILMINGTON STAR MIN. CO. OF COAL CITY and others.**<sup>1</sup>

(*Supreme Court of Illinois*. May 15, 1886.)

#### 1. MECHANIC'S LIEN—AS AGAINST PURCHASER.

A party purchasing property against which a petition for mechanic's lien has been filed, where such purchase is made from the owner and defendant after the petition was filed, but before jurisdiction of the person of the defendant owner was acquired by service of process or otherwise, does not take the title of the property free from the lien of the statute relating to mechanic's liens.

#### 2. SAME—TRUSTEE SHOULD BE A PARTY.

In mechanic's lien suit against property incumbered by a trust deed, both trustee and *cestus que trust* should be made parties.

#### 3. ESTOPPEL—RES ADJUDICATA.

The doctrine of *res adjudicata* embraces, not only what has actually been determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it; and this rule has a still broader application, and will sometimes include persons who are not parties to the record, and have not acquired interests *pendente lite*, binding them by the judgment or decree. Persons on whose behalf, and under whose direction, the suit is prosecuted or defended, in the name of some other person, fall within this category.

#### 4. SAME—EVIDENCE—PAROL—REAL PARTIES IN INTEREST.

In such cases, parol evidence is admissible to show who are the real parties in interest, and that they conduct the litigation in the names of other persons.

Appeal from appellate court, Second district.

The following is the opinion delivered by **BAKER, J.**, in the appellate court:

**BAKER, J.** The facts involved in this case are very numerous and quite complicated; and, in the view we take of the merits of the controversy, it is necessary to state but comparatively few of them, and these may properly be

<sup>1</sup> For the report of this case, which will appear in the eighteenth volume of *Bradwell's Appellate Court Reports*, we are indebted to Hon. J. B. Bradwell, of Chicago, reporter.

referred to in connection with the points it is deemed essential to consider and decide.

1. The Coleman Gas-works Manufacturing Company filed its petition for a mechanic's lien in the circuit court of Grundy county on the fourteenth day of September, 1875, against the Coalfield Coal Company, Charles H. Goold, and H. Leroy Thayer; and it is admitted that this was within the six months after the last payment for labor and materials became due and payable, that is allowed by section 28 of the lien law for the institution of a suit for the purpose of enforcing such lien in order to make it effective as against other creditors and incumbrancers. It appears, however, that the Coalfield Coal Company parted with its title to the hotel premises in question after the petition was filed, but before jurisdiction of its person was acquired by the service of process or otherwise. We understand the claim of appellees, made in this behalf, to be that in such case one who purchases from the owner of the land, and defendant to the petition, takes the title to the property forever freed from the lien created by the statute. This position is not tenable, and for several reasons. In the first place, a purchaser is not within the protection of this section, as he is neither a creditor nor an incumbrancer. It was expressly so held in *Dunphy v. Riddle*, 86 Ill. 22. In the second place, the statute saves the right of the holder of the lien, if suit is instituted to enforce such lien within the six months limited for such purpose; and it has been decided that the proceeding under the statute of liens is a chancery proceeding, and that the filing of the petition is the institution of the suit. *Work v. Hall*, 79 Ill. 196; *Dunphy v. Riddle*, *supra*. And, in analogy, where an amendment is allowed, making a new party defendant to the petition, the suit is brought, as to him, at the time of the amendment. *Crowl v. Nagle*, 86 Ill. 437. If the rule were as is urged, then this lien law would afford but scanty protection to those whom it is intended to benefit; for the owner might in every instance, by simply evading service of process, have both power and opportunity to either sell or incumber to the full value of the land, and thereby render nugatory the plain intent of the statute.

2. It is objected by appellees, to the validity of the decree that was entered in the mechanic's lien suit as affecting their rights, that on the twenty-seventh of July, 1875, and prior to the filing of the petition, the Coalfield Coal Company executed to Frank Goodspeed, as trustee, a trust deed, to secure the payment of \$4,750 to Goold and Thayer; and that, while Goold and Thayer, the *cestuis que trust*, were made parties to the proceeding, yet the trustee was not; and that they were each and all necessary parties. We understand the general equity rule to be as is claimed. *McGraw v. Bayard*, 96 Ill. 146; *Scanlan v. Cobb*, 85 Ill. 296; Story, Eq. Pl. § 207. The first cited case is directly in point, and it was there decided that where a trustee is interposed between lender and borrower merely for the purpose of enabling the lender to obtain payment through the exercise, by the trustee, of powers conferred upon him, both trustee and *cestui que trust* must be made parties. It is also true that it was held in *Crowl v. Nagle* and *Dunphy v. Riddle* that, where there is an existing incumbrance at the time the suit is brought, and the incumbrancer is not, within six months after the last payment becomes due, made a party to the petition, then the lien of the mechanic will be postponed to that of the incumbrancer.

In order to properly apprehend this matter of the omission of the trustee as a party defendant in the lien proceeding, it is necessary to briefly state a few additional facts that appear in the record. On the second day of May, 1876, Goodspeed made a sale, under the provisions of the trust deed, of the premises, and conveyed them to Goold and Thayer, who were purchasers at such sale. On the third day of October, 1876, Goold and Thayer entered into a written contract with Ira F. Benson for the future conveyance of the prop-

erty to him, (Benson.) On November 22, 1876, Benson assigned his interest in the contract, and made a quitclaim deed of the premises, to the Wilmington Star Mining Company, one of the appellees herein. On the eighteenth day of December, 1878, the mechanic's lien suit, a former decree therein having been reversed by the supreme court, and the cause remanded, was still pending and undetermined in the Grundy circuit court. At that time the three defendants to the petition, the Coalfield Coal Company, Goold, and Thayer, filed answers to it for the first time; and the only persons who then had any interest in the premises upon which the lien was sought to be enforced, were the two latter and the Wilmington Star Mining Company. The title of the Coalfield Coal Company had long prior been divested by the sale under the trust deed. The suit had become *lis pendens* in respect to Thayer on the twenty-eighth of October, 1875, by the service of process on him; but it is questionable whether it became *lis pendens* with reference to Goold and the Coalfield Coal Company before their answers were filed. Assuming that Goold and Thayer, by the failure of the petitioners to make Goodspeed, the trustee, a party to the proceeding, and by the conveyance from such trustee, were in a position to insist the lien could not be made effective to their prejudice, then it was their bounden duty to interpose such defense in the pending litigation. The petition charged that Goold and Thayer were interested in the real estate covered by the lien as mortgagees or otherwise, and prayed for a lien, and that the lots might be sold clear of all incumbrances. If these parties to the suit had a valid defense to the enforcement of the lien as against any rights they were vested with, they should have disclosed it; and, if they either did or did not do so, the binding force of the lien is *res judicata* as between them and their privies, and all parties claiming under the decree. That decree necessarily affirmed the validity of such lien, as against whatever right or title the defendants therein possessed, for the court expressly found and decreed that the "petitioner is entitled to a first lien upon said premises;" and it is conclusive upon the parties and their privies. The doctrine of *res judicata* embraces, not only what has actually been determined in the former suit, but also extends to any other matter properly involved, and which might have been raised and determined in it. *Hamilton v. Quimby*, 46 Ill. 90; *Rogers v. Higgins*, 57 Ill. 244; *Kelly v. Donlin*, 70 Ill. 378; *Ruegger v. Indianapolis & St. L. R. Co.*, 103 Ill. 449. In Bigelow, *Estop*, p. 46, note, it is said: "It follows, also, from the authorities considered, that a valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purposes of every subsequent suit, whether founded on the same or a different cause." See, also, *Gage v. Ewing*, 107 Ill. 11, and *Scates v. King*, 110 Ill. 456.

This rule of the binding and conclusive effect of a former adjudication has a still broader application than we have thus far stated, and will include, not only Goold and Thayer, but the Wilmington Star Mining Company. Sometimes persons who are not parties to the record, and have not acquired interests *pendente lite*, are bound by the judgment or decree. Persons on whose behalf, and under whose direction, the suit is prosecuted or defended in the name of some other person, fall within this category; and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other persons. *Freem. Judgm.* § 174, and authorities cited in notes.

In the case of *Cole v. Favorite*, 69 Ill. 457, the supreme court of this state recognized and approved this extension of the principle of *res judicata*, and there said: "The suit in the federal court, although in the name of appellee, was prosecuted at the request of and for the benefit of appellant; he advised and directed it, was a witness therein, and while he was not formally a party



to the record, he was a party in interest, and must be regarded a privy." The parol evidence conclusively shows that the Wilmington Star Mining Company employed the attorney who sued out and prosecuted the writ of error from the supreme court to bring before it the record of the first decree entered in the lien suit, and upon which it was reversed; and employed the attorney who made the defense that was interposed, both before and at the time the decree now in question was rendered, and who afterwards litigated the matter, on error, in the appellate court; and not only paid the fees of such attorney, but all the other expenses of the defense.

One or two other matters may properly enough be noted in this connection. The rights of the Wilmington Star Mining Company are based upon and have their origin in the Goold, Thayer, and Benson contract of October 3, 1876, and it was possessed of such rights when it employed counsel and made defense to the suit for mechanic's lien. The corporation also had a claim or color of title to the hotel property, through a quitclaim deed executed by the Coalfield Coal Company on the twenty-second of November, 1876. This supposed title we have ignored in our consideration of the case, and for the simple reason that all right and title of the coal company had passed out of it on the second of May, 1876, by virtue of the sale and conveyance made by Goodspeed under the deed of trust, so that nothing was conveyed by this deed of November 22d. Mary S. Buchanan, the other appellee herein, derives her interest in the premises as follows: On January 3, 1880, Goold transferred his interest in the land, and in the Goold, Thayer, and Benson contract, to Isabella Clark and Bacon Wheeler; on the twenty-eighth of March, 1881, Isabella Clark transferred her interest, so acquired therein, to said Wheeler; and Wheeler died on the twenty-sixth of May, 1882, having devised the interest vested in him to her, the said Mary S. Buchanan; and Thayer, by deed dated December 5, 1883, also conveyed his interest in the premises to her.

Our conclusion, then, upon this branch of the controversy, is that in respect to the right and title now held by the Wilmington Star Mining Company, the validity of the mechanic's lien, as a first lien, is *res judicata*; that with reference to the right and title of Mary S. Buchanan derived through Goold, the rule of *lis pendens* will apply, as the transfers from the latter were made in 1880, and the mechanic's lien proceeding became *lis pendens* as to Goold on the eighteenth of December, 1878, if not sooner, and continued to be such until the entry of final decree on the twentieth of December, 1881; and the law of *lis pendens* is that an alienation of the subject-matter of the controversy made *pendente lite* is void against the judgment or decree finally rendered in the suit. In respect to the title derived by Mary S. Buchanan from the Thayer deed of 1882 it is sufficient to say that conveyance was executed long after the decree for the lien was entered, in a suit to which the grantor was a party, and, of course, such title was subject to the lien of the decree.

3. It appears from the record that, at the time the mechanic's lien petition was filed, one of the five incumbrances in the nature of either mortgages or trust deeds that had been placed upon the hotel lots, and were then subsisting liens, was a mortgage to H. Leroy Thayer, dated April 1, 1875, to secure 11 notes of \$1,000 each, and one note of \$1,500, making \$12,500 in all. The point is made, as against the binding force of the mechanic's lien decree so far as the rights of appellees are concerned, that four of the notes for \$1,000 each, and the note for \$1,500, were sold and transferred by Thayer prior to the filing of the petition, and that the holders of said notes were not made parties to the bill within six months from the time the money was due for the work and material furnished; and that afterwards the amounts due on said notes were included in the decree entered in the Grundy Circuit Court, in the cause

of the bill filed by the Wilmington Star Mining Company against Thayer for specific performance, and wherein specific performance was awarded upon payment of the amounts due Thayer, which amounts were there determined, and decree therefor rendered, and which decree was subsequently, upon payment by her of the full amount thereof, assigned to Mary S. Buchanan. It is urged that the assignees and then holders of each of these notes stood in the light of mortgagees, and should, within the time limited by the statute, have been made parties to the petition. We do not, from the testimony as abstracted, understand it to be a fact that said five notes were, when petition was filed, held by assignees. The evidence does show they were assigned after the day of their date, and prior to the third day of October, 1876, the time the Gould, Thayer, and Benson contract was entered into; but proof they were in the hands of other parties at and just before this latter date does not establish they were assigned prior to the fourteenth day of September, 1875; and, in the absence of evidence to the contrary, the presumption of fact would be that they continued in the hands of the person to whom they were executed and delivered, and were owned by him when the petition was filed. However this may be, we do not deem it an essential matter; for the testimony shows that Thayer assigned these notes, without any consideration, to one J. D. Bennett "without recourse," and then claimed them as his own, and sought to have them returned; and in fact did get two of them back on October 3, 1876, and afterwards, during October and November, 1876, obtained the others. They were all back in Thayer's hands, as mortgagee, and he continued to hold them as such mortgagee during the residue of the time the petition was pending, and still held them at the date of the decree for the amounts due on them, which was rendered in the suit for specific performance. So we must hold, with reference to these five notes, as we hold in regard to the matter of omitting Goodspeed, the trustee, as a defendant, that the defense should have been availed of, by those through whom the appellee Mary S. Buchanan claims, in the proceeding for the lien.

4. The lots in controversy were sold on the thirteenth day of January, 1883, under the decree for a mechanic's lien, and were purchased by H. H. C. Miller, to whom a certificate of purchase was executed, and which he subsequently assigned to Charles Goodspeed. The property was not redeemed by the appellees, the owners of the equity of redemption, within the 12 months allowed by law. H. Leroy Thayer had, at the September term, 1877, of the Will county circuit court, recovered a judgment by default against the Coalfield Coal Company for \$5,968.21 damages and costs; and on January 15, 1884, he assigned this judgment to Fred Bennitt, one of the appellants, who, as such assignee, on the same day, sued out an execution on the judgment, directed to the sheriff of Grundy county. Bennitt thereupon redeemed from the master's sale, and the sheriff executed and delivered to him, as a judgment creditor of the Coalfield Coal Company, a certificate of redemption, and caused said real estate to be advertised for sale under said execution. Appellees then exhibited the present bill, alleging they are the owners of the real estate in controversy; the said Mary S. Buchanan holding the legal title, and the Wilmington Star Mining Company holding the equitable title; and being in actual possession and occupancy of the premises under agreement of purchase; and alleging the invalidity of the lien obtained in the decree of December 20, 1881, on the ground already considered by us; and further alleging that Bennitt is not the owner of the Will county judgment in good faith and for value, and that said judgment is in part fraudulent, (setting forth the matters of alleged fraud,) and as to the matter not fraudulent had been paid in full. The bill prayed for an injunction, and for a removal of the cloud from their title, and that the levy made by virtue of the execution from the Will circuit court be set aside and annulled. On the hearing, all the material allegations of the

bill were found to be true; and a decree was entered substantially as prayed for, and making the injunction perpetual.

It is insisted by appellants that if the decree in the mechanic's lien case concludes the appellees, then the question of the validity or invalidity of the judgment under which Bennett seeks to make redemption cannot be raised by them, and that it is wholly immaterial whether the Will county judgment was fraudulent or not. If we properly apprehend the point made, it is that if the decree is of binding effect as to appellees, then, as the 12 months allowed them by statute in which to redeem have expired, the bill cannot be maintained by them for want of interest in the subject-matter of the suit. Of course, appellees must have an interest in the subject-matter, in order to give them a standing in court; but we do not understand the authorities cited by appellants to go to the extent of holding that, in the case suggested, appellees would have no such interest. *Meyer v. McIntonye*, 106 Ill. 414, is an authority to the contrary. There land had been sold under a decree of foreclosure, and the 12 months in which the owner might redeem had passed, and no redemption had been made, and thereupon a void execution was issued on a judgment at law against the owner, and the purchaser at the master's sale accepted the redemption money tendered, and the premises were resold on the void execution; and it was held that the acceptance of the money necessary to redeem from one having no right to redeem, after the expiration of the 12 months given the owner for redemption, had the effect simply to extinguish all rights under the first purchase, and relieve the land of the incumbrance of the mortgage. It would seem a similar result would follow in this case if the process upon which the redemption was made, was issued upon a void judgment.

5. The appellant Bennett is not an assignee of the Will county judgment in good faith and for value. His own testimony shows that he paid nothing for the assignment, and is under no obligation to pay anything; that it was made at the suggestion of Thayer, who told him that any title that he (Thayer) might acquire would inure to Mrs. Buchanan; and that a court of equity would not permit him to hold such title. We are satisfied from the evidence as a whole that Bennett is but a mere volunteer or nominal party, and has no real interest in the judgment.

6. We think it would subserve no useful purpose to discuss the very voluminous facts and circumstances upon which the charge of fraud in the obtention of the judgment in the Will circuit court is predicated. Suffice it to say that in the present case the court below found that that judgment "is now, and at the time of the rendition of the same was, fraudulent, and without any consideration whatever, as to the greater part of the damages awarded and reserved therein, and as to such part of said damages judgment ought not to have been recovered, and that, as to the remainder of said damages, the same had been paid in full at and prior to the date of the assignment of said judgment," and that with this finding we are content. The judgment was a fraud to the extent of \$3,000, and the residue included in it was also embraced in the amount assumed by Benson in his own contract, and was afterwards included in the decree rendered in the suit with the Wilmington Star Mining Company, and which was paid by the appellee, Mary S. Buchanan. It would be inequitable and unjust to permit Thayer, the real party in interest, to have from her a second satisfaction of the amount so paid. Besides, in his deed to her Thayer expressly covenanted that he had not done, or suffered to be done, anything whereby the lands in question were or might be in any manner incumbered or charged, and that he would warrant and ever defend the premises against all persons lawfully claiming or to claim the same through or under him. These covenants should estop him, in equity, from making his judgment out of this property.

7. But the appellant Fred. Bennitt, after the time within which appellees could redeem these lots from the master's sale had expired, did redeem them, and the redemption money was accepted by the holder of the certificate of purchase, and such redemption has freed the real estate of appellees from a binding and subsisting lien. It is a maxim of the courts of chancery that those who seek equity must do equity. As appellees have voluntarily sought the assistance of the equity court, they should be compelled to observe the requirements of the maxim we have cited.

The decree of the circuit court is reversed, and the cause remanded with these directions: That, if appellees shall be so advised, they have leave to amend their bill by tendering to appellant Bennitt the sum of money paid by him for redemption, with 6 per cent. interest thereon from January 16, 1884, and that they be required to pay the same into court, and that upon their so doing a final decree be entered herein in accordance with the prayer of the bill, and making the injunction perpetual; but that, in the event appellees should decline and refuse so to do, then their bill of complaint shall be dismissed, at their own proper cost.

*Jordan & Wing*, for appellants.

*George S. House*, for appellees.

PER CURIAM. After a careful examination of the record in this case, and a full consideration of the elaborate arguments presented upon the questions involved, we perceive no error in the decision of the appellate court. The questions involved have been fully considered and elaborated in the opinion of the appellate court, by BAKER, J., in which we concur. Cross-errors have been assigned by appellees, but we do not regard them well taken. A sufficient discussion of the questions raised by the cross-errors will be found in the opinion of the appellate court.

The judgment of the appellate court will be affirmed.

(117 Ill. 176)

GORE and others v. KRAMER and others.

(*Supreme Court of Illinois*. May 15, 1886.)

1. EQUITY—REMEDY AT LAW—CANCELLATION OF SALE—FRAUD.  
A bill in equity to cancel a contract of sale of goods on the ground of fraud, and for recovery of the value of the goods, will not lie, as there is an adequate remedy at law.
2. EQUITY—CREDITORS' BILL—FRAUDULENT CONCEALMENT OF ASSETS.  
A creditors' bill cannot be maintained without first recovering judgment, and exhausting the legal remedy. Mere fraudulent concealment of assets will not be a sufficient ground for equity to take jurisdiction.

Appeal from First district.

This was a bill in equity by appellants against Emanuel Kramer, Nathan Kramer, and Samuel Loebstein, composing the firm of Kramer Bros. & Co., in which it is alleged:

That said firm of Kramer Bros. & Co. was formed on or about November 1, 1882, for the purpose of conducting a wholesale hat business, and was to continue for three years; that they started with an alleged capital of \$76,000, of which Nathan Kramer put in \$18,000, Samuel Loebstein \$25,000, and Emanuel Kramer \$33,000; that they transacted during the first year a profitable business, and in January, 1884, had

increased their capital stock to \$86,000; that having done a successful business, paid their bills promptly, and established a large credit with the trade generally, they conceived and concocted the fraudulent scheme to use their said credit for the purpose of a gigantic swindling operation, and to that end they did, during the summer of 1884, buy of dealers in New York city and elsewhere an amount of goods and merchandise largely in excess of the legitimate demands of their business, and amounting in the aggregate to upwards of \$125,000; that they obtained said goods by false and fraudulent statements and misrepresentations,—they stating that they had a net capital of \$86,000, and were worth three dollars to every dollar that they owed; that, by reason of such false and fraudulent statements and representations, they obtained a long term of credit, and settled with their creditors by giving them their promissory notes due in four, five, and six months from date; that, after fraudulently obtaining said goods, as a next step in their scheme, they sent out their agents all through the western states, and sold and disposed of a large portion of said goods on short time, and greatly reduced prices, and for figures below the purchase price of said goods; that they received therefrom a large amount of money, which they have kept and concealed, and intend to keep and conceal, from their creditors; that there are still a large number of accounts due and owing by various parties to said firm, and that many of said parties reside in other states, and are unknown to complainants, and that said firm keep the names of their said debtors, the amounts they owe, and where they reside, from the knowledge of their creditors, and are collecting, discounting, and compromising said claims, and converting them into money as rapidly as possible for their own use and benefit, and with intent not to pay any of said money to their creditors; that said notes given by them to their various creditors are not yet due, but that only time is needed to make said obligations absolute, but by reason of the fraud practiced upon them by said firm, they have a right to have said contracts rescinded by delivering up said notes, and recover the value of their said goods so converted.

That, as the next step in their scheme, and to prevent creditors from getting any part of the proceeds of their said goods, Emanuel and Nathan Kramer did, on November 29, 1884, confess three pretended judgments, amounting in all to \$29,077.50, and costs, of which \$1,600 was for attorney's fees; that said judgments were confessed in favor of First National Bank of Chicago for \$19,000, in favor of J. T. Baldwin, cashier Manhattan Company Bank, for \$8,500, and in favor of Charles Glanz for \$1,577.50, on notes dated November 28, 1884, but which complainants charge were made November 29, 1884, and antedated; that said suits were commenced against and judgments entered against Emanuel and Nathan Kramer alone, when in truth and in fact Samuel Loebstein was at that time a member of said firm; that executions immediately issued upon said pretended judgments against the property of Emanuel and Nathan Kramer, and were, on the evening of said twenty-ninth day of November, 1884, levied by the sheriff upon the stock of

goods and merchandise, safe, office furniture, etc., of said firm of Kramer Bros. & Co., of which firm Samuel Loebstein was then a member, and that sheriff has advertised to sell same December 11, 1884, at 11 A. M., to satisfy said executions; that said judgments were entered in the afternoon of the last day of the November term of superior court, and execution given to sheriff after court adjourned for the term; that said banks have collateral security for their debts, to which complainants cannot resort; that there is in hands of sheriff \$40,000 to \$50,000 worth of property of said firm, which in equity should be applied to the payment of partnership debts; that, if sheriff is allowed to sell same under said execution, the partnership property will be exhausted to satisfy the pretended individual debts of Emanuel and Nathan Kramer; that on December 1, 1884, Samuel Loebstein pretended to sell his store, in Beecher, Illinois, to one S. Myer, and also pretended to assign three mortgages owned by him, and give a trust deed on another piece of real estate, thus attempting to place all his individual property beyond the reach of creditors; that defendant firm has no other property save said property levied upon by sheriff, and complainants know of none owned by the members except the above-mentioned property of Loebstein; that by reason of said fraudulent transactions complainants are in imminent danger of losing their demands, unless the sheriff be enjoined from proceeding with said sale, and said property be turned over to a receiver to protect the same for benefit of the creditors of said firm; that, if sheriff is allowed to sell said stock, same will be sacrificed and sold at a great loss; that the debts of said firm largely exceed their assets; that complainants would not have sold said goods to said firm but for their false and fraudulent representations, which, at the time, complainants believed; that said defendants knew them to be false, and made them for the purpose of defrauding, and never intended to pay for said goods; that complainants had no knowledge of the fraud practiced upon them until the said pretended judgments were entered, executions issued, and sheriff had made his levy; and that they file this bill on behalf of themselves and all other creditors of said firm.

Bill prays for an injunction, and receiver to take charge of all assets of said firm, and collect its debts for benefit of creditors of said firm; that the contracts made between said firm and complainants be declared void for fraud, and complainants be allowed to recover the value of their goods; that an accounting be had between said firm and all its creditors, and that partnership property be first subjected to payment of partnership debts; that said judgments against Emanuel and Nathan Kramer be postponed until after partnership debts are paid; and that conveyances made by Samuel Loebstein may be declared fraudulent and void as to creditors, and be set aside, etc.

A preliminary injunction was granted, which, upon a hearing, the court, on motion, dissolved.

The defendants demurred to the bill for want of equity. The superior court sustained the demurrer; and, the complainants electing to stand by their bill, the court decreed that it be dismissed. From that

decree the complainants appealed to the appellate court of the First district, and that court affirmed the decree of the superior court. The case is here by the appeal of the complainants from this affirmance.

SCHOLFIELD, J. This is not, as was *Henshaw v. Bryant*, 4 Scam. 97, cited by counsel for appellants, a bill to rescind a contract of sale, and restore the property obtained under it. Under the facts alleged here, the property could not be restored, and the primary object of the bill is simply to recover a debt; first canceling the contract of sale for fraud, and then obtaining a decree for the payment of the value of the goods. It is not contended that this could not be done at law; and it is clear that, if the contract of sale was fraudulent, an action at law could lie for the value of the goods, and the fraudulent contract could not be interposed to bar a recovery; nor is it sought to restrain the disposition of property until there can be a trial at law. Not a single ground for purely equitable, as distinguishable from legal, cognizance is perceived. The effect of maintaining the bill would be to deprive the defendants of a jury trial on a question where, by the rules of the common law, they are entitled to such trial. The rule has been often repeated in this court that a party can have no standing in a court of equity who has a plain and adequate remedy or defense at law. *Puterbaugh v. Elliott*, 22 Ill. 157; *Coughron v. Swift*, 18 Ill. 414; *City of Peoria v. Kidder*, 26 Ill. 351; *Bigelow v. Andrews*, 31 Ill. 322; *Long v. Barker*, 85 Ill. 431. Nor is there anything in the situation of the assets of Kramer Bros. justifying a resort to equity before a judgment at law is obtained. This is conclusively settled by *Shufeldt v. Boehm*, 96 Ill. 560, and *Dormueil v. Ward*, 108 Ill. 216, and cases therein recited. In the last-named case, as in this, no judgment at law had been obtained. Numerous fraudulent acts were charged in the bill, and we said:

"If a bill of this kind can be maintained at all on the ground that the debtor has been guilty of fraud, and is seeking to defeat the collection of an honest debt by covering up his property, or placing it beyond the reach of his creditors, with a fraudulent intent, enough is clearly shown to maintain this bill. \* \* \* But it is clear, unless we are prepared to overrule a long line of decisions, extending back almost to the time of the organization of this court, a bill of this character cannot be maintained upon the ground suggested, and this, of course, we cannot consistently do in face of the fact the rule adopted by this court is supported by the decided weight of authority. As was said in a recent case, this is no longer an open question."

It was contended that the facts brought that case within the recognized exceptions to the general rule; and in reply to that it was said:

"These so-called exceptions, when properly understood, are rather nominal than real; for a bill of this character will not lie in any case where the claim, as it is here, is purely legal. In all cases where such a bill has been maintained, the claim of the complainant has had some equitable element in it,—such as a trust or the like. But, in the absence of some element of this character, there is a want of jurisdiction to adjudicate upon the case at all, and it is upon this fundamental doctrine the rule controlling this class of cases rests."

But counsel contend this bill may be maintained as a bill for the administration of the assets of an insolvent firm. But, to enable the complainants to maintain a bill of that character, they must, in the first place, acquire an equitable lien, by exhausting their legal remedy, or in some other way. A creditor at large has no standing in court upon such a question. *Crippen v. Hudson*, 13 N. Y. 161. And in *Goembel v. Arnett*, 100 Ill. 42, we held that a creditor of a firm, who had not obtained a judgment at law, could not maintain a bill in equity to set aside a sale on the ground of a fraudulent preference.

We find no cause for disturbing the judgment of the appellate court. It is therefore affirmed.

(117 Ill. 542)

**FERGUS v. WILMARTH and others.<sup>1</sup>**

(*Supreme Court of Illinois. May 15, 1886.*)

**1. MORTGAGE—MORTGAGED PROPERTY DESTROYED—APPLICATION OF INSURANCE MONEY.**

Where buildings on mortgaged property are destroyed by fire, and insurance money is collected by the trustee, at a time when the mortgagor is not in default, it is not the duty of the trustee to apply it on the loan, or to pay it over to the mortgagor on a mere promise to rebuild. An offer to pay it to the mortgagor on the completion of a new building on the property is an equitable proposition.

**2. SAME—DEPOSIT OF MONEY IN BANK AT MORTGAGOR'S REQUEST—FAILURE OF BANK—MORTGAGOR NOT ENTITLED TO CREDIT.**

Where such moneys are deposited in bank at the mortgagor's request, and in the bank of his choice, during the rebuilding, and such bank fails, and the money is lost, the mortgagor cannot afterwards insist on being credited with the amount of such money

Error to appellate court, First district.

*R. B. Bacon*, for plaintiff in error.

*E. A. Otis*, for defendant in error.

*Geo. W. Smith*, for William E. Furness, trustee.

MAGRUDER, J. This is a bill to foreclose a trust deed, dated June 26, 1871, executed by George H. Fergus and wife to William E. Furness, the trustee, upon lot 3, in block 12, in Kinzie's addition to Chicago, to secure a note of same date for \$12,000 borrowed money, made by George H. Fergus, payable five years after date to order of Alexander H. Rice, agent, drawing interest at 8 per cent. per annum, payable half yearly, and indorsed over by Rice to Seth Wilmarth. The bill was taken as confessed by all the defendants except Fergus and wife, who answered, admitting the execution of the note and trust deed, but denying the existence of the full indebtedness claimed, and averring that by the terms of said trust deed the said George H. Fergus was required to insure the buildings on said premises for \$7,500, and, by the policy, the loss, if any, was to be made payable to said trustee for the benefit of the holder of said notes; that prior to the fire of October, 1871, he had so insured said buildings for said sum, and had placed the said policy in the hands

<sup>1</sup> A petition for rehearing is pending in this case.



of said trustee, and the buildings were in said fire destroyed, and said trustee afterwards, to-wit, on or about September 1, 1872, collected from said insurance the sum of \$7,500, and the same should have been credited on said principal note, and should now be credited on said indebtedness, (as of the time when the same was paid to said trustee.) The exact language of the covenant in the trust deed, about which the dispute arises, is as follows:

"And will and shall keep all buildings (except out-houses) that may, at any time during the continuance hereof, be upon, or a part of, the said premises, insured against loss or damage by fire in such insurance company or companies as the said party of the second part, or his successor in trust, his heirs or assigns, may direct, for the full insurable value thereof, not to exceed, however, the amount of said indebtedness; and will and shall, with the proper consent of the insurers, assign the policy or policies to the said party of the second part, his successor in trust hereinafter named, his heirs or assigns, upon request therefor, as a further security for the indebtedness aforesaid."

The circuit court of Cook county, where the cause was tried, rendered a decree in favor of Wilmarth for \$14,272.10 on January 16, 1880, under which the property was sold by the master. A writ of error was prosecuted from the appellate court of the First district, to review the decree, after the time of redemption had expired, and after the purchaser at the sale, or his assignee, had received a master's deed. Upon the affirmance of the decree by the appellate court the cause was brought here by further writ of error from this court.

The only specific assignment of error is that the trial court did not allow to the plaintiffs in error a credit, upon the mortgage indebtedness, of the full amount of money paid to the trustee by the insurance company.

On August 3, 1872, Fergus received from the insurance company a draft for \$7,500 in payment of the insurance on the property. The draft was payable to the trustee's order, and was turned over to him on the same day on which it was received. On August 13, 1872, the trustee deposited the money in the Scandinavian National Bank of Chicago, and received a certificate of deposit therefor. On December 9, 1872, the bank failed, and went into the hands of a receiver. On March 1, 1873, the receiver issued and delivered to the trustee a certificate, certifying that such trustee was a creditor of the bank to the amount of \$7,643.83. Subsequently the receiver paid two dividends to the trustee, one of \$1,910.96, and one of \$1,146.58,—all of which money was paid out either to Fergus, or for his benefit and upon his account, towards the erection of a new building upon the premises. Upon the trial of the cause the complainant below turned over the receiver's certificate to Fergus, who accepted the same. Fergus paid the interest upon the whole amount of the mortgage down to December 26, 1877. After the collection of the insurance money by the trustee, the question arose what he should do with it. He was the agent of both the mortgagor and the holder of the note. The money took the place of the buildings destroyed

by the fire, and was, in his hands, a part of the security for the debt. The creditor, Wilmarth, desired to have the money credited upon the indebtedness, but Fergus was unwilling to have such application made of it. As the principal was not yet due, and no default had been made in the payment of interest, the trustee could not apply the fund to the reduction of the debt without the consent of Fergus. Fergus wished that the money should be paid over to him, to be used in the construction of a new building upon the lot.

It would not have been right for the trustee to have turned over to the mortgagor either the whole amount at once, or different portions of such amount at different times, unless its application to the erection of a new building, and thereby a consequent increase in the value of the security, would have been, in some way, made certain. If Fergus had received the insurance money, and had appropriated it to some other purpose, neglecting to improve the lot at all, the creditor would have had reason to complain of the trustee. The latter was not unwilling, as the testimony shows, to pay over the \$7,500 to the mortgagor whenever he should be offered, in exchange for it, a new insurance policy for the same amount upon any new structure that might be placed upon the premises. Fergus himself testifies: "An agreement was made that I was to have the money when the roof was on the building." He did not commence rebuilding until the latter part of October, 1872, and there is nothing in the testimony to show that "the roof was on" before the bank failed, on December 9, 1872. Under these circumstances, the trustee did not pay the money to the creditor to be applied on the debt, nor to the mortgagor upon a mere promise that it would be used in rebuilding. He concluded to hold it until there was a default in the payment of some portion of the indebtedness, or until the new building should have progressed far enough to justify an expenditure of the fund in liquidating the cost of its erection. We cannot see that, by this course, he failed in his duty towards either party. The views here expressed are in harmony with those of the opinion in *Gordon v. Ware Savings Bank*, 115 Mass. 588. At no time, during any of these transactions, did Furness, the trustee, have the note or trust deed in his possession. They were in Massachusetts, in the hands of Wilmarth. Furness did not receive the insurance money as the agent of the holder of the note authorized to collect the debt secured. His position was that of mere trustee in a deed of trust, occupying the relation of agent as much to the mortgagor as to the beneficiary in the deed. *Jones, Mortg.* § 1771.

As to the deposit of the money in the Scandinavian National Bank, it was done at the suggestion of Fergus, and in compliance with his wishes. He was a friend of Siller, the cashier, and was doing work, as a printer, for the bank. He told Furness that he knew the Scandinavian Bank, and had had dealings there, and that it paid interest on deposits, and he requested that the money be placed there. He took the trustee there, and introduced him to the cashier. The bank had a fair standing, and was in good credit at the time the deposit was made. The money was

deposited to the credit of the trustee, as such, and not mingled with his private funds.

In no view of the case can the appellee Wilmarth be charged with this sum of \$7,500 as a credit upon his mortgage indebtedness. We see no error in the accounting had before the master in the trial court.

The judgment of the appellate court is affirmed.

(117 Ill. 180)

GALLAHER and others v. HERBERT.

(Supreme Court of Illinois. May 15, 1886.)

1. ANNUITY—DISTINGUISHED FROM COVENANT FOR SUPPORT—RESCISSON DENIED.

On a bill to rescind a conveyance made in consideration of a covenant for an annuity, which was recorded, the court distinguishes it from cases of conveyance in consideration of a covenant for support. The annuitant has a lien, which is ample security, and rescission is denied.

2. SAME—LIEN OF ANNUITANT ENFORCED—PURCHASER TAKES SUBJECT TO LIEN OF RECORDED COVENANT.

A purchaser of such premises from the covenantor takes subject to the lien of the recorded covenant, and a decree is ordered subjecting the premises to the lien, and directing a sale in case of a default.

Appeal from La Salle.

SCHOLFIELD, J. This case is quite different in its facts from *Frazier v. Miller*, 16 Ill. 48; *Oard v. Oard*, 59 Ill. 46; and *Jones v. Neely*, 72 Ill. 449,—cited by counsel for appellee. In each of those cases the grantor conveyed in consideration that the grantee undertake to furnish a home for the grantor, and take care of him and support him, during life. The consideration could not be measured by dollars and cents. The personal kindness and numerous delicate attentions demanded by the age and condition of the grantors in those cases, and that they might expect from the affections of the grantees, are not marketable commodities; and it was therefore impossible, by mere money compensations, to make the grantors whole. What they had given their property for they had not received, and they could not receive; and the circumstances justified the conclusion that the grantees, when they obtained the deeds, did not intend to perform the contracts. In this case the grantor contracted for nothing but the payment of money,—\$200 on the first day of March in each and every year, commencing on the first day of March, A. D. 1872, and thereafter, during the natural life of the grantor,—and the release by the grantee of the interest he otherwise would have in the estate of the grantor upon his death as one of his heirs at law. This release was conclusive upon the grantee, (*Kershaw v. Kershaw*, 102 Ill. 307;) and the payment to the grantor of \$200 on the first day of March in each and every year, from the designated period, during his natural life, would give him all that he bargained for, and ever expected to receive. As to the payments now overdue, interest will, in legal contemplation, compensate for their non-payment.

In the construction of deeds, courts will always incline to interpret the language as a covenant, rather than as a condition. *Board Ed.*,

*etc., v. Trustees, etc.*, 63 Ill. 204. There is nothing in the form of the language here employed to indicate that it was intended the conveyance was upon a condition subsequent. The words "upon condition" do not occur, and there are no other words of equivalent meaning. There is no clause providing that the grantor shall re-enter, in any event; and these are the usual indications of an intent to create a condition subsequent. Shep. Touch. (6th Ed.) 118. The rule is a court of equity will never lend its aid to divest an estate for a breach of a condition subsequent. 4 Kent, Comm. (8th Ed.) 134, \*130. But where a compensation can be made in money, courts of equity will relieve against such forfeitures, and compel the party to accept a reasonable compensation in money. 2 Story, Eq. Jur. § 1315 *et seq.* The language here is reasonably susceptible of the construction that the parties only intended to secure the payment of the \$200 during the life-time of the grantor, and it is clear that much was intended. That was the only pecuniary interest the grantor had in the question of whether the land should be alienated or not during his life-time. If alienated, the grantee might not be able to pay the \$200 per annum; but, if it could not be alienated during his life-time, it was ample security for the payment of the \$200. The duty to pay the \$200 and the inability to alienate go together. It accomplishes the same result, does injustice to no one, and is more in harmony with the general rules governing the alienation of real property to hold that the grantor here retained a lien on this land for the payment of the \$200 annually, on the first day of March, during his life-time. The appellants took whatever rights they may have, with notice by the record of the deed of all its reservations in favor of the appellee, (*Willis v. Gay*, 48 Tex. 463; S. C. 26 Amer. Rep. 328;) and so theirs are subordinate to his.

There is no proof of mental weakness in appellee; that he was overreached in any way, or unduly persuaded to execute the deed. From his own testimony the grantee did not solicit the making of the deed, dictate its provisions, or to the slightest extent control or influence the transaction by word or deed. It is of appellee's own invention, as he says, just as he intended it to be, and the wrong of the grantee is in not doing what he obligated himself to do by accepting the deed.

The decree below is reversed, and the cause remanded, with directions to that court to enter a decree in favor of appellee against the land in controversy for the several unpaid annual installments of \$200 each, with interest thereon from the time they were severally due, at the rate of 6 per cent. per annum, and that the payment of \$200 hereafter, annually, on the first day of March, during the life of appellee, be a lien on said land; and that, in default of payment of such sums, the master in chancery proceed to make sale of the land; and that all interests and claims of appellants in said lands are junior and subordinate to the lien of appellee.

(117 Ill. 67)

## WETHERBEE and others v. FITCH.

(Supreme Court of Illinois. May 15, 1886.)

## 1. ASSIGNMENT—CHOSE IN ACTION—TRANSFER OF, BY DEBTOR FOR BENEFIT OF CREDITOR.

A debtor holding a claim against a third person may deliver it into the hands of his creditors, and authorize suit to be brought upon it in his own name for the benefit of such creditor.

## 2. ATTORNEY AND COUNSELOR—SPECIAL AUTHORITY NECESSARY TO COMPROMISE SUIT—UNAUTHORIZED SETTLEMENT VALID BY RATIFICATION.

While an attorney must have a special authority in order to compromise a suit, yet an unauthorized settlement by an attorney will become valid upon ratification; and such ratification may be inferred from knowledge, acquiescence, and acceptance of the benefits.

## 3. MORTGAGE—FORECLOSURE—DEFICIENCY DECREE—RATE OF INTEREST—DISCREPANCIES NOT REVIEWED.

The supreme court will not review an alleged discrepancy between the amount of the original indebtedness, and the amount of the judgment upon which a deficiency decree is founded, nor reverse the decree because it follows the former, and not the latter, nor because it allows 10 per cent. interest, (in 1876,) instead of 6.

## 4. SAME—REDEMPTION—TRUSTEE CANNOT REDEEM AGAINST CESTUI.

While a trustee cannot redeem against a *cestui que trust*, the court holds that the relations set out at length in the opinion do not in any manner make the appellee a trustee for the appellant.

Appeal from superior court, Cook county.

Geo. W. Smith and F. S. Winston, for appellants.

H. S. & F. S. Osborne, for appellee.

MAGRUDER, J. This case has already been decided by us, as may be seen by reference to *Fitch v. Wetherbee*, 110 Ill. 475. It is unnecessary to repeat here the facts stated in the opinion rendered on a former hearing. After the cause had been remanded for further proceedings to the superior court of Cook county, appellants, by leave of that court, filed an amended petition, in which it is charged that the judgment under which the redemption took place was obtained by fraud, and that the facts constituting such fraud did not come to the knowledge of appellants until after the first decision of the case in this court at the January term, 1884. The judgment under which appellee redeemed the tract of land named in the original petition, to-wit, the N. W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  section 1, township 39 N., range 14 E. of third P. M., in Cook county, from the foreclosure sale at which the same had been bought by appellants, was rendered on the sixth day of October, A. D. 1880, by the circuit court of the United States for the Northern district of Illinois, in favor of appellee, and against the Cook County Land Company, for the sum of \$4,908.69, with legal interest from its date. It was not a judgment at law, but a deficiency decree in a foreclosure proceeding. It will be necessary to state the facts leading up to its rendition in order to understand the grounds upon which it is alleged to be fraudulent, as against appellants.

In September, 1868, Charles A. Gregory and one Allen claimed to own a part of a lot fronting  $17\frac{1}{2}$  feet on Madison street, in Chicago.

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Gregory afterwards bought out Allen's interest. In September, 1868, the common council of Chicago passed an ordinance for opening or extending Franklin street from Madison street south to Adams street. The required width of this extension necessitated the condemnation, by the city, of the 17½ feet in question. Proceedings were instituted by the city, under the laws then in force, for the purpose of acquiring the fee to these 17½ feet. The assessment roll returned by the commissioners of the board of public works was confirmed by the council on September 20, 1869. The net damages assessed by the commissioners for the value of the 17½ feet were \$8,589.94, and for the value of the buildings thereon \$4,075.10, making a total of \$12,664.94. In March, 1872, the city gave notice that it was ready to pay the \$8,589.94 to the owners of the property, and in July, 1872, took possession of the 17½ feet for a public street, and has since continued in such possession. The city never took possession of the buildings, which were destroyed in the great fire of October 9, 1871. From some time in 1871 down to the spring of 1880, a controversy existed between Gregory and his grantees, on the one side, and the city of Chicago, which claimed under its condemnation proceedings, on the other side, as to the ownership of the 17½ feet. The proof shows that in July, 1871, Gregory tried to get the city officials to pay him the condemnation money, and they were willing to do so upon his procuring a quitclaim from Allen, and giving the city a warranty deed, which, however, he declined to do. On September 3, 1872, Gregory borrowed \$15,000 of appellee, giving his note of that date for the amount, payable five years after date, with interest at the rate of 10 per cent. per annum, payable semi-annually, and to secure this note executed to appellee a mortgage upon the 17½ feet, providing that, upon default in payment of interest, the principal might be declared due, which mortgage was recorded September 5, 1872. On November 29, 1872, he conveyed the 17½ feet to the Cook County Land Company, subject to the Fitch mortgage, which the land company assumed and agreed to pay.

On November 10, 1873, the Cook County Land Company, Gregory acting as its attorney, commenced an ejectment suit in the superior court of Cook county against the city of Chicago to recover possession of the 17½ feet, formerly on Madison street, then a part of Franklin street. This case was tried in the fall of 1876, and a judgment rendered therein on November 4, 1876, in favor of the land company and against the city. On May 8, 1876, in an action brought in the United States court on the note for \$15,000, appellee had obtained judgment against Gregory for \$15,907, and costs. On November 13, 1876, appellee, by his solicitors, H. S. & F. S. Osborne, filed a bill in the United States circuit court against Charles A. Gregory, the Cook County Land Company, the city of Chicago, and others, to foreclose the mortgage for \$15,000, which bill, as originally filed and as amended, set up the judgment recovered on the note, the conveyance by Gregory to the land company, the assumption by the latter of appellee's debt, the condemnation proceedings by the city, etc.; and alleged that Gregory had had no title to the 17½ feet when

he borrowed the \$15,000, but had fraudulently represented his title to be good, in order to get the money, and that appellee had demanded the condemnation money of the city, but that the city had refused to deliver it. The bill prayed that, if any title passed to appellee by the mortgage, the 17½ feet might be sold to pay it, but that, if no title passed, the condemnation fund due from the city might be charged with the payment of appellee's mortgage. Answers were put in by the city, by the land company, and by Gregory.

On July 28, 1877, the city paid the costs in the ejectment suit, and took a new trial under the statute. About this time, Gregory, who was not only the attorney of the land company in the suit at law, and its solicitor in the foreclosure proceeding, but was also its president, authorized Messrs. H. S. & F. S. Osborne to prosecute the ejectment suit, to "see what there was in it for Dr. Fitch." They were engaged in negotiations with the city from time to time, in reference to the payment of the condemnation money, the city refusing to pay interest, or the damages awarded for the buildings, and they claiming both. On April 23, 1879, Gregory withdrew his appearance as attorney for the land company, the plaintiff in the ejectment suit; and Messrs. H. S. & F. S. Osborne entered their appearance, as attorneys for such plaintiff, by a written stipulation filed in the case, and signed by themselves, and by Gregory, and by the attorney for the city. On the same day, the second trial of the suit took place, without a jury, before one of the judges of the superior court, who held the case under advisement until July 12, 1879, and then found the issues in favor of the city, deciding the title to be in the latter. Before judgment was entered upon the finding of the court, a motion for new trial was made by the land company, and the case stood on such motion until the settlement hereinafter mentioned. On April 12, 1880, the land company withdrew its motion for new trial, and judgment was rendered in favor of the city, in accordance with the previous finding of the court. The judgment was so entered in pursuance of a written stipulation, signed by H. S. & F. S. Osborne, as plaintiffs' attorneys, dated April 7, 1880, and filed in the case on April 12, 1880. On April 7, 1880, a written stipulation entitled in the foreclosure suit was entered into between H. S. & F. S. Osborne, as solicitors for Fitch, and the solicitor for the city, by the terms of which the city admitted that the whole amount of the condemnation money, to-wit, \$12,664.94, with interest from August 1, 1872, was due from the city "to whomsoever may appear entitled to receive the same." The latter stipulation was filed in the United States court, in the foreclosure suit, on May 3, 1880. In other words, Messrs. H. S. & F. S. Osborne settled the ejectment suit by suffering judgment to go in favor of the city, and, in consideration thereof, received an agreement from the city to pay the amount of money and interest which they had been claiming.

The objection made by appellants to this settlement grows out of the apparently inconsistent position occupied by the Messrs. Osborne, as solicitors for appellee *against* the land company in the foreclosure suit, and

as attorney for the land company in the ejectment suit. When, however, all the circumstances of the case are taken into consideration, it does not appear that any fraud was committed, or that any wrong was intended. Gregory owed appellee \$15,000, and interest from September 3, 1872,—an honest debt, due for borrowed money. To secure it he had given a mortgage upon a clouded title,—upon 17½ feet of ground of which the city of Chicago claimed to be the owner. It is not necessary to determine whether such claim was valid or not. If it had been successfully maintained after a contest, the city's title would have been superior to the title under the mortgage, and appellee would have had no security for his debt, except such unpaid purchase money as he might obtain from the city. Gregory had conveyed his equity of redemption to the Cook County Land Company; and, as a part of the consideration for such conveyance, that company had assumed and agreed to pay appellee's mortgage debt. Gregory was a bankrupt. The Cook County Land Company had no money. Under these circumstances, Gregory requested Fitch's attorneys to take hold of the pending ejectment suit, brought to recover the title to the same property which had been mortgaged to their client, and to do so for the express purpose of making what they could out of it, towards the payment of appellee's mortgage. Gregory had authority to employ the Osbornes to appear for the land company in the suit at law. For a number of years he had acted as its attorney and solicitor in litigation pending in the federal and state courts. He was the originator and founder of the company. He was its president and authorized representative before the public. By the terms of the by-laws it was "the duty of the president to exercise a general supervision over the entire business of the company,—all the property of the company shall be under his control." A debtor holding a claim against a third person may deliver it into the hands of his creditors, and authorize suit to be brought upon it in his own name for the benefit of such creditor. Such, and such only, was the real purport of the employment of appellee's attorneys in this matter.

It is said, however, that the Osbornes had no power to settle the ejectment suit in the manner already stated, even though they may have been properly empowered to act in it as the plaintiff's counsel. It is undoubtedly the law that authority to prosecute a suit does not involve authority to compromise it. Before an attorney can compromise a suit he must have special authority for that purpose. *People v. Lamborn*, 1 Scam. 123; *Nolan v. Jackson*, 16 Ill. 272; *Jennings v. McConnell*, 17 Ill. 148; *Trumbull v. Nicholson*, 27 Ill. 148; *Melvine v. Lamar Ins. Co.*, 80 Ill. 446. But in this case it is a fair conclusion from all the evidence that the company and its officers authorized the settlement, as made, and ratified it after it was made. For several years the Osbornes were negotiating with the city, with a view of getting payment for the value of the buildings, as well as the value of the land taken, and also with a view of getting interest upon the whole amount to be paid. These negotiations were well known to Gregory, the president, and Watriss, the secretary of the company. They had conversations about them with the



Osbornes, and were kept advised about them during their progress. They made no objections to taking money, instead of land. What they were "solicitous" about was to have the city pay the whole amount of the condemnation money, and interest, instead of a part of such money without interest. After the settlement was made they knew that judgment in the ejectment suit had been rendered in favor of the city, and that the condemnation money was to go to appellee. They may not have known the details of the settlement. They may not have seen the written stipulation in which the Osbornes withdrew the motion for a new trial, and conceded the title to the city. But they must have known that all this was involved in the payment of the condemnation money by the city. The acceptance of such money by the land company and its mortgagee estopped them from thereafter attacking the title of the city. To take the fund and continue the fight for the land would not have been honest. Therefore the knowledge that the city had paid the money necessarily implied the further knowledge that the city had obtained the title for which such payment was made. That the president of the company ratified and approved of the settlement will fully appear when we come to consider the agreed statement of facts filed in the foreclosure suit.

We have thus dwelt upon the manner in which the ejectment suit was disposed of, because it has a bearing upon what afterwards took place in the foreclosure suit. The latter was brought to a hearing, and final decree was entered therein by the United States court on October 6, 1880. The evidence was presented to the court in the form of an agreed statement of facts reduced to writing, and signed by Gregory, for himself and as solicitor of the Cook County Land Company, and by H. S. & F. S. Osborne as solicitors for Fitch. This statement sets forth the execution of the note and mortgage for \$15,000; the condemnation proceedings, and amount of damages therein awarded; the conveyance by Gregory to the land company, and its assumption of the mortgage debt, and agreement to pay it; the judgment for \$15,907 against Gregory; the agreement of the city that there is due from it to the person entitled thereto, for condemnation money, \$12,664.94, with interest from August 1, 1872; and the bankruptcy of Gregory, and his discharge therefrom. The statement also sets forth that "the ejectment suit is now in judgment in favor of the city, \* \* \* and the title to the land is now, by such judgment, vested in the city, leaving in its place the condemnation money in the hands of the city treasurer." Gregory, to whom this statement was submitted before July 26, 1880, was thereby informed of the judgment, and of the city's title to the property. That judgment, entered on April 12, 1880, refers to the stipulation of April 7, 1880, withdrawing the motion for a new trial, and consenting to the entry of judgment for the city. The statement also refers to the other stipulation of April 7, 1880, between the Osbornes and the counsel for the city as to the amount to be paid by the city, in these words: "By stipulation on the part of the city on file in this cause." This goes to show that there was no concealment of the stipulations, and that the at-

tention of the president of the company was expressly called to them. The agreed statement of facts also contains these words:

"Nothing herein contained is intended to operate to deprive the complainant of any \* \* \* right he may have to the condemnation money, \* \* \* and no facts are insisted upon by this defendant which would deprive him of such money."

Thus the president of the company not only knew that the city had the title, and was ready to pay the condemnation money, but he was willing to have that money applied to the payment of appellee's debts.

After the hearing of the foreclosure suit upon the pleadings and agreed statement of facts, the judge of the federal court took the case under advisement, and finally entered a decree as of October 6, 1880. This decree found that there was due to appellee, upon his mortgage debt, \$23,789.98 from the land company; that there was due from the city \$18,881.29, as condemnation money, and that the amount so due should be paid to appellee, upon his mortgage debt, "as the proceeds of said mortgaged premises, and interest thereon;" that the difference between the two sums, to-wit, \$4,908.69, being the deficiency or balance due appellee over and above the amount coming from the city, should be paid to the appellee by the land company; and that execution should issue therefor. This deficiency decree, under which the redemption complained of took place, is alleged to be fraudulent for the reason that the 17½ feet of ground were worth \$35,000 in April, 1880; and if the title thereto, instead of being yielded to the city, had been recovered for the land company in the ejectment suit, the mortgage of appellee would have been paid in full, and no deficiency would have existed. It is true that, if a judgment be entered where no indebtedness actually exists, such judgment cannot be used for the purpose of effecting a redemption. *Martin v. Judd*, 60 Ill. 78; *Arnold v. Gifford*, 62 Ill. 249. But we have already seen that the settlement of the ejectment suit was duly authorized, and fairly and properly made. This being so, and the amount realized from such settlement being insufficient, by the sum of \$4,908.69, to pay off the full amount due on the mortgage, it follows that the deficiency decree, in this case, does represent an actual existing indebtedness.

It is said that the deficiency was made larger than it ought to have been, because the decree was rendered for the amount of the original indebtedness, and 10 per cent. interest thereon, whereas it should have been rendered for \$15,937.16, the amount of the judgment rendered against Gregory on May 8, 1876, and 6 per cent. interest thereon. This is a matter which was fairly submitted to the court which rendered the decree. That court had jurisdiction over the subject-matter and the parties, and we have no power to review its action.

The deficiency decree is alleged to be fraudulent, as having been obtained by collusion between the solicitors of appellee and the solicitor of the land company. The only ground for this charge is the fact that the cause was submitted for hearing upon an agreed statement of facts, and not upon proofs taken. If the material facts in a case are undisputed,

and the counsel on both sides stipulate as to what those facts are, and submit the question involved for the decision of the court upon such stipulation, it does not necessarily follow that there has been a fraudulent collusion. In this case all the facts set up in the agreed statement are true; nor is it claimed that any of them are untrue. But, in addition to this, the statement shows on its face that the solicitor of the land company did not consent to a deficiency decree, but was opposed to it. After referring to the prayer of the bill for a deficiency judgment, he inserted in the statement, in his own handwriting, the following words: "And the right to resist such judgment upon all legal and equitable defenses is hereby reserved to the said Cook County Land Company." We fail to see that any trust relation existed between appellee and appellants which made it inequitable for appellee to redeem under his deficiency decree. Appellants were purchasers of certain property belonging to the Cook County Land Company at a sale under a decree rendered in a certain foreclosure proceeding instituted against that company. That sale, as we have decided, was subject to redemption, under the statute, by the land company, during twelve months after it was made, and by judgment creditors of the land company during the three months after the expiration of the twelve months. Appellee was such a judgment creditor as is contemplated by the statute. He exercised his statutory right, and effected a redemption, and obtained a deed from the marshal, in pursuance thereof. We see no reason to change our former decision.

The judgment of the superior court is therefore affirmed.

(117 Ill. 123)

WALLAHAN and others v. INGERSOLL.

(*Supreme Court of Illinois*. May 15, 1886.)

1. **TAXATION—TAX TITLE — REDEMPTION NOTICE — AFFIDAVIT OF, MUST STATE FACTS.**  
It is essential to the validity of a tax title that the affidavit of proper notice for redemption should state the particular facts relied on as showing a compliance with sections 216, 217, of the revenue act. 2 *Starr & O. St. c. 120*, pars. 218, 219.
2. **ESCHEAT—TITLE OF STATE MUST BE JUDICIALLY DETERMINED—STATUTE REGULATING PROCEEDINGS MUST BE OBEYED.**  
It is essential to the establishment of title by escheat in the state that the title be judicially ascertained by proceedings complying with the statute thereon. The statute of 1845 (*Rev. St. 1845, c. 38, p. 225*) required, among other things, (1) the filing of an information by the attorney general or circuit attorney, alleging *the names of terre-tenants, and persons claiming the estate*; (2) the issuance and service upon such terre-tenants of a *scire facias*; and where there is no such allegation, and there is service upon but one of the parties named as occupants, the proceedings are fatally defective in both respects.
3. **WRIT AND PROCESS—"NAME OF PEOPLE"—OMISSION OF "NAME OF PEOPLE" FATAL—CONSTITUTIONAL REQUIREMENT.**  
It is an imperative requirement of the constitution (*Const. 1870, art. 6, § 83; Const. 1848, art. 5, § 27*;) that process of the courts shall run in the name of the people. A writ which omits this requirement is fatally defective.

Appeal from Woodford.

*Hopkins & Hammond*, for appellants.  
*C. H. Chitty*, for appellee.

MULKEY, C. J. On the fourth of November, 1884, Eva Ingersoll commenced an action of ejectment in the Woodford circuit court, against Elizabeth Wallahan and others, for the recovery of E.  $\frac{1}{4}$  N. E.  $\frac{1}{4}$  section 15, and the N. E.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  section 29, township 27 N., range 2 W. The cause was subsequently tried upon the merits, resulting in a judgment for the plaintiff, to reverse which this appeal is brought. That the plaintiff established a *prima facie* right of recovery in the first instance is not seriously controverted. The questions, therefore, to be determined, relate to the sufficiency of the defense to overcome the *prima facie* case made by the plaintiff. The defendants sought to establish on the trial an outstanding title in the state, by escheat, to the whole of the property, and a valid tax title as to the 80-acre tract in Mrs. Wallahan, founded upon a tax sale in 1881, for the taxes of 1880 and prior years.

Not stopping to remark upon the inconsistency of these defenses, the latter may be disposed of in a few words. The affidavit upon which the tax deed was issued, is wholly insufficient. It does not state the particular facts relied on as showing a compliance with the requirements of sections 216 and 217 of the revenue act, as amended by the act of 1879. Indeed, there is no attempt to do so. Such being the case, there was no authority in the county clerk to issue the tax deed, and it is consequently void. *Price v. England*, 109 Ill. 394. Having reached this conclusion, it is unnecessary to notice the other objections urged against the tax proceeding.

The evidence relied on to establish title in the state is anything but satisfactory. It consists mainly of certain papers found in the office of the clerk of the circuit court of Woodford county, and though none of them, except perhaps one, bear the file-mark of the clerk, yet, all the circumstances considered, we think it sufficiently appears that they constitute the files of an escheat proceeding, commenced, in the name of the people, in 1849, for the purpose of establishing title in the state, by escheat, to the land in controversy. Before calling attention to the statutory provisions on the subject with a view of determining whether they were complied with in that particular case, it is perhaps proper to call attention to the general common-law principles relating to the subject of escheats. When the owner of real property dies intestate without heirs capable of inheriting it, the title thereof devolves, by operation of law, upon the state. Yet, when thus acquired, the state cannot make its title available without first establishing it in the manner prescribed by law. This is done by the institution of a purchase proceeding in the proper court, in the name of the people, for the purpose of proving and establishing by a judicial determination title in the state. The facts essential to the existence of the state's title are specifically set forth in the statute, and must be clearly proven on the hearing. The proceeding is in the nature of an inquest of office, and the record of it is the only competent evidence by which a title by escheat may be established. *Dem*

v. *O'Hanlon*, 21 N. J. Law, 582; *Crane v. Reeder*, 21 Mich. 28; *Com. v. Hite*, 6 Leigh, 588; *Perple v. Cutting*, 8 Johns. 1.

The proceeding, the record of which is relied on as showing title in this case, was had under the act of 1845 entitled "Escheats," (see Rev. St. 1845, p. 225,) which is in most respects like the present act; the material difference being that estates now escheat to the county in which the property, or the greater portion of it, is situated, instead of to the state. By the second section of the act of 1845 it is made the duty of the attorney general, or the circuit attorney of the proper county, when he is informed, or has reason to believe, that any real estate within his district has escheated to the state, to file an information in the circuit court of the county in which such estate is situated, "setting forth a description of the estate, the name of the person last lawfully seized, the names of the terre-tenants, and persons claiming such estate, if known, and the facts and circumstances in consequence of which such estate is claimed to have escheated, and alleging that by reason thereof the state of Illinois hath right by law to such estate." Upon the filing of such information it is made the duty of the court to award and issue a *scire facias* against such person or persons, bodies politic or corporate, *as shall be alleged in such information* to hold, possess, or claim such estate; requiring them to appear and show cause why such estate should not be vested in the state, etc. It is also made the duty of the court to make an order setting forth briefly the contents of the information, and requiring all persons interested in the estate to appear and show cause, if any they have, at the next term of the court, why the same should not be vested in the state. This order is required to be published for six weeks successively in some newspaper in or nearest to the county in which such proceeding is had; the last insertion to be at least two weeks before the commencement of the term at which the parties are required to appear. Such are the plain and express provisions of the statute with respect to the preliminary steps to be taken before there can be any valid adjudication in an escheat proceeding. In this, as in all other judicial proceedings, it is essential to the validity of the adjudication, and final decision therein, that the court rendering it shall have jurisdiction of the subject-matter of the suit, as well as of the persons to be affected by it. General power over the subject-matter, in cases of this kind, is of course given by the statute. Nevertheless the court must be put in motion by the filing of an information which conforms substantially to the requirements of the act governing the proceeding, otherwise jurisdiction as to the subject-matter will not attach.

Although quite a number of exceptions are taken to the information, we are of opinion that, with one exception, they are not well founded. The only substantial objection to it is that it fails to name, as defendants, the occupants or terre-tenants of the land, although it affirmatively appears from other parts of the record that two persons, namely, one Painter and Abram Dressler, were in possession of the land at the time the information was filed. By a so-called *scire facias* some one not named—presumably the officer to whom it might happen to be de-

livered—is commanded to summon these parties, and there is a return by the sheriff of the county showing service on Painter, but no return as to Dressler. The importance of the information setting forth the names of all persons in possession or claiming an interest in the premises, is shown by the fact that the *scire facias* is required to issue only against such “as shall be alleged, in such information, to hold, possess, or claim such estate.” The issuing of the *scire facias* against, or service of it upon, any others, would manifestly be a superfluous, idle act, and available for no purpose whatever. It would be just like any other case of serving one with process who is not made a party to the suit. Had no one been in possession or claimed an interest in the land, the information should simply have stated that fact. In that case, the issuing of a *scire facias* would not have been proper, for the reason there would have been no one to issue it against. For the reasons already stated, and others yet to be mentioned, we are of opinion the court failed to obtain jurisdiction over the persons of any one claiming adversely to the state.

The persons to be affected by the adjudication were of two classes: (1) Those in possession of the premises, and such as were known to claim an interest therein; (2) all other persons not embraced in the first class. As to the first class, the statute requires, as we have just seen, their names to be set forth in the information, and a *scire facias* is to be issued against and personally served upon them. As to the second class, or persons generally, jurisdiction can only be obtained by means of constructive service, as provided in the second section of the act, which, it will be remembered, is obtained by the court's making an order, setting forth the contents of the information, and requiring persons interested in the estate to appear, etc., and causing such order to be published six weeks successively in the proper newspaper; the last insertion to be at least two weeks before the commencement of the term at which the parties are required to appear. We are clearly of opinion the service is fatally defective as to both classes provided for in the statute.

As to the so-called personal services, there are several fatal objections to that: (1) There was no authority to issue the writ at all, because no one is “alleged in the information to hold, possess, or claim the estate.” (2) Assuming the writ might properly have issued against the occupants of the land in the absence of such a charge in the information, then the service was not good, because the return shows there was service upon but one of the occupants, and no return as to the other. As well might a court proceed in a partition case, where there is service on a part of the defendants only, with the hope of making a valid partition, as for it to have proceeded in that case where only a part of the terre-tenants had been personally served. (3) Outside of all these objections, the *scire facias* was and is absolutely void upon its face, because it does not run in the name of the people. There are other minor objections to it which we will not stop to notice.

The constructive service relied on is equally bad, waiving all objections to the form of the order. The grantee's certificate, which is offered

in evidence in this cause, shows upon its face that the last insertion of the order in the newspaper was less than two weeks before the commencement of the term at which the parties were required to appear. This objection is fatal to the notice, notwithstanding the recital in the record to the effect that notice was properly given.

No question of innocent purchaser for value is involved in this case; hence those decisions sustaining titles in the interest of innocent purchasers upon such recitals have no application. The question here is whether one having no title can avail himself of such a recital to show an outstanding title in a stranger for the purpose of defeating a plaintiff's action who otherwise appears to have a good title, when, as is the case here, it is clear from the proof of notice itself, which is a part of the same record, that the recital is untrue. In such case we have no hesitation in holding the recital as not available for such a purpose.

As we regard the jurisdiction of the court fatally defective in the escheat proceeding on the grounds stated, it follows the judgment and orders in the case were without authority of law, and consequently afford no defense to the present action. Having reached this conclusion, it is not necessary to discuss the other objections taken to the proceedings in that case. Judgment affirmed.

(117 Ill. 223)

VILLAGE OF HYDE PARK v. WASHINGTON ICE CO.

(*Supreme Court of Illinois*. May 15, 1886.)

1. MUNICIPAL CORPORATIONS—SPECIAL ASSESSMENT—BENEFITS—INSTRUCTION AS TO DAMAGES.

An instruction directing the jury to ascertain the depreciation in value, if any, caused to certain property by a certain improvement, implies a calculation both of damages and benefits, and is not faulty as excluding benefits from the consideration of the jury.

2. SAME—BENEFITS—DERIVABLE ONLY AT EXPENSE EQUALING VALUE.

Where the evidence shows that property might derive a benefit from an improvement if a sum greater than its entire value were expended upon it in putting it into a condition to receive such benefit, a failure to instruct the jury to deduct the benefits to such property from the damages is not clearly erroneous.

Appeal from county court, Cook county.

*Geo. Willard and Henry V. Freeman*, for appellant.

*Frederick Ullmann*, for appellee.

MAGRUDER, J. This was a proceeding by appellant to condemn certain land of appellee and others for the opening and extension of One Hundredth street, in the village of Hyde Park. Appellee filed its cross-petition, setting forth that the proposed improvement would damage certain of its lands not taken, and praying that such damages might be assessed, etc. There is no dispute, and can be none, under the stipulation in the record, in relation to the damages awarded for the land actually taken. The sole contention is as to the damages to the lands not taken. The only error insisted upon by appellant is the giving of appellee's second instruction, which is as follows:

"(2) The jury are instructed that they are to ascertain from the evidence, after their own view of the property, the fair market value of the property sought to be taken, and also the damages, if any have been proven, to the property from which the strip is to be taken. And if the jury believe from the evidence that the property occupied by the ice company, in its present condition, has a special capacity, as an entirety, for the purpose of ice freezing, cutting, and transporting, and, as an entirety, is devoted to such purposes, and that the value of such tract will be depreciated and lessened by the taking of the strip in question, then the owners of the property are entitled to recover a sum equal to such depreciation in value."

The second sentence of this instruction, which is the only part of it that is objected to, is an almost literal copy of the language of an instruction which was approved of by this court in *Chicago & E. R. Co. v. Dreed*, 110 Ill. 89. We do not think that the instruction is improper when considered in reference to its particular application to the facts of the case at bar. The objection urged against it is that it ignores and excludes from consideration the evidence which tended to prove that the opening of the proposed street would benefit the property for use for dockage and manufacturing purposes. The property in question consists of about 64 acres in South Chicago, bounded on the west by the Pittsburgh & Fort Wayne Railroad, on the east by the Calumet river, on the south by the lands of the South Chicago Dock Company, and on the north by certain forge works. In 1878, appellee constructed an ice-pond upon the tract, which was a mere marsh. Large embankments, 80 feet wide, were thrown up around some 35 or 40 acres of the tract on the north, east, and south sides; the railroad embankment protecting it on the west side. The inclosure was dredged and thoroughly improved, and water pumped in from the river. A large ice-house was built, and some \$70,000 expended in fitting and preparing the pond for the business of freezing, cutting, and transporting ice. The property has been used for the carrying on of such business since 1878 or 1879. Since that time it has increased in value. Docks, manufactories, and lumber yards have been built and located around it since the ice business was started there. The chief advantages of the locality for the purposes of making ice are the facts of the river on one side, where water can be obtained, and the railroad on the other, so that easy transportation can be procured. The proposed street, 80 feet wide, will run through appellee's ice-pond from east to west, splitting it into two parts. The part south of the street, and between the street and the property of the dock company, will be a strip 118 feet wide, and 1,825 feet long, and will be practically useless for almost any purpose. The only ground upon which it is claimed that the opening of the street would benefit the property is the fact that it would thereby be more accessible when used for dockage or manufacturing purposes. The evidence, however, shows that the tract is only worth from \$3,000 to \$3,500 per acre, and that it will cost \$4,000 per acre to fill it up, and that it cannot be used for dockage or manufacturing purposes until it is filled up. The opening of the street will confer no benefit upon the property, situated as it is. Two hundred and forty-six thousand dollars will have to be expended upon the 64;



acres in order to get it into such shape that the benefits can be made available. Under this view of the testimony, it is questionable whether an instruction which had called the attention of the jury to the subject of benefits to be derived from the proposed improvement would have been based on the evidence. The question of damages is to be determined with reference to special benefits to the property not taken. *Village of Hyde Park v. Dunham*, 85 Ill. 569. Any mere general and public benefit, or increase of value, received by the land in common with other lands in the neighborhood, is not to be taken into consideration in estimating compensation. *Page v. Chicago, M. & St. P. Ry. Co.*, 70 Ill. 324.

But, even if there was evidence which tended to show a special benefit to the property not taken, the instruction here under discussion, when taken in connection with the other instructions given for appellee, did not necessarily exclude the consideration of such benefit. The jury were asked to inquire whether the opening of the street would depreciate the value of the property not taken. If the jury had found that there was no depreciation, they may have reached that conclusion because the benefits equaled or exceeded the depreciation. If they found that the property was depreciated, they may have reached that conclusion because the benefits derived were less than the depreciation produced. Either finding involved a consideration of benefits.

It is to be noted that the appellant asked no instructions whatever of the trial court. Consequently none were given for it; nor can it complain of the refusal of any. If counsel for appellant had desired that the attention of the jury should be directed to a particular theory of the case, they should have asked an instruction embodying that theory.

The judgment of the county court is affirmed.

(117 Ill. 118)

**CORCORAN v. WHITE and others.**

(*Supreme Court of Illinois*. May 15, 1886.)

1. **CONTRACT—OFFER AND ACCEPTANCE—NEGOTIATIONS HELD NOT A CONTRACT.**  
A meeting of minds is necessary to a contract. Where an acceptance of an offer is relied on, the acceptance must be unconditional.<sup>1</sup>
2. **VENDOR AND VENDEE—CONTRACT—OFFER—ACCEPTANCE.**  
On an offer to sell realty for cash, an acceptance, "provided the title is perfect," with no payment or tender of the cash, will not make a contract.

Appeal from Cook.

*B. M. Shoffner*, for appellant.

*Daniel L. Shorey*, for appellee.

**SHELDON, J.** This was a bill in equity, filed by Theresa R. Corcoran against Nathan S. White and others, to compel the specific performance of an alleged agreement to sell to the complainant subplot 2 of lot 1, in block 3, of the original town of Chicago. On final hearing, upon bill,

<sup>1</sup> See note at end of case.

answers, replications, and proofs adduced, the bill was dismissed, and the complainant appealed to this court.

The facts relied upon as establishing a case for the complainant are as follows: The lot in question belonged to Christine Cardell, of West Virginia, deceased, who died, leaving four children surviving her, and a will which contained this provision:

"(5) I give and devise all my real estate, to be sold by my executor, and do hereby authorize him to do so as soon as it can be done without prejudice to my children, and after first consulting them about the sale; and after deducting from the sale of my Chicago lot the legacies herein given for the benefit of my grandson and granddaughter, and also the other legacy herein given, I give and bequeath all the rest and residue of the sales of my real estate, and all other property, to my four children."

Nathan S. White was appointed executor. On July 3, 1880, Thomas Lyman, who was authorized by the will to lease the property until it was sold, and the heirs at law of the testatrix, executed a lease of the premises to one Samuel Thomas from August 1, 1880, to August 1, 1885, which was subsequently, February 3, 1883, assigned to Michael J. Corcoran, the husband of appellant. At the time of the assignment there was a one-story and basement brick building, valued at \$4,000, standing on the premises, which building appellant had purchased. After this assignment, improvements, amounting to \$600, were made on the building by appellant. About March 19, 1883, appellant, desiring to purchase the ground, caused her attorney, James H. Ward, to write letters to White, the executor, and to some of his heirs at law, asking whether the premises were for sale. The following answer was received from White:

"CHARLESTON, W. VA., March 24, 1883.

"J. H. Ward, Esq.—DEAR SIR: In response to your letter of the 19th, addressed to Dr. Cordell, of Baltimore, and forwarded to me by him, I would state that, as the personal representative of the estate of Mr. Cordell, I have authorized Thomas Lyman, of your city, to sell the property you refer to, and will be glad to have you call on him, at 101 Washington street, your city. I will write to Mr. Lyman at once, and inform him of your wishes.

"Very respectfully,

N. S. WHITE."

Ward called upon Lyman, learned from him the property was for sale, and afterwards, about April 13, 1883, received the following postal card from Lyman:

"APRIL 13, 1883.

"DEAR SIR: I can sell the lot you wanted, at \$7,000. Please let me know at once what your parties say.

"Yours,

T. LYMAN."

April 14, 1883, Ward wrote the following:

"APRIL 14, 1883.

"Thomas Lyman, Esq., 101 Washington Street, City—DEAR SIR: Yours of the thirteenth inst. at hand, and, replying to the same, will say that my client will accept your proposition for the premises 15 North Clark street, and will pay \$7,000 for the same, provided the title is perfect. I will call at your office again on Monday, at 10 o'clock, at which time I can get the abstract

and have it examined. I called to-day with my client, but you had left your office.

"Respectfully,

JAMES H. WARD."

Mr. Ward testifies that they called on Lyman, Monday; told him they would call the next day, as Mr. Corcoran was unable to call that day; that he and Mr. Corcoran went and saw Lyman, and he said the property was not for sale; that they asked for the abstract, and were ready to make a deposit on the property, but they were informed by Lyman the property was not for sale at that price. Sometime in May, 1883, Ward again called on Lyman, when the latter informed him that the premises could be purchased for \$8,000. Appellant agreed to pay the additional \$1,000. Lyman stated he was going east. On his return he executed and delivered the following:

"JULY 18, 1883.

"Received of James A. Ward, attorney for Theresa R. Corcoran, his check for \$500, as deposit on account of proposed purchase of sub-lot 2, in lot 1, in block 8, in original town of Chicago; said sum of \$500, when paid, to apply on said purchase of said lot, at \$8,000 cash, or to be returned to him in case said sale cannot be perfected, say within sixty days from this date, or in case the title should prove defective; it being understood that we are to forward a deed to the owner of said lot, and recommend its execution.

"LYMAN & GIDDINGS."

The deed was forwarded accordingly, but never executed; Mr. White being unwilling to sign the deed until the heirs had done so, and one of them seems to have refused. Repeated demands were made on Lyman for the deed; appellant saying she was ready to pay the remaining \$7,500, and that she would accept a deed from White without the heirs joining, or with as many as would join. After the giving of the receipt of July 18, 1883, appellant expended some \$600 on the building.

In respect to the alleged offer of sale for \$7,000 by his postal card of April 13, 1883, Lyman testifies, without contradiction:

"In relation to that card, I would say that Mr. Ward came over, and said his parties would take the property, and arranged to come in the next morning and deposit \$500. He came in two days after, and brought in a check for \$200, not certified, which I refused to take. The next morning I discovered the record of the great sale opposite where the Sibley building now stands, and as a trustee under the will I felt it my duty to decline to carry out the \$7,000 sale."

He also testified that he offered back the \$500 deposit, which was refused.

It is impossible, from the foregoing, to make out any contract of sale. Assuming, as is contended, that, under the will, the executor, White, had an estate in the lot, and not a mere power to sell, and that his letter of March 21, 1883, shows sufficiently that Lyman had from him authority in writing to make sale of the lot, and conceding that Lyman's postal card of April 13, 1883, was an offer to sell, and not mere information of authority to sell, yet, under that postal card, and Ward's letter in reply, of April 14, 1883, there did not arise a contract of sale. In order to that result, there should have been an unconditional acceptance

of Lyman's offer. There was here but a conditional acceptance; one upon the condition that the title was perfect. Again, there was no compliance with the offer before it was retracted. The proposition was that Lyman could sell the lot for \$7,000. There was neither a payment, nor tender of payment, of the \$7,000. As Lyman testifies without contradiction, there was a promise to come in the next morning and deposit \$500. Appellant's agent came in two days after, and brought in a check for \$200, not certified, which Lyman refused to take. The next morning he discovered the record of an important sale of property in the vicinity, which he considered made it his duty to decline to carry out the \$7,000 sale. The offer had not then been met by compliance with its terms, and there was the right to retract it. The receipt of July 18, 1883, obviously does not evidence a contract of sale. It shows but a proposed purchase of the lot, and that the agents were to forward a deed to the owners, and recommend its execution.

We are of opinion the circuit court did right in dismissing the bill, and the decree is affirmed.

#### NOTE.

It is said in *Baxter v. Bishop*, (Iowa,) 22 N. W. Rep. 685, that "contracts may be made by correspondence; but to constitute a contract by correspondence one letter must contain a distinct proposition, and the answer must be an unqualified acceptance. 1 Pars. Cont. 476; *Vassar v. Camp*, 11 N. Y. 441."

It is an undoubted rule of law that, before an agreement can be gathered from a correspondence, it must appear by the correspondence that what has been proposed on one side has been definitely agreed to upon the other, so that a clear and complete contract can be derived from the letters. *Darlington Iron Co. v. Foote*, 16 Fed. Rep. 646. See *Wheeler v. New Brunswick & C. R. Co.*, 5 Sup. Ct. Rep. 1061.

A. wrote to B., offering to sell land for a certain sum, payable at specified times; nothing being said about the place of payment or delivery of the deed. B. replied by letter, accepting the offer, adding: "You may make out the deed, leaving the name of the grantee in blank, and forward it to C., to be delivered to me on payment," etc. Three days later B. telegraphed to A.: "Have written you. Will take land at your figures. Ans." Afterwards, and before either the letter or telegram reached A., the latter wrote again withdrawing his order. Held, that neither the letter of B. nor the telegram was an unqualified acceptance, and that, therefore, the offer might be withdrawn. *Baker v. Holt*, (Wis.) 14 N. W. Rep. 8.

(44 Ohio St. 406)

#### DAY and others v. PITTSBURGH, Y. & C. R. Co.

(*Supreme Court of Ohio*. June 29, 1886.)

1. **WATERS AND WATER-COURSES—DEED OF LAND ON BANK OF RIVER—CANAL.**  
A general deed of premises lying upon the bank of a river, in which is constructed a canal, conveys the grantor's rights to the center of the stream bounding the property; and, to reserve or exclude from the grant any such rights, the conveyance should contain proper words of such reservation or exclusion.

2. **SAME—CANAL IN RIVER—DISSOLUTION OF CANAL COMPANY—REVERSION OF RIGHTS.**

Where a canal company, owning and operating a canal constructed in a river, has the right only to use, for canal purposes, the bed and waters of such river, on ouster of such company from its corporate franchises, and its dissolution by order of the supreme court, the trustees winding up its affairs have no power to convey such rights, but they revert to the proper owners.

Error to district court, Portage county.

The Pittsburgh, Youngstown & Chicago Railroad Company is a corporation under the laws of Ohio, and it was building its road through the village of Kent, in Portage county, Ohio. It was commencing to grade and build its road on property claimed by Day, Williams & Co., as partners, when, October 1, 1881, they, the plaintiffs in error, commenced an action against the railroad company and others, to enjoin the railroad company from entering upon their premises until the right of way was duly condemned and paid for. The property is what was once used as a part of the Pennsylvania & Ohio canal, and it is in the bed of the Cuyahoga river, between the east bank and the middle of the river.

In their petition plaintiffs averred that they owned the premises on the east bank of the river, which premises extended to the middle of the river, and that they were extensively engaged in the manufacture of glass on the property; that the use of the water of the Cuyahoga river was indispensable to their business; that it was impossible to carry on the manufacture of glass without said water; that it was not practicable to obtain water elsewhere, save at enormous expense; that the construction of the railroad, as proposed, would deprive them of the use of said water, and necessitate the abandonment of their business, or the carrying it on at a loss,—damage them many thousand dollars, and otherwise do them great and irreparable injury; and they prayed for an injunction and damages. A temporary injunction was allowed.

On February 7, 1882, the railroad company set up, in its amended answer, that it admits the copartnership of the plaintiffs; that they are the owners of a glass-factory property in the village of Kent, in Portage county, Ohio; that they purchased the same from Marvin Kent, by contract in writing, dated the first day of July, 1864, and received a deed thereof from Marvin Kent and wife, dated March 3, 1868, in pursuance of said contract, and in fulfillment thereof; that the plaintiffs are engaged in the manufacture of glass; and that defendant is engaged in the construction of a line of railroad extending through said village of Kent. The defendant denies that the west boundary of plaintiffs' glass-works property is the center of the Cuyahoga river. Defendant further says that about the year A. D. 1840, a corporation duly created, organized, and then existing under the laws of Ohio by the corporate name of Pennsylvania & Ohio Canal Company, and possessing under its charter full authority and right to construct, maintain, and operate a public canal and water highway for the transportation of persons and property through the county of Portage, in the due and legal exercise of its rights and franchises in and about the acquisition of its right of way, and the construction of its canal thereon, duly obtained the right and legal authority to construct its canal in the Cuyahoga river, through a portion of the township of Franklin, in the county aforesaid, in which plaintiffs' said premises are located, and did construct its canal in said river from a point several hundred feet northward of plaintiffs' premises, to a point several hundred feet southward thereof; that, in and about the construction of the canal, said canal company, between the points aforesaid, and oppo-

site plaintiffs' premises, constructed its towing path in and along a portion of the original channel of said river, and thereby diverted the stream so that all the waters thereof, except that portion of the same used for the purposes of the canal, ran and flowed along the channel of the river lying and being on the westerly side of the towing path, and the canal company constructed all and every part of the channel and bed of said river lying east of its said towing path, and between the east line thereof and plaintiffs' said premises, into a canal, and maintained, used, and operated the canal so constructed from that time down to the year A. D. 1872; that the construction of said canal, in the manner aforesaid, permanently changed and diverted the flow of the waters of the river to the west side of said towing path; that by reason of the acquisition of the right of way and portion of said river by the canal company, and the construction of its canal thereon as aforesaid, cut off and appropriated all the water-rights, mill privileges, and riparian rights and interests in, to, and connected with any and all lands lying on the eastern side of said river, including the premises of the plaintiffs between the points aforesaid. The defendant further says that, by the terms and provisions of its charter, the canal company took the fee-simple title to all the lands, rights, and interests so acquired by it for the purposes of the canal, and that all of its rights and lands are now owned and held by the defendant, as hereinafter stated. The defendant further says that long after the construction of the canal, as aforesaid, and while the same was being maintained and operated by the Pennsylvania & Ohio Canal Company under its rights, powers, and franchises, the plaintiffs purchased from one Marvin Kent all the lands and premises now owned by them, bounded and described as follows, to-wit: Situate in Franklin township, Portage county, Ohio, and known as part of township lot No. 25, bounded and described as follows: Beginning at a point in the west line of Canal street, in said town of Kent, where a continuation west of the south side of Mill street crosses said Canal street; thence south, 18 deg. 15 min. west, seven chains and thirty-one and one-third links, to a post in the west line of Canal street; thence north, 72 deg. 30 min. west, four chains and twenty-one links, to the Pennsylvania & Ohio canal, (the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river;) thence northerly along the east bank of the Pennsylvania & Ohio canal, to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania & Ohio canal; thence north, 69 deg. 45 min. east, one chain and fifty-eight links, to the place of beginning. That plaintiffs' deed from Marvin Kent, containing the aforesaid description and boundaries, carried the west boundary line of their premises to the east line of said Pennsylvania & Ohio canal. That they never had or held any riparian or other rights in, to, or concerning said canal during the time the same was maintained and operated, or since; and they never took, by the terms of their deed, or otherwise, any title or ownership to any portion of the bed of the canal, or to any of the land over which the same was constructed. *Second.* For further answer herein, the defendant says that it is the owner of all the

lands lying west of said former east bank and line of said Pennsylvania & Ohio canal, adjoining plaintiffs' premises on the west, that were formerly owned and occupied by said canal for the purposes of the construction, maintenance, and operation of the same by said canal company; that the defendant has the title thereto by virtue of a contract in writing between it and the New York, Pennsylvania & Ohio Railroad Company dated the nineteenth day of July, A. D. 1881,—said last-named company having title thereto by virtue of conveyances from the trustees of said canal company, duly executed and of record in the county of Portage; that the east line of the premises so purchased and owned by defendant is the east line of the berme bank of said canal on and along plaintiffs' premises; that the line of defendants' railroad is located and fixed entirely on its own land, lying west of said line, and in no place or part does it touch any land of the plaintiffs, or in anywise interfere with or affect the same, or any buildings or structures thereon, and the defendant has the complete right to enter upon its said premises, and construct its line of railroad in the legal exercise of its franchises and powers.

In the reply the plaintiffs deny specifically many allegations of the answer, and aver that, prior to the construction of the Pennsylvania & Ohio canal, the canal company entered into a contract with the Franklin Land Company, which last-named company then owned the premises described in the petition, and held the legal title thereto; that in said contract it was provided that the canal company should construct its canal between two walls in the river, and that, between the canal and the east bank of the river, water should continuously flow, from the pond created by the canal dam, down to and past the premises now owned by plaintiffs, for the express use, convenience, and enjoyment of the owners of said premises, and their assigns, and for the propulsion of valuable mills and machinery located on said premises; that in the contract all riparian and other rights to the waters of said Cuyahoga river, and the flow of the stream thereof, were expressly reserved as an appurtenance of and to the premises now owned by plaintiffs, and to said land company as the owners thereof, and its assigns, and that said riparian rights, water privileges, and appurtenances, and mill powers, property, and premises, by divers and sundry mesne grants, conveyances, and assignments, became and are the property and inheritance of the plaintiffs as appurtenant to the premises described in the petition; that such riparian rights and privileges were always recognized by the canal company as appurtenant to said premises, and were always exercised and asserted by plaintiffs, and their grantors, without let or hindrance from anybody, and under claim of right by them. Further replying, plaintiffs say that said Pennsylvania & Ohio canal was substantially abandoned long previous to plaintiffs' purchase of their property and premises; that no repairs were done on the canal after 1862, and the same was suffered to get out of repair, and to become practically unnavigable, before July 18, 1864, and the evidences were then conclusive and plenty that the same would soon be completely and permanently abandoned; and that previ-

ous to March 3, 1868, the canal had been entirely abandoned by said canal company, and suffered to become entirely useless and out of repair for the purposes of a public highway by means of said canal as a waterway, and has ever since been abandoned as a canal or public highway by means of water navigation; that for a period of more than 12 months prior to March 8, 1869, said canal had been entirely abandoned, and suffered to become entirely useless and out of repair, and had entirely fallen into disuse as a canal or public highway by means of water navigation, by boats or other means of conveyance upon or through the waters thereof. And plaintiffs say that at the December term, A. D. 1872, of the supreme court of the state of Ohio, in a suit therein pending in the nature of *quo warranto*, instituted by the state of Ohio on the eighth day of March, 1869, the said Pennsylvania & Ohio Canal Company was, by judgment, order, and decree of said court, dissolved and altogether ousted from its corporate rights, privileges, and franchises, and altogether ousted and excluded from being a body politic and corporate of and within said state, and from all and singular and any and all rights, powers, privileges, and franchises appertaining or attaching to such corporation under the laws of said state, and that said corporation was, and is to all intents and purposes, dissolved and dead; that thereafter neither the Pennsylvania & Ohio Canal Company, nor any other corporation or person, had any right to keep or maintain in said Cuyahoga river any of the artificial obstructions built and placed in said river by the canal company for the purposes of its canal; that these defendants can acquire no right by reason of such obstructions; that the same are unlawfully there, and unlawfully kept and maintained in the river; that, if all such unlawful obstructions were removed, the larger part of the waters of said river would naturally flow against the east bank, on which plaintiffs' factories stand.

The court of common pleas made the injunction perpetual, and the action was appealed to the district court. On trial in the district court it was agreed that formerly the Franklin Land Company owned both sides of the river, from the dam above this property, down to a point below this property upon the river, to the south end of this disputed property, and including it. "And the rights of the land company, and their title, as it is conceded, were conveyed to the land company from the Franklin Silk Company; from the Franklin Land Company, by sheriff, to Zenas Kent; from Zenas Kent to H. A. and Marvin Kent; from H. A. Kent, by quitclaim, to Marvin Kent; and then comes the contract and deed from Marvin Kent to Day, Williams & Co. This is the subject of the agreement." The deed from Marvin Kent to Day, Williams & Co., as to this part of the property, was a general warranty deed, except the right to abut a dam on part thereof. This deed bounded the property as set forth in defendant's answer.

The defendant claimed title to the property it had entered upon, by virtue of its purchase from the assigns of the trustees of the Pennsylvania & Ohio Canal Company, acting in case of *State v. Pennsylvania & Ohio Canal Co.*, 23 Ohio St. 121, when that company in Ohio was dissolved, and its property sold; and also by the verbal consent of Marvin



Kent, given to it, to so use the property. The canal company obtained its rights in the property from the Franklin Land Company by a contract granting to the company, as follows:

"The canal company shall use the canal-dam, and waters therein, for canal purposes, and the land company shall use the same dam, and the water therein, as well as the water passing round the lock at that point, for the propulsion of water-wheels; and in consideration, further, that said canal company shall locate and construct their canal so as to lock down into said canal-dam, and pass out of the same, by a lock in the dam, thence to the south line of the lands purchased by said land company of Zenas Kent. Said canal shall be constructed between two walls in the river-bed, and so far from the east bank of the river as to leave a space between said east bank and the walls of the canal of sufficient width for a convenient tail-race for such wheels as said land company, or their assigns, may there construct; and this race shall be excavated by said canal company, the whole length, to a level with the apron under the wheels of the flouring-mill bought by said land company of Zenas Kent, and pass under the canal into the river channel by a culvert at or near said south line."

The contract also permitted the canal company to take and divert "from said river such quantity of water as will be sufficient to keep said canal in a navigable state at all times when the same shall be navigated; and, when the navigation of said canal shall be interrupted by frost or otherwise, said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal; taking due care to keep the lock-gates shut, and to prevent any unnecessary leakage; upon condition, however, that the lake reservoirs shall be constructed and used in the manner recommended in the report of S. Dodge, Esq., made to the board of directors of said canal company on the sixth of July, A. D. 1835, or in the manner recommended in the report of Alfred Kelley, Esq., made to the executive committee of said board of directors, July 29, 1835, reference to said reports being hereby had," etc.

On trial the majority of the district court found that the plaintiffs were not entitled to the relief prayed for in their petition, and dismissed the same at plaintiffs' costs, without prejudice to their right to bring an action at law to recover the possession of the premises described in the petition, or such other action as may be necessary to determine their rights.

A bill of exceptions was taken, and plaintiffs seek a reversal of that judgment, and the injunction prayed for, and the establishment of their rights.

*Myron A. Norris and M. Stuart*, for plaintiffs in error.

*T. W. Sanderson*, for defendant in error.

FOLLETT, J. A correct understanding of the facts of this case, set forth and shown in the statement, is necessary to the proper application of the legal principles that determine the rights of the parties. But plaintiffs' rights depend greatly upon the true construction of the deed of Marvin Kent and wife to them, dated March 3, 1868; and the defendant's rights depend upon what was conveyed to its grantor by the

trustees of the Pennsylvania & Ohio Canal Company after the ouster of that company by this court, as shown in *State v. Pennsylvania & O. C. Co.*, 23 Ohio St. 121.

1. What rights has the defendant, the Pittsburgh, Youngstown & Chicago Railroad Company, in this disputed property? The Franklin Land Company owned both sides of the Cuyahoga river where this property is in dispute; and, while such owner, it made the contract with the Pennsylvania & Ohio Canal Company, dated May 27, 1836. The contract provided that "said canal shall be constructed between two walls in the river bed, and so far from the east bank of the river as to leave a space between said east bank and the walls of the canal of sufficient width for a convenient tail-race for such wheels as said land company, or their assigns, may there construct, and this race shall be excavated by said canal company, the whole length, to a level with the apron under the wheels of the flouring-mill bought by said land company of Zenas Kent, and pass under the canal into the river channel by a culvert at or near said south line." It also provided that "the canal company shall use the said canal-dam, and waters therein, for canal purposes, and the land company shall use the same dam, and the water therein, as well as the water passing round the lock at that point, for the propulsion of water-wheels; and in consideration, further, that said canal company shall locate and construct their canal so as to lock down into said canal-dam and pass out of the same by a lock in the dam, thence to the south line of the lands purchased by said land company of Zenas Kent." It further provided that, "when the navigation of said canal shall be interrupted by frost or otherwise, said canal company shall have the right to draw from said river so much water as shall be necessary for the purpose of sustaining the levels and preserving the canal; taking due care to keep the lock-gates shut, and to prevent any unnecessary leakage." The canal company must locate the canal at a distance west of the east bank of the river, "of sufficient width for a convenient tail-race."

These provisions clearly show that the canal company took only the right to use the property west from a line west of the east bank of the river, and to use the water of the river so far only as needed for the canal; and, when the canal company was dissolved, this right must be regarded as abandoned, and it reverted to the land company, and to its grantees. *Corwin v. Cowan*, 12 Ohio St. 629; *Longstreet v. Harkrader*, 17 Ohio St. 28, 29. This left nothing that the trustees of the canal company could sell and convey, unless, perhaps, something that they could remove from this property. And the defendant has no rights in this property by virtue of any conveyance or sale by such trustees.

This position is fully sustained in case of *McCombs v. Stewart*, 40 Ohio St. 647, where, as to a similar conveyance of these same trustees, it is held:

"A canal company, incorporated under the act of January 10, 1827, (25 Ohio L. 3,) erected across a river a dam, causing the water to flow back upon the lands of a proprietor above the dam on the stream. The company owned

in fee-simple, by purchase, the land on which the south half of the dam was built, but none of the land on which the north half was built; and conveyed, in fee-simple, to certain mill-owners, the land it thus owned, and granted to them and their heirs the privilege of using the surplus water of the dam not required for canal purposes. Held, the right of the company, acquired by appropriation, to flow the lands of such proprietor by maintaining a dam of such height, did not, by virtue of the company's conveyance and grant to the mill-owners, survive and vest in them after the dissolution of the corporation."

In case of *Pittsburgh & L. E. R. Co. v. Bruce*, 102 Pa. St. 23, as to another such conveyance by the trustees, it is held "that the company acquired, under the terms of the charter, a right of way only over the lands appropriated by them, and that they did not acquire said lands in fee;" "that said canal company having become insolvent, and all its property and franchises being sold to a railroad company by order of court, held, that said last-named company could not construct its tracks on the right of way acquired by the canal company, without compensation to the owner of the land." This company had only the right to use the property and the waters of the river for the canal, and after ouster and dissolution neither the company nor the canal remained or existed.

If we disregard the form and averments of the pleadings, whether or not the defendant acquired any rights in this property through the verbal permission of Marvin Kent is determined by what rights Kent had at that time,—long after his deed to plaintiffs.

2. What rights have the plaintiffs in this disputed property? We will not stop to discuss what rights their possession gives them, though this is valuable,—especially in connection with their contract and deed. On the trial it was agreed by the parties that "the Franklin Land Company owned both sides of the river, from the dam above this property, down to a point below this property upon the river, to the south end of this disputed property, and including it. And the rights of the land company, and their title, as it is conceded, were conveyed \* \* \* from the Franklin Land Company, by sheriff, to Zenas Kent; from Zenas Kent to H. A. and Marvin Kent; from H. A. Kent, by quitclaim, to Marvin Kent; and then come the contract and deed from Marvin Kent to Day, Williams & Co. This is the subject of the agreement." By this written contract Marvin Kent sold to Day, Williams & Co. "that lot of land, and the buildings and improvements thereon known as the 'Franklin Glass-works,'" and he bounded the property by running the line the other way from what it is run in the deed. The contract is dated July 18, 1864, and the deed is dated March 3, 1868, and was made to carry out the contract. As to this property, the deed contains a covenant of general warranty, and described the property, "with the buildings and improvements thereon, known as the 'Franklin Glass-works,' situate in said town of Kent; and is known as being a part of township lot No. twenty-five, (25,) in said township of Franklin, and bounded and described as follows, to-wit: Beginning at a point in the west line of Canal street, in said town of Kent, where a continuation west of the south side of Mill street crosses said Canal street; thence south, 18 deg. 15 min.

west, seven chains and thirty-one and one-third links, to a post in the west line of Canal street; thence north, 72 deg. 30 min. west, four chains and 21 links, to the Pennsylvania & Ohio canal, (the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river;) thence northerly, along the east bank of the Pennsylvania & Ohio canal, to a point where the continuation west of said south line of Mill street intersects the east line of said Pennsylvania & Ohio canal; thence north, 89 deg. 45 min. east, one chain and fifty-eight links, to the place of beginning,—containing ——— acres of land, be the same more or less."

By the terms of the deed, Kent conveyed to the plaintiffs all the rights he had in this property along the east bank of the river, and up "to the Pennsylvania & Ohio canal;" and then adds in parenthesis, "the east bank of which is hereby understood to be what was formerly the east bank of the Cuyahoga river;" and he made no reservation of any part of the bed of the river, or of any water privileges. When the canal was gone, there was nothing left but the river.

As early as *Gavit v. Chambers*, 3 Ohio, 496, this court held: "In Ohio, owners of lands situate on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law." And the same is true of all streams away from tide-water. In *Benner's Lessee v. Platter*, 6 Ohio, 505, this court held: "A call in a survey for a stream not navigable is a call for the main branch of such stream, and the boundary is the middle of the stream." In *Lamb v. Rickets*, 11 Ohio, 311, the court held: "Where the owner of land is bounded by a stream, he owns to the center of the stream, subject to the easement of navigation." Here it was subject to the rights of the canal company. In *Walker v. Board of Public Works*, 16 Ohio, 540, the court repeats the holding: "He who owns the land on both banks of a navigable river, owns the entire river, subject only to the easement of navigation; and he who owns the land upon one bank only, owns to the middle of the main channel, subject to the same easement." And also: "The legislature cannot, by declaring a river navigable which is not so in fact, deprive the riparian proprietors of their rights to the use of the water for hydraulic and other purposes, without rendering them compensation." In *June v. Purcell*, 36 Ohio St. 396, this court went further, and held: "The principle decided in *Gavit v. Chambers*, 3 Ohio, 496, that the owners of lands situated on the banks of navigable streams running through the state are also owners of the beds of the rivers to the middle of the stream, as at common law, has become a rule of property, and, irrespective of the question of its original correctness, ought not to be disturbed." And, in the opinion, WHITE, J., adds: "To disturb the rule now would be a dangerous tampering with riparian rights." Such is the law of England, and of most of these states.

If the grantor does not intend to convey the bed of the river, and the water in the water-course bounding the land conveyed, he must insert in the instrument of conveyance proper words for the purpose of reser-

vation or exclusion; "but, in the absence of such words, the bed, and consequently the stream itself, passes by the conveyance." Ang. Water-courses, §§ 9, 17, and cases there cited. Here there was no such reservation or exclusion. The plaintiffs had all the rights ever held by Marvin Kent in this property, and the defendant took nothing by Kent's permission. The court erred in permitting Kent to testify as to any permission he gave the defendant in this property, and it also erred in the construction of plaintiffs' deed, and of defendant's conveyance.

The judgment is reversed, and the injunction prayed for granted and made perpetual, and cause remanded.

(103 N. Y. 355)

VAN AERNAM v. BLUSTEIN, President Courier Co.

(Court of Appeals of New York. June 1, 1886.)

1. TRIAL—STIPULATION—JOINT-STOCK COMPANY.

In this action defendant's attorney stipulated, for the purpose of trial, that the Courier Company was a joint-stock association, as alleged in the complaint, and that defendant was its president. Defendant, at close of evidence, moved for nonsuit on the ground that such stipulation did not admit that such company consisted of more than seven shareholders, which plaintiff had not proved. *Held*, that the stipulation was sufficient, and was intended to concede that the action was brought in proper form.

2. LIBEL AND SLANDER—ACTION AGAINST JOINT-STOCK COMPANY.

An action for libel can be maintained against a joint-stock association editing a paper in the name of its president or treasurer.

3. APPEAL—POINTS NOT RAISED BELOW—LIBEL—QUESTION OF MALICE.

The point that the charge of the judge was erroneous in not submitting the question of malice to the jury cannot be raised for the first time on appeal to the court, in an action for libel, where no request or exception on the point was made at the trial.

Affirming judgment of general term, Fifth department, affirming a judgment in favor of the plaintiff, rendered upon the verdict of a jury.

*John G. Milburn*, for appellant, George Blustein, President Courier Co.

*C. D. Van Aernam*, for respondent, Henry Van Aernam.

RAPALLO, J. The only point made on the part of the appellant on the trial of this action was that the action could not be maintained against the defendant, as president of the Courier Company, for the reason that it did not appear that the company was a joint-stock company consisting of seven or more members. Prior to 1849 all the members of an incorporated joint-stock company or association were necessary parties to an action by or against such company or association, whatever the number of its members might be. 2 Lindl. Partn. 1084. Such an association could not sue in the name of any officer of the association, or in the name of its trustees. By the Laws of 1849, c. 258, § 1, it was provided that any joint-stock company or association *consisting of seven or more shareholders or associates* might sue or be sued in the name of the president or treasurer, for the time being, of such joint-stock company or association, and that suits so prosecuted should have the same effect on the joint rights or property of the company as if prosecuted in the names of all the shareholders or associates.

The only manner in which the question was raised in this case was by motion for nonsuit at the trial. The plaintiff put in evidence a stipulation, signed by the defendant's attorneys, whereby it was admitted, for the purposes of the trial, that the Courier Company was a joint-stock association, as alleged in the complaint, and that the defendant was its president at the time of the commencement of this action, and that the said company published the Buffalo Courier, and had done so for five years last past. The defendant now claims that its stipulation was ineffectual, as it does not state that the company consisted of seven or more shareholders or associates, but only that it was a joint-stock association, as alleged in the complaint, and that by reference to the complaint it appears that the allegation therein was that it was a joint-stock company or association duly formed and organized and then existing under and by virtue of the laws of the state of New York, without stating the number of associates.

We think that the fair construction of the stipulation is that it was intended to concede that the action was brought in proper form against the defendant, as president of the association, and to relieve the plaintiff from the necessity of producing proof, at the trial, of the organization of the association, and to be so understood by the counsel for the plaintiff. If not intended to have this effect, it was of no avail for any purpose, as it would still have left the plaintiff subject to the necessity of preparing himself with proof of the organization, for he could not prove that the association consisted of seven or more members without proving the organization and membership of all the associates. To attach to it the silent reservation now claimed, and which could not have been contemplated by the parties, would make it deceptive and misleading. The stipulation, read in connection with the complaint, was an admission that the defendant was a joint-stock company or association, duly formed and organized, and then existing, under and by virtue of the laws of the state of New York. This must be deemed to have reference to the statutes of this state; and when it is considered that the act of 1849, under which this action was brought, and all other statutes of the state relating to joint-stock companies or associations, refer to companies or associations consisting of seven or more shareholders or associates, (Laws 1851, c. —; Laws 1853, c. 153; Laws 1854, c. 245,) and that there are no statutes recognizing or referring joint-stock companies comprised of a smaller number of members, it is quite evident that such a company as is referred to in the statutes was intended.

The only other point raised on the motion for a nonsuit was that the action was not of such a nature that it could be maintained against a joint-stock association in the name of its president or treasurer. Conceding that the Courier Company is not a corporation; but a partnership with some of the powers of a corporation, it is admitted that the association published the paper in which the libel was contained; and we can see no reason why it, and all its members, should not be responsible for a libel published by their authority. The officers of the unincorporated company, or the publishers or editors employed by it, have the same power,

when acting within the scope of their authority, to bind the company, and all the associates, which an ordinary partner has to bind the firm and his copartners.

A further point was raised on the argument of the appeal in this court, which does not appear to have been raised upon the trial, viz., that the publication complained of was privileged, and there was no proof of actual malice. The plaintiff was, at the time of the publication, a candidate for the office of representative in congress. He had at a former period held the office of commissioner of pensions; and the publication of the defendant complained of consisted of charges of malfeasance and corrupt conduct of the plaintiff as such commissioner. These charges had been the subject of investigation by a committee of the house, and the proceedings of the committee were before the defendant, and were largely drawn upon in the various articles which it published, and which are claimed to be libelous; and parts of the testimony were referred to which tended to establish the charge of malconduct, while the plaintiff claims that the editor of the defendant who wrote the articles did not refer to the parts of the testimony and proceedings which exculpated him.

At the conclusion of the trial of this action the counsel for the defendant stated to the court that it was not claimed, on the part of the defense, that there was anything wrong in Dr. Van Aernam's conduct in the pension-office; and the plaintiff's counsel then stated that upon the defendant's statement the plaintiff would rest, and thereupon the court charged the jury that there must be a verdict for the plaintiff for nominal damages at least. To this charge the defendant's counsel excepted, and the jury rendered a verdict for the plaintiff for \$2,000 damages.

The defendant's counsel now raises the point that the charge was erroneous, because the judge should have submitted the question of malice to the jury. We think this objection comes too late. There was no request to submit the question to the jury; nor was it claimed, on the motion for a nonsuit, that there was no evidence of malice. The nonsuit was asked for on different grounds. If the defendant desired to go to the jury on that specific point, he should have made the request, or should have stated the ground of exception to the charge at a time when it would have been in the power of the court to correct it in the respect complained of. The court evidently assumed to decide upon the evidence that the publications were not fair criticisms on the official conduct of the plaintiff, and therefore that they were not privileged. Without deciding whether or not, under the evidence in the case, it was within the province of the court to pass upon that question, we are of opinion that, if the defendant deemed himself entitled to have it left to the jury, he should have made the claim at the trial.

The judgment should be affirmed.

(All concur, except RUGER, C. J., not voting.)

(142 Mass. 30)

HAM, Petitioner, etc., v. BOARD OF POLICE OF THE CITY OF BOSTON.

(Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1886.)

MUNICIPAL CORPORATIONS—POLICE OFFICER—REMOVAL—HEARING—CAUSE—CHAPTER 323, ST. 1885.

Under St. Mass. 1885, c. 323, the board of police of the city of Boston, created thereby, has no power to remove an officer or member of the police force of Boston, without assigning any cause for removal, and cannot make such removal until the officer or member has had notice, and an opportunity to be heard in defense or explanation of what may be suggested as a cause of removal.

Petition for *mandamus*.

The petitioner alleged that on or about the thirty-first day of August, 1885, while he was a member of the police force of Boston, and holding the position of chief inspector, he received from the board of police of the city of Boston—said board having been created by chapter 323 of the Acts of 1885—a communication in writing, requesting him to resign his office as a member of the police force of said city on or before the first day of September next thereafter; that thereupon the petitioner inquired of said board as to the cause of such request, and if any charges had been brought against him, or if it, the board, had any to prefer, but the board refused to give any legal cause, and stated that no charges had been brought, and that they had none to prefer; that the petitioner refused to resign from said force, and on the fifth day of September said board of police passed an order removing him from said police force, and have since refused to allow petitioner, although willing, to perform the duties thereof. The petitioner further alleged that, under the powers vested by the statute in said board of police, the board had authority only to remove him from his office of policeman for legal cause; that in exercising such power of removal they acted in a judicial capacity, and could remove him only after charges had been preferred against him, notice thereof given him, a hearing held thereon, with an opportunity for him to present his defense. The petitioner further alleged that said action of said board tended to injure his character and reputation; and that by such attempted removal, if not restrained, he would lose his rights to be retired upon a pension, to which his long years of service made him eligible. The prayer of the petition was for a writ of *mandamus* to issue to said board of police, commanding it to restore the petitioner to said office of policeman, or show cause why it should not do so. The respondent justified under the powers conferred upon it by chapter 323 of the Acts of 1885, alleging that the vote passed removing the petitioner was within its powers. Hearing in the supreme court, before C. ALLEN, J., who reserved the case for the full court, upon the petition, answer, and facts which appeared at the hearing, as follows:

"(1) The vote of the police commissioners set up in the answer was passed by them without any formal charges being preferred against the petitioner, and without any hearing of him before the commissioners. (2) By St. 1876, c. 16, the Boston Police Relief Association was incorporated; and it passed certain by-laws, under which the petitioner claims to be entitled to certain benefits. (3) Under city ordinances of 1876, continued in 1880, which is to



be referred to, a large fund has accumulated, and the petitioner claims to be entitled to certain benefits under the same. (4) Before the removal of the petitioner, the police commissioners orally stated to him that they did not consider him an efficient officer, and that both they and the public had lost confidence in him, and for that reason they proposed to remove him."

*R. D. Smith and Charles Albert Prince*, for petitioner.

*A. J. Bailey*, for respondents.

C. ALLEN, J. This case grows out of the legislation transferring the administration of the police of the city of Boston to a board appointed by the governor of the commonwealth. It is conceded by the counsel for the defendants that under St. 1878, c. 244, the board of police commissioners could only remove officers or members of the police department for cause; and that, before a removal for cause could be made, the party must have had notice, and an opportunity to be heard. But it is contended that under St. 1885, c. 323, the new board of police, thereby created, has power to remove an officer or member without assigning any cause, and without notice or hearing. And this presents the question to be determined. Section 2 of this statute is as follows:

"The board of police shall have authority to appoint and establish and organize the police of said city of Boston, and make all needful rules and regulations for its efficiency. All the powers now vested in the board of police commissioners in said city of Boston by the statutes of the commonwealth, or by the ordinances, by-laws, rules, and regulations of said city, except as otherwise hereby provided, are hereby conferred upon and vested in said board of police."

The power of removal, which was vested in the board of police commissioners, was expressed in the following language in St. 1878, c. 244, § 3: "Any of said officers or members of the department may be removed by the board, for cause." The same power is given to the new board of police, unless in the act of 1885 it is otherwise provided.

It may be at once assumed that it is not necessary that it should be otherwise provided in express terms, if it can be seen from the general purpose and scope of the act that such a change was intended. There is nothing in the act of 1885 which in terms provides that the new board may make such removals without assigning any cause. It is necessary, therefore, to examine and see if such authority is fairly implied.

Section 2 provides that the board shall have authority to appoint and establish and organize the police. The apparent purpose of this provision, as to appointments, was to show that the new board could act without the concurrence of the mayor of the city. Formerly, by St. 1878, c. 244, § 3, the appointment of the superintendent of police, the deputy superintendent, and the captains was subject to approval by the mayor. Now the new board may make all appointments without such approval; that is, when appointments are to be made. The general power "to establish and organize" the police seems to be only a compact and summary way of stating that the power of the old board, in these respects, is transferred to the new board. The powers of the old board were expressed more at length, and included the power to establish and organize

the police, though these exact terms were not used. There may be some slight variations in details, but in substance and effect this power was vested in the old board; and yet that board had not the power to remove without cause. The power to remove without cause is not, therefore, to be inferred from the authority to establish and organize the police. The use of this phraseology does not imply any larger power, in respect to removals, than the old board had.

Section 3 of the act of 1885 provides that "the members of the Boston police force in office when the said board of police are first appointed, shall continue to hold their several offices until removed or placed on the retired list by the said board; and the present rules and regulations of the board of aldermen for the government of the police shall continue in force until otherwise ordered by said board of police." This is the only provision in the statute of 1885 which makes any express mention of removal from office, or placing police officers on the retired list. Looking at this statute alone, no one could tell what is meant by the words "placed on the retired list." If the provision as to removal stood alone, and there was nothing to show in what sense it was intended, it might well be held to imply an absolute and arbitrary power of removal. But in the preceding section express reference is made to "the powers now vested in the board of police commissioners by the statutes of the commonwealth," and this means by the statute of 1878. And the whole act of 1885 must be construed with reference to the statute of 1878, to which it refers, and which it supersedes. Especially the words "placed on the retired list" can only be understood by looking at the earlier statute, where detailed provision therefor is made; and, since these words are coupled with the mention of removal, a reference to the earlier statute to assist in ascertaining the meaning of this word also is naturally suggested. Looking, then, at that statute, it is found that the authority conferred by section 3 of the act of 1885 is copied literally from section 10 of the act of 1878, making the necessary changes as to the board by which the authority is to be exercised. And in the act of 1878, where it is provided that the members of the police force shall continue to hold office "until removed or placed on the retired list by the said commissioners," the meaning is, until removed for cause, as provided in section 3 of that act. It thus appears that it was not the design of these words, as used in the statute of 1878, § 10, to confer any power of removal. This power had already been conferred and limited by section 3; and by section 10 it could not have been intended to enlarge the power of removal so as to authorize the commissioners to remove officers without cause, since that would be plainly inconsistent with section 3; and, indeed, this much is conceded. But, seeing that these words were literally copied into the statute of 1885, and that the meaning of the words "placed on the retired list" must be sought in the statute of 1878, we do not see that it would be a fair construction to hold that the words "until removed" were intended to confer any greater power of removal than would exist under other provisions of the statute.

Looking now at the more general purpose and scope of the statute of

1885, we are not able to see any clear indication that the legislature intended to confer upon the new board a merely arbitrary power of removal. It was the established policy, under the statute of 1878, that the officers and members of the police force should only be removable for cause. Continuance in office is valuable to them, not merely as a means of present support, and as a matter of reputation, but because there are no incidental pecuniary benefits under the statute and city ordinance which are referred to in the report. The new board has power to make all needful rules and regulations for the efficiency of the police, for the government and discipline of the department, and generally for its proper administration. It may also remove any officers or members of the department for cause; that is, for such cause as seems to it sufficient, after the party has had notice and an opportunity to be heard in defense or explanation of whatever may be suggested as a cause of removal. No express provision is made for any revision of the determination of the board; and there would appear to be no opportunity for such revision, unless perhaps by the courts, in case of an arbitrary exercise of the power, for a cause which is unreasonable and in law insufficient; as, for example, for refusing to contribute money for political purposes. St. 1884, c. 320, §§ 8, 11. We have nothing to do with the question whether, in transferring the administration of the police to a board of commissioners appointed by the governor, it would be better to give a larger power of removal. If such is the policy of the legislature, it is easy to say so. But, looking at St. 1885, c. 323, as it stands, we are unable to see an intention to change the preceding policy in this respect, and accordingly must hold that the petitioner was improperly removed, no hearing having been accorded to him.

*Mandamus* to issue.

(142 Mass. 85)

GOULD v. EASTERN R. Co.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1886.*)

DEED—BOUNDARIES—ADJACENT STREET OR PASSAGE-WAY—PLAN—GRANT—IMPLICATION—FEE.

Where a deed describes land as bounded by certain streets and passage-ways as shown upon a plan, which is referred to, and the dimensions of the land conveyed are stated to be as shown by the plan, the conveyance will be held, by implication, to include one-half of such adjacent streets and passage-ways, if the grantor owns the same, unless there is something further to show a contrary intention, and, where land is described in a deed as bounded by a street or passage-way, the grant of such deed of a right or privilege to use the passage-way or street does not exclude the inference of a grant of one-half thereof because it is designed to show that the grantee shall have a right to use the whole width thereof.<sup>1</sup>

Petition for the appointment under chapter 360, Acts 1873, to assess damages for the taking of land in Charlestown, being the fee in First street, and passage-ways laid out between said First street and Second street, and between First street and Austin street. The plain-

<sup>1</sup>See note at end of case.

tiff claimed through a deed from the Charlestown Wharf Company, dated October 19, 1844, to James Gould, and by a deed from said James Gould to the plaintiff, dated April 28, 1870. Thomas Nutter, assignee in insolvency of said James Gould, conveyed, March 22, 1852, all of said Gould's interest in said land to John S. Tyler, and said Tyler, by deed dated December 26, 1853, conveyed back to said James Gould all rights and interest conveyed to said Tyler by said Nutter. No question was made about the right of said James Gould so far as insolvency proceedings are concerned. The Charlestown Wharf Company, prior to its said deed to James Gould, was the owner in fee of a large tract of land, including said street and passage-ways, in said Charlestown. The lots of land abutting on said street and passage-ways were conveyed to divers parties by said company prior to the deed of October 19, 1844, to James Gould. Hearing in the supreme court, before Morton, C. J., who reserved for the full court the question whether the various deeds of the Charlestown Wharf Company, prior to the deed to Gould, dated October 19, 1844, conveyed the fee in the said streets and passage-ways to the several grantees. If they did, the petition to be dismissed; otherwise commissioners to be appointed to assess damages for the taking of such lands as should be adjudged to have belonged to the plaintiff at the time of such taking. The deeds of the Charlestown Wharf Company referred to as conveying the land abutting on said streets and passage-ways to various parties prior to its said deed to James Gould, referred to the land "as lots on a certain plan," which was recorded in the registry of deeds, and the land conveyed in each instance was described as bounded by the streets and passage-ways in question, and by certain other of the lots and streets delineated on said plan. There was also a clause in each deed, giving to the grantee "the right and privilege to pass and repass in, through, and over said last-mentioned passage-way in common with said corporation."

*J. T. Wilson*, for petitioner.

*R. Olney*, for respondent.

C. ALLEN, J. Where there is a plan showing a tract of land laid out into streets and passage-ways, blocks and lots, the blocks and lots are usually defined by lines which are coincident with the outer lines of the streets and passage-ways, and the dimensions and boundary lines of the blocks and lots are usually expressed in figures which exclude the streets and passage-ways. And when, in a deed of a lot of land, reference is made to such a plan, it is usual to give the dimensions of the lot as shown by the plan. But although, in such cases, the literal description in the conveyance does not in terms include the grantor's interest in the adjacent streets or passage-ways, yet the presumption is so strong that a grantor, under such circumstances, does not intend to retain the fee therein, subject to the right of way, after disposing of all his interest in the land which is subject to exclusive occupancy, that it has come to be established as a rule of law that the conveyance will, by implication, be held to include one-half of such adjacent streets and passage-ways, if the

grantor owns the same, unless there is something further to show a contrary intention.

In *Codman v. Evans*, 1 Allen, 443, enough was found to show such contrary intention, and the passage-way was held not to be included in the grant. In *Motley v. Sargent*, 119 Mass. 231, a case in some particulars much like *Codman v. Evans*, sufficient evidence of such contrary intention was wanting; and the general rule was applied that where there is a boundary upon a fixed monument which has width, as a way, stream, or wall, even if the measurements were only to the side of it, the title to the land conveyed passes to the line which would be indicated by the middle of the monument. So, in *Clark v. Parker*, 106 Mass. 554, it was held that "the law presumes it to be the intention of the grantor to convey the fee of the land to the center of the way, if his title extends so far. This presumption is of course controlled whenever there are words used in the description showing a different intention. But it has been held that giving measurement, in the deed, of side lines which reach only to the outer line of the way, are not alone sufficient to overcome it." And in *Berridge v. Ward*, 10 C. B. (N. S.) 400, a reference in a deed to a plan annexed, the measurement and coloring of which would exclude the highway, to the center thereof passes by the conveyance. See, also, *Walker v. Boynton*, 120 Mass. 349; *White v. Godfrey*, 97 Mass. 472.

The grant, in such a deed, of a right or privilege to use the passage-way or street, does not exclude the inference of a grant of one-half thereof, because it is designed to show that the grantee shall have a right to use the whole width thereof. *Motley v. Sargent*, 119 Mass. 231; *Peck v. Denniston*, 121 Mass. 17.

Looking at the deeds in the present case in the light of the foregoing decisions, it must be held that they conveyed the fee in the streets and passage-ways to the several grantees. Petition dismissed.

#### NOTE.

Respecting lands bounded by a street or roadway, see *Ayers v. Pennsylvania R. Co.*, (N. J.) 3 Atl. Rep. 885, and note, 889.

In *Clarke v. Gaffeney*, (Ill.) 6 N. E. Rep. 689, the owner of a piece of land having made a plat, and divided the land into ten lots, five lying on each side of a strip of land running through the center, and thereafter sold the lots at public auction, publicly announcing that the strip of land had been laid out as a road for the use of the different lots so as to give access to the main road without traveling over the property of their neighbors, there being no other means of access, an easement or right of way is created which passes to the grantees of the original purchasers, and qualifies the title to the strip of ground, whether in the original owner, in his heirs, or in their grantees.

(142 Mass. 96)

ANDREWS and others v. CASSIDY and another.

(Supreme Judicial Court of Massachusetts. Suffolk. June 28, 1896.)

POOR DEBTOR—EXAMINATION—PENDENCY OF—CHARGES OF FRAUD—PUB. ST. CH. 163, § 49.

The examination of a poor debtor before a magistrate must, within the meaning of Pub. St. c. 163, § 49, be treated as pending up to the time of the announcement of the decision of the magistrate, and the creditor may file  
v.7N.E.no.6—35

charges of fraud at any time before the announcement of the decision, although the hearing of evidence and arguments have closed, and the magistrate has continued the case for the purpose of considering the questions of law and fact involved therein.

This was a petition for *mandamus*. The petition set forth that the petitioners, copartners, having their usual place of business in Boston, on June 26, 1885, duly recovered judgment against G. I. Robbins, of said Boston, in the municipal court of the city of Boston, on which execution duly issued on June 30th, and that, after all due and proper proceedings on the same, the said defendant duly appeared before William E. Cassidy, a commissioner in insolvency within and for the county of Suffolk, for the purpose of taking the oath for the relief of poor debtors; that the said Robbins was duly sworn, and an examination was signed by the debtor, being continued over two separate terms; that said written examination was signed by the debtor on July 31, 1885, and the cause or hearing continued to August 11, 1885, by the magistrate, for a consideration of questions of law and of fact in the case; and that on said day, the same being the day to which the cause had been continued, and pending the proceedings, no decision having been rendered by the magistrate, and while the case was still open, the plaintiff presented to the magistrate "charges of fraud" against the said debtor, the same being in writing and duly sworn to, and the same were read, but the magistrate declined to allow the same to be filed, on the ground that the hearing was closed, although no decision had then or has since been given in the cause. The prayer of the petition was for a writ of *mandamus* to compel the said William E. Cassidy to allow said charges of fraud to be filed, and that the debtor might be ordered to plead to the same. The respondents' answer admitted the facts as alleged; and, further answering, said that on July 31, 1885, said Robbins duly signed and swore to said examination in writing; that witnesses were then and there duly sworn and heard in said proceedings; that arguments were then and there made by the counsel for the parties to said proceedings; and said respondents claimed that said case was then closed, and that said commissioner then continued said proceedings, as alleged in the petition; and, answering further, the said respondents said that said commissioner refused to allow said charges to be filed because the same were offered too late, not having been filed, or offered for filing, at any time pending the examination of said Robbins; and that said petitioners did not present, file, or offer to file said charges of fraud within the time allowed by law. Hearing in the supreme court, before C. ALLEN, J., who reserved the case for the consideration of the full court.

H. J. Edwards, for petitioners.

S. T. Harris, for respondents.

C. ALLEN, J. The only question is whether, within the meaning of Pub. St. c. 162, § 49, the examination of the debtor must be treated as pending up to the time of the announcement of the decision of the magistrate, so that the creditor was at liberty to file charges of fraud at any

time before the announcement of the decision, although the hearing of evidence and arguments had closed, and the magistrate had continued the cause for the purpose of considering the questions of law and fact involved therein. And we are of the opinion that such an examination is still pending, until the announcement of the decision. Until then the cause might have been reopened, in the discretion of the magistrate, and further evidence or arguments heard. *Mandamus* to issue.

(142 Mass. 117)

RICH and another v. CRANDALL.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 29, 1886.*)

MASTER AND SERVANT—LIABILITY FOR ACTS OF AGENT OF LESSEE OF EXPRESS LINE—PRESUMPTION.

A., the defendant, was the owner of an express line known as "S.'s Express," doing business between B. and E., and had in his employ one C. A. subsequently, without the knowledge of plaintiffs, leased the line to D., in whose employ C. continued. The plaintiffs had for some time previous to the lease forwarded goods by A.'s express, and about a month after the lease to D. intrusted certain goods to C., with instructions to collect the pay for him, and return the latter to plaintiffs. C. delivered the goods, and collected the money, which, through no fault of C., was never returned to plaintiffs. *Held*, that in the absence of evidence that the plaintiffs were misled, by conduct or silence of A., into believing him to be the real party behind C. in conducting the business at the time referred to, A., the defendant, was not liable, although the plaintiffs believed him to be the owner of the business.

This was an action of contract. Hearing in the superior court, without a jury, before BRIGHAM, C. J., when the following facts appeared:

The plaintiffs are parties doing business, under the style of the New England Oyster Company, in the city of Boston, and the transactions out of which plaintiffs claim that the cause of action stated in their declaration arose were between them and the Smith Express, running between Boston and Exeter, New Hampshire, and these transactions consisted in the bringing of orders for oysters from persons in Exeter by said express, with directions to collect in cash the price of same on their delivery in Exeter to the persons who had ordered them. In September, 1882, Daniel B. Smith, the owner of Smith's express, sold the route, good-will, and property of the same to the defendant. The business, however, continued to be conducted in the same name after said sale, and said Smith continued to conduct the same for the defendant for about a month; and while so conducting the same, and on an occasion while presenting orders for said express, notified the plaintiff of the sale to the defendant, and that he (Smith) was then in defendant's employ. At the expiration of said month said Smith was succeeded by one John H. Orr, Jr., who continued to conduct the same under the same style of Smith's Express, on joint account with the defendant, under an arrangement that, when the current profits and expenses of the express could be approximately ascertained, said Orr was to receive from defendant a lease of the teams, horses, etc., and good-will of said express upon a rent payable monthly. In pursuance of this arrangement, the defendant and said Orr, in March, 1883, settled between themselves the business of said express to that time; and on April 1, 1883, defendant leased to said Orr, upon a rental of \$20 per month, said express, and all property used in conducting the same; and thereafter said Orr conducted said express under said lease in the same name of Smith's Express, and was so conducting it at the time of the transactions on which plaintiffs claim to recover from the defendant. One Safford was a servant

of the said express before the sale from Smith to the defendant, and continued in its service afterwards, dealing with the plaintiffs while said express was conducted by said Smith for the defendant, and continuously during the oyster season, that is to say, from September to May; and so remained while the express was conducted by said Orr, under the lease before mentioned. As such servant, said Safford was authorized, by the person or persons severally conducting the same, to represent said express, and, as such representative, brought to the plaintiffs orders from persons in Exeter for oysters, received the same from plaintiffs to take to Exeter, and deliver on payment in cash of the price by the persons ordering them; and did so take and deliver oysters, and receive in cash the price of them in several instances mentioned in plaintiffs' bill of particulars, and this money was, by no default of said Safford, never turned over to plaintiffs. The money thus received, and not accounted for, the plaintiffs seek to recover in this action of the defendant. Plaintiffs never saw defendant, nor had any business transactions personally with him; and never had any actual notice of the lease to said Orr, nor of said Orr's conducting said express under said lease, although the fact was so stated in the reading columns of a newspaper published in Exeter, New Hampshire, and circular notices to the same effect were issued by said Orr, and distributed among persons with whom said express transacted business; but neither said newspaper nor circulars were ever received by the plaintiffs. The orders on which said oysters were delivered to said Safford bore a printed heading, "SMITH EXETER EXPRESS. J. H. ORR, AGENT." By the contract of lease between the defendant and said Orr the defendant had no interest in the profits, and was not to be responsible for the losses of the said express from April 1, 1883, to the time of this action.

The court ruled that upon the facts found, and hereinbefore stated, this action could not be maintained against the defendant, and thereupon found and ordered judgment for defendant, and the plaintiff alleged exceptions.

*J. Brown Lord*, for plaintiff.

*F. F. Fay*, for defendant.

C. ALLEN, J. The defendant had not been Safford's employer or principal, in point of fact, for several months before the transactions now in question, and cannot be charged in this action without proof that the plaintiff had a right to regard him as such employer or principal, and did in fact honestly and in good faith so regard him, and give credit to Safford relying on the defendant's responsibility. But it is not found as a fact, and there is no legal presumption from the facts which are found, that the plaintiffs dealt with Safford under the belief that he was acting for the defendant, or that they relied on the defendant's credit to make good Safford's undertakings. It does not appear that the plaintiffs were misled by the defendant's conduct or silence into believing him to be the real party behind Safford in conducting the business at the time referred to. Inasmuch as the facts found do not show that the plaintiffs were entitled to recover, judgment was properly ordered for the defendant. See *Packer v. Hinckley Locomotive Works*, 122 Mass. 489; *Wright v. Herrick*, 128 Mass. 240.

Exceptions overruled.



(142 Mass. 120)

BATES and others v. YOUNGERMAN and another.

*(Supreme Judicial Court of Massachusetts. Suffolk. June 20, 1886.)*

## TROVER AND CONVERSION—CREDIT—ORAL REPRESENTATIONS OF—EVIDENCE.

In an action of tort for conversion of merchandise sold upon credit, oral representations or assurances made by one of the defendants in regard to the credit and pecuniary responsibility of the other defendant are inadmissible under Pub. St. c. 78, § 4.

This was an action of tort brought for the conversion of certain merchandise sold by the plaintiffs to the defendants, Joseph Youngerman and Marks Rubinovz. At the trial in the superior court, before ALDRICH, J., the plaintiffs offered evidence of oral representations or assurances made by defendant Rubinovz, October 18, 1881, in regard to the credit and pecuniary responsibility of defendant Youngerman, that said Youngerman might obtain credit, for the purpose of showing that they were thereby fraudulently induced to make the sale to Youngerman; but the court ruled that the evidence, the statement not being in writing, was inadmissible, and ruled also that upon the evidence the action could not be maintained, directed a verdict for the defendants, and the plaintiffs alleged exceptions. Sufficient facts appear in the opinion.

*H. Dunham and E. C. Mitchell, Jr.*, for plaintiffs.

*H. N. Sheldon and J. H. Sherburne*, for defendants.

GARDNER, J. The plaintiffs offered oral representations or assurances made by the defendant Rubinovz, in regard to the credit and pecuniary responsibility of the defendant Youngerman, that Youngerman might obtain credit. This was offered for the purpose of showing that the plaintiffs were fraudulently induced to make the sale to Youngerman. This evidence comes within the provisions of Pub. St. c. 78, § 4. The false representations were made concerning the defendant Youngerman with an intent to induce the plaintiffs to part with their property to Youngerman on credit. This is within the prohibition of the statute. *Kimball v. Comstock*, 14 Gray, 508; *Wells v. Prince*, 15 Gray, 562; *Mann v. Blunckard*, 2 Allen, 386; *McKinney v. Whiting*, 8 Allen, 207. In their offer of proof the plaintiffs did not go far enough to take it out of the limitations of the statute. At the time of the sale, the defendant Youngerman, in the presence of Rubinovz, made a written statement, "as a basis of credit for present and all future purchases." The manager of the plaintiffs' firm in New York testified that, "after the statement was made and signed, I gave defendant Youngerman a line of credit, relying solely on said statement, and the oral representations or assurances of the defendant Rubinovz." These representations or assurances were rightly excluded, as we have already shown. There is nothing in the bill of exceptions to show that any part of the written statement was untrue. It is difficult to see what evidence of misrepresentation or fraud was laid before the jury to show a conversion of the plaintiffs' property by the defendants, or either of them. If the property was obtained from the plaintiffs by the defendant Youngerman under the form of a sale, but

in fact by misrepresentation and fraud, and the defendant Rubinovz obtained it of Youngerman with knowledge of the fraud, the plaintiffs could maintain trover for it, because the possession both of Youngerman and Rubinovz was wrongful and constituted a conversion. *Stevens v. Austin*, 1 Metc. 557. In the case at bar we find no evidence of a conversion by the defendants, jointly or severally. Exceptions overruled.

(142 Mass. 142)

**ELLIOT FIVE-CENT SAV. BANK v. COMMERCIAL UNION ASSUR. CO.**

(*Supreme Judicial Court of Massachusetts. Suffolk. June 30, 1886.*)

**1. FIRE INSURANCE—RIGHT OF INSURANCE COMPANY TO REPAIR—LOSS—DAMAGE.**

Where a policy of insurance provides that the insurance company shall pay the loss within 60 days after proof of loss, or may, within 15 days after the proof of loss, notify the insured of its intention to rebuild or repair the premises insured, the company will not be held to have been deprived of its right to elect to rebuild or repair the premises where it appears that nine days after a fire, and after the agent of the company has appraised the loss, the mortgagee of the property insured, to whom the insurance was payable, began to repair the premises; such repairs being reasonable and necessary to protect the property from further damage.

**2. SAME—LOSS—ELECTION OF COMPANY TO PAY MORTGAGE—REASONABLE TIME.**

Where the statute and the policy of insurance give an insurance company the right, in a case where it is not liable to the mortgagor or owner of property insured, to elect to pay the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt, the law implies a condition that this right of election shall be exercised within a reasonable time; and where the company did not make such tender until seven months after suit was brought upon the policy, and had filed an answer in the suit denying its liability, such tender is insufficient, not being made within a reasonable time.

**3. SAME—TENDER—MUST INCLUDE REASONABLE EXPENDITURES BY MORTGAGEE.**

A tender by an insurance company, under the statute, to a mortgagee of property insured, and which has been damaged by fire, and repaired by the mortgagee, must include, not only the amount of the mortgage and interest accrued, but all sums which the mortgagee has reasonably spent to protect the property, and uphold his security.

**4. SAME—PROOF OF LOSS—OBJECTIONS—WAIVER—DEFECT.**

Where an insurance company issued a policy of insurance upon a building on which there was a mortgage, and the building was damaged by fire, and the mortgagee, to whom the insurance was payable, sent to the company a proof of loss signed by the owner of the property, and also one signed by the person to whom the policy was originally issued, and the proofs sent were accepted without objection by the company, who made no reply to subsequent requests of the mortgagee for information whether further proof of loss was required or desired, the company must be held to have waived any defect in the proof of loss, if any existed.<sup>1</sup>

This was an action of contract, by a mortgagee of real estate in Boston, to recover for a loss by a fire occurring on November 29, 1883. After hearing in the superior court upon agreed facts, judgment was ordered for plaintiff for \$4,529.28, and the defendant appealed. The facts appear in the opinion.

*H. G. Allen and J. L. Thorndike*, for plaintiff.

*M. & C. A. Williams*, for defendant.

<sup>1</sup> See note at end of case.

MORTON, C. J. By the policy in suit the defendant insured "George B. Taylor, payable, in case of loss, to Eliot Five-cent Savings Bank, mortgagees, as interest may appear," on the Hotel Clifton, in the sum of \$5,000, for five years from July 1, 1881. The policy is in the standard form prescribed by Pub. St. c. 119, § 139, and St. 1881, c. 166, § 1; and contains the provision that, "if this policy shall be made payable to a mortgagee of insured real estate, no act or default of any person other than such mortgagee, or his agents, or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate: provided, that the mortgagee shall, on demand, pay according to the established scale of rates for any increase of risks not paid for by the insured; and whenever this company shall be liable to the mortgagee for any sum for loss under this policy for which no liability exists as to the mortgagor or owner, and this company shall elect, by itself, or with others, to pay the mortgagee the full amount secured by such mortgage, then the mortgagee shall assign and transfer to the companies interested, upon such payment, the said mortgage, together with the note and debt thereby secured."

The policy also contains the provision that in case of any loss or damage the company, within 60 days after the statement or proof of loss, "shall either pay the amount for which it shall be liable, or replace the property with other of the same kind and goodness, or it may, within 15 days after such statement, notify the insured of its intention to rebuild or repair the premises, or any portion thereof separately insured by this policy, and shall thereupon enter upon said premises, and proceed to rebuild or repair the same with reasonable expedition."

The building insured was damaged by fire, November 29, 1883, and within a few days thereafter an agent of the defendant and an agent of the plaintiff examined the premises, and appraised the amount of loss at \$4,488, to recover which sum this suit is brought, the writ being dated June 16, 1884. At the time the policy was issued, and at the time of the loss, the plaintiff held a mortgage upon the premises to secure the note of the said George B. Taylor for \$12,000. On December 26, 1883, the plaintiff delivered to the defendant a proof of loss, signed and sworn to by Abbie E. Taylor, to whom George B. Taylor had conveyed the premises since the policy was issued; and on March 22, 1884, more than 60 days before this suit was brought, the plaintiff delivered to the defendant another proof of loss, signed and sworn to by the assured, George B. Taylor. The defendant received and retained both of these proofs without objection, and though twice asked, in writing, to inform the plaintiff if it required or wished for any further statement, remained silent, and made no reply. It must be held to have waived any defects in the proof of loss, if any existed.

If we assume, as claimed by the defendant, that the conveyance by George B. Taylor to Abbie E. Taylor, without the consent of the company, avoided the policy as to them, yet, under the first clause above cited, it would not affect the right of a mortgagee to recover.

But the defendant relies upon two grounds of defense.

One is that the plaintiff, by its acts in entering upon and repairing the premises immediately after the fire, deprived the defendant of its right to elect to rebuild or repair the premises within 15 days after the proof of loss. It appears that nine days after the fire, and after the agent of the defendant had examined the premises and appraised the loss, the plaintiff began to repair the premises. Immediate repairs were necessary in order to prevent further damage. The repairs were finished March 28, 1884, and, it is admitted, were reasonable and proper for the protection of the property. The policy provides that the company shall pay the loss within 60 days after the proof of loss, or it may, within 15 days after the proof of loss, notify the insured of its intention to rebuild or repair the premises. The fact that the plaintiff had commenced making repairs without notice did not deprive the defendant of its right to notify the plaintiff of its intention to repair the premises. If the defendant had done so, and found that the insured was making repairs without any notice to it, both acting in good faith, it might be difficult to adjust fairly the rights of the parties. But there is nothing to show that the defendant ever entertained an intention to repair. It has never notified the insured of such intention, and it is clear that the acts of the plaintiff, in making necessary repairs, in good faith, ought not, upon any principles of law or justice, to defeat the right to recover its actual loss.

The other ground of the defense is that the defendant tendered to the plaintiff the amount secured by the mortgage, and demanded a transfer of the mortgage and note, which the plaintiff refused. The facts agreed are that "on January 20, 1885, the defendant made a legal tender to plaintiff of the amount of the principal of the mortgage, (\$12,500,) and accrued interest thereon due upon said day, and requested the plaintiff to assign, transfer, and deliver to defendant the mortgage and note, which plaintiff declined to do." We think there are two answers to this defense. The statute and the policy give the company the right, in a case where it is not liable to the mortgagor or owner, to elect either to pay the mortgagee the loss, or to pay the full amount secured by the mortgage, and to receive an assignment of the mortgage and debt; but the law implies a condition that this right of election shall be exercised within a reasonable time. In the case before us the defendant denied its liability to pay the loss, compelled the plaintiff to bring this suit, filed an answer denying any liability on its part, and, seven months after the suit was brought, made the tender upon which it relies. If this tender is sufficient, it must follow that any tender made before judgment in the suit would defeat the plaintiff's right to recover. The result would be to throw upon the plaintiff all the costs and expenses of the suit, which would be unreasonable and unjust. We are of opinion that the tender made by the defendant was not made within a reasonable time, and was too late to be of avail as a defense to this suit.

We are also of opinion that the tender was not sufficient in amount. The defendant was required to tender "the full amount secured by such mortgage" at the time the tender was made. The plaintiff had, before

the tender, made large expenditures necessary to protect the property, and prevent further damage to it. The fire rendered the plaintiff's security insufficient to cover its debt. The mortgagor and owner of the equity were unable to make repairs, and the plaintiff did so at their request. We cannot doubt that, under these circumstances, the mortgagor and his assigns would in equity be liable to pay whatever the mortgagee had reasonably spent to protect the property and to uphold his security, and that the full amount secured by the mortgage includes such expenditures.

For these reasons we are of opinion that the plaintiff is entitled to recover the full amount of the loss. Judgment affirmed.

## NOTE.

In case of *Badger v. Glens Falls Ins. Co.*, (Wis.) 5 N. W. Rep. 845, where the policy of insurance upon provided that the assured should forthwith give notice of the loss, and within 30 days render a particular account of such loss, and should also produce a certificate of a specified character from the chief of the fire department, etc., it was held that the provision respecting the procuring of such certificate must be strictly construed to avoid a forfeiture, (see *Killips v. Insurance Co.*, 28 Wis. 472; *O'Connor v. Insurance Co.*, 31 Wis. 160,) and that it does not require that the certificate be furnished within 30 days.

Where a formal notice was forwarded as soon as possible to the company, who replied that, as the premium had not been paid, the case could not be taken under consideration, it was unnecessary to furnish any proofs of loss, which are but conditions precedent to the bringing of the action, and these, if waived, need not be complied with. Notice given within a reasonable time, under the circumstances, is all that can be required. *Lebanon Mut. Ins. Co. v. Erb*, (Pa.) 4 Atl. Rep. 13.

Failure to object within a reasonable time to proofs of loss, where the defects in the proof could be remedied, if intelligently pointed out, amounts to a waiver. *Mercantile Ins. Co. v. Holthouse*, (Mich.) 5 N. W. Rep. 642.

It is said that the insurer who rejects preliminary proofs as defective, without specifying the defects, with a notice that he insists on an exact compliance with the conditions in the policy, waives no rights to urge the defects in such proofs. *Gauche v. London & Lancashire Ins. Co.*, 10 Fed. Rep. 347.

The repudiation of any liability, under the policy, to the person entitled to demand payment of the same, waives any imperfections in the preliminary proof of loss, *Rumsey v. Phoenix Ins. Co.*, 1 Fed. Rep. 396; and renders all imperfections in proof of loss immaterial, *Miller v. Alliance Ins. Co.*, 7 Fed. Rep. 649.

Denial of liability is a waiver of production of proof of loss. *King v. Hekla Fire Ins. Co.*, (Wis.) 17 N. W. Rep. 297.

A statement by an agent that the company absolutely refused to pay a loss will operate as a waiver of the production of proofs before suit. *O'Brien v. Ohio Ins. Co.*, (Mich.) 17 N. W. Rep. 726.

(162 N. Y. 505)

## MURRAY v. BEARD and others.

(Court of Appeals of New York. June 1, 1886.)

## PRINCIPAL AND AGENT—RIGHT TO COMMISSIONS—AGENT ACTING FOR SEVERAL—BAD FAITH.

A contract by an agent with several employers separately to obtain a sale of piles for each one of them on commissions, he knowing that proposals are about to be made by a company building a pier, for the purchase of the same of the lowest bidder, but not disclosing the same to his principals, cannot be enforced by him against one of his employers who is the successful bidder, both on account of no consideration, and also that he acted in bad faith in his dealings with his principals.

Appeal from general term city court of Brooklyn, affirming a judgment dismissing the complaint.

*Henry D. Hotchkiss*, for appellant, James Murray.

*Thomas E. Pearsall*, for respondents, *William H. Beard* and others.

RUGER, C. J. The claim in this case presents a novel industry, and one which, if successfully carried out, would seem to become the source of profit to its prosecutors without much expenditure of time or money. The plaintiff, a timber broker, learning that the Hamburg American Packet Company was about to build a pier requiring a large number of piles in its construction, and to advertise for bids from timber merchants to supply them, visited the several dealers in such materials in New York and Brooklyn, and obtained prices therefor, and, under the inducement that he would act for them respectively in securing a sale of piles, obtained promises from each that, if he secured a sale for such dealer, he should receive a commission of 25 cents on each pile sold. He did not inform the dealers of the name of the intending purchaser, or the fact that a contract could be obtained only by competitive bidding, or that he had effected a similar understanding with other dealers. The company soon thereafter issued proposals for the supply of the piles, and sent invitations to dealers generally, among whom were the defendants, to compete for a contract for the piles required. A number of persons, among whom were the plaintiff, the defendants, and other dealers, submitted bids for such contract, and, after a canvass of such proposals by the company's engineer, he awarded the contract to the defendants. The defendants having refused to pay the plaintiff's claim for commissions, this action was brought to recover them.

Upon the trial the plaintiff was nonsuited by the court below, upon the ground that there was no consideration for the promise to pay commissions. We think the judgment was properly ordered upon that ground, and that it can also be sustained upon the ground of the fraudulent suppression of material facts by the plaintiff in making the contract, as well as that it was *contra bonas mores*. The plaintiff, while assuming to act for the defendants in obtaining the contract of sale, was in fact under obligations to competing dealers to assist them in effecting the same sale. Thus, if plaintiff's services could have been of advantage to any one, he was under the necessity of being treacherous to one employer or another. An agent is held to *uberrima fides* in his dealings with his principal; and if he acts adversely to his employer in any part of the transaction, or omits to disclose any intent which would naturally influence his conduct in dealing with the subject of the employment, it amounts to such a fraud upon the principal as to forfeit any right to compensation for services. Story, Ag. §§ 31, 334; Story, Eq. Jur. § 315; Ewell's Evans, Ag. 268; Dunlap's Paley, Ag. 105, 106; *Carman v. Beach*, 63 N. Y. 97, 100. It is an elementary principle that an agent cannot take upon himself incompatible duties or characters, or act in a transaction where he has an adverse interest or employment. *New York Cent. Ins. Co. v. Protection Ins. Co.*, 14 N. Y. 85; Ewell's Evans, Ag. 14; *Greenwood v. Spring*, 54 Barb. 375; *Neuendorff v. World Mut. Life Ins. Co.*, 69 N. Y. 389. In such a case he must necessarily be unfaithful to one or the other, as the duties which he owes to his respective principals

are conflicting and incapable of faithful performance by the same person.

The plaintiff in this case was a bidder for the contract, and if he succeeded in obtaining it himself, and had not the piles to fulfill it, he was under equal obligations to several different persons to employ their piles in its performance. Some or all of his principals must have been disappointed by him, and he would have been under the necessity of violating his obligations to some of his employers. Such conduct is violative of the plainest principles of morality and fair dealing and cannot be sustained by a court of justice. Neither does the proof show that he rendered any service to the defendants in effecting the sale. His situation rendered him incapable of serving the defendants to advantage, even if he had desired to do so; but the evidence fails to show any effort on his part to sell the defendant's property. He did attempt to sell his own property, or secure the contract for furnishing piles; but whether this was done for defendant's benefit or not does not appear. As we have seen, he was under contract obligations to others, as well as to the defendants, and it does not lie in his mouth to allege that he intended to defraud others for the benefit of the defendants. There was no evidence showing a performance by the plaintiff of the obligations of his contract with the defendants, and he was therefore properly nonsuited on the trial.

The judgment should be affirmed.

(All concur.)

(102 N. Y. 510)

PEOPLE v. CRUGER.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. LARCENY AND RECEIVING STOLEN GOODS—INDICTMENT—PROOF MUST AGREE WITH ALLEGATIONS OF LARCENY.

The indictment against defendant charged that he "did steal, take, and carry away one lace-pin, of the value of eight hundred dollars, \* \* \* the property of James Porteous." The evidence was that Porteous had left it with defendant to be sold, but the former had authorized him to procure a loan upon it, which he did. Defendant asked the court to charge that "the indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain the loan as authorized, they cannot convict under the indictment for the larceny of the pin." The court refused to so charge. *Held* error.

2. SAME—EMBEZZLEMENT OF PROCEEDS FROM AUTHORIZED SALE, NOT A LARCENY OF THING SOLD.

An omission to account for the proceeds of a loan obtained on a pin which accused was authorized to pawn, could not, by relation, change the voluntary act of the owner, in parting with the pin, into a larcenous taking by the defendant, nor support the allegation of the indictment.

Appeal from judgment general term supreme court, First department, affirming judgment and order denying motion for new trial on conviction of the defendant of grand larceny in the second degree at the New Yorkoyer and terminer.

Morris A. Tyng, for appellant, Kortright Cruger.

<sup>1</sup> Reversing 38 Hun, 500.

*Randolph B. Martine*, for the People.

DANFORTH, J. The conviction is for stealing, on the tenth of March, 1885, a diamond pin, the property of one Porteous. It appeared in evidence that the defendant was engaged in the business of buying and selling jewelry, and of effecting loans upon personal property; that before the time in question there had been dealings between the parties in relation to the pin, but on that day it was in the possession and under the sole control of Porteous, who, as he testified, left it with the defendant to be sold; but, according to the testimony of the defendant, Porteous wanted him to procure a loan upon it, and did not direct a sale. It also appeared that at the police court, on the twenty-sixth of April, 1885, at an examination concerning the same transaction, Porteous was asked this question, "You authorized a loan?" and answered, "Yes sir; when he [the defendant] suggested either a loan or a sale." Other circumstances in evidence sustain the defendant's version, and there are some which might impair the credit of the complainant as a witness. There was sufficient evidence that the defendant did procure the loan from one Hawkins. At the close of the testimony the defendant moved for a direction of a verdict of acquittal, on the ground that "the indictment charges distinctly a larceny of a certain particular pin; and, the evidence being perfectly clear that the pin was left with the defendant for the purpose of procuring a loan on it, that he did procure a loan on it, acting exactly within the scope of his authority, and doing precisely what it was left with him for, he cannot be convicted under this indictment of the larceny of this pin." The court denied the motion, saying: "The complainant claims that there was no such authority conferred upon him; that it was left with him for the purpose of sale, and not for the purpose of pledging."

The defendant then asked the court to charge the jury as follows:

"The indictment being for the larceny of a certain pin, if the jury believe that the complainant, being the owner of the pin, authorized the defendant to obtain a loan upon it, and the defendant did actually obtain that loan from Mr. Hawkins, (the witness who has testified,) as authorized by the complainant, they cannot convict the defendant under this indictment for the larceny of the pin."

The court declined to do so.

The exception then taken presents the only question we think it necessary to consider. The proposition presented by the request negatived every ingredient of the offense charged, and, if found in favor of the defendant, would have made a conviction impossible. If the owner intended to part with the property for a special purpose, and the defendant used it only in the way prescribed, it could not be said to be stolen. There could have been neither a false pretense nor a felonious taking on his part. It is said, however, by the learned counsel for the respondent that the request asked too much, because it did not take in the possible intent of the defendant, "at the time of procuring the loan," to appropriate the proceeds to his own use. This by no means answers the ex-



ception; for, if found according to the propositions of the request, it would appear that the defendant received the property lawfully, and disposed of it according to the wish of the owner; that he not only obtained the loan, but obtained it as authorized. The request might have been amplified, but it was unambiguous, and contained a proposition good in law, and to the benefit of which the defendant was entitled. An omission to account for the proceeds of the loan could not, by relation, change the voluntary act of the owner in parting with the pin into a larcenous taking by the defendant, nor sustain the allegation upon which the indictment stood, that the defendant "feloniously did steal, take, and carry away" the property in question. There may have been a breach of trust, and even fraudulent conversion of the proceeds of the loan, but that does not constitute the offense charged.

The exception was well taken. The judgment and conviction should therefore be reversed, and a new trial granted.

(All concur.)

(102 N. Y. 530)

KALBFLEISCH and others v. LONG ISLAND R. Co.

(Court of Appeals of New York. June 1, 1886.)

NEGLECTANCE—CONTRIBUTORY NEGLIGENCE—TAKING OUT BENZINE NEAR ENGINE.

Where the "spark arrester" in the smoke-stack of an engine is so defective that fire escapes, and ignites the vapor arising from plaintiff's kettle of varnish standing near the railroad, and plaintiff is injured, a motion to dismiss his complaint, on the ground "that the taking out of the inflammable benzine was contributory negligence," was properly denied.

Appeal from order general term city court of Brooklyn, refusing to re-settle its order affirming a judgment for damages caused by a fire which originated from sparks from defendant's engine.

*Wm. J. Kelly*, for appellant, Long Island R. Co.

*Wm. M. Dykman*, for respondents, Albert M. Kalbfleisch and others.

DANFORTH, J. The defendant, at the close of the plaintiff's case, moved the trial judge to dismiss the complaint, on the ground "that the taking out of the inflammable benzine was contributive negligence; also that there is no evidence that the fire came from the defendant's engine." The motion was denied, and an exception then taken raises the only question we can consider.

It appeared that the plaintiff was the owner of certain buildings in Brooklyn, adjoining the tracks and station of the defendant, which he leased to one Lewis Kupper. In September, 1882, the latter was engaged in making black varnish, and had commenced thinning it down with benzine. It was giving off vapor. At that time defendant's train stopped at the station to let off its passengers, "when," according to one witness, "she started off again, and commenced to puff," and, he says, "I saw a flash come from the engine right into the kettle, and it was all on fire." "The train had just got in front of our place when it caught on fire." "I looked up," he says, "and the vapor was afire." This was

about 1 o'clock. The fire on plaintiff's premises had been extinguished at 11, and there was no fire in the neighborhood except as it was emitted from the locomotive. That its condition permitted this escape was established by its engineer, who testified that the wire netting of the smoke-stack was out of order. "It was," he says, "split lengthwise of the smoke-box about a foot and a half, and through working the engine it opened it out, and made a space there,—I should say very near a foot wide, and a foot and a half long open in the netting. This netting is supposed to be a spark arrester. It is right underneath the smoke-stack, on the upper part of the smoke-box, under the stack, on the inside of the smoke-box. That was the only thing there was there to arrest the sparks. I know of this engine having set fire to lots of fences, and one thing and another along the road, that I know of. I knew it would set fire to fences about the beginning of September, or the latter part of August of the same year." On cross-examination by defendant's counsel, he testified that a week before the fire he reported this break, when it first occurred, to the master mechanic, and after the fire it was patched up. "The effect of such a hole as I have described would be that all the sparks would come through the flues, and would escape through the opening, where, if the vent was closed, the sparks would be arrested. I think it would increase the amount of sparks thrown largely, more or less. It increased the sparks coming out of this engine."

This was the condition of the case when the motion referred to was made, and it is a complete answer to it, unless the mere location of a railroad and its use are to operate as an absolute prohibition upon certain branches of industry in its vicinity. By purchase such dominion might be acquired, but that is not pretended.

In *Fero v. Buffalo & St. L. R. Co.*, 22 N. Y. 215, the court found it difficult to maintain the proposition that one could be guilty of negligence while in the lawful use of his own property upon his own premises; but in the case before us the claim is advanced that the mere taking out and use of an article necessary in the manufacture carried on upon plaintiff's premises put them beyond the protection of the law. In view of the fact that no impediment was offered to the freest discharge of sparks from defendant's engine, and the testimony of the eye-witness that the fire causing the injury came from it, the two grounds upon which the defendant sought to arrest this case were equally untenable. *Fero Case*, *supra*; *Cook v. Champlain Transp. Co.*, 1 Denio, 91. The exception is therefore unavailing. But the record shows that the plaintiff afterwards gave evidence, and the case was submitted to the jury in a manner satisfactory to the defendant; and, in the absence of any request for a further charge, it must be presumed that the instructions given covered every point then thought by the defendant to be material. No exception other than the one above referred to was taken at the trial.

The judgment appealed from should be affirmed.

(All concur.)

For affirmance, see *People v. ...* and *People v. ...*

(102 N. Y. 704)

*In re* Petition of the NEW YORK, L. & W. R. Co., etc., v. BENNETT and others.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

**1. RAILROADS—COMMISSIONERS TO APPRAISE PROPERTY TAKEN—MISCONDUCT BY.**

The petitioner made a written contract with the appellants by which they agreed to purchase of Harriet A. Bennett certain elevator property, and commissioners were named therein to ascertain the compensation to be made by the company. It was agreed that they should be governed, in estimating said valuation, by the rules of law applicable to proceedings under the statute, with right of appeal. No compensation was to be allowed for damage to this or adjoining property, but they were to take into consideration "the capability of the premises for any use whatever." Appellant was to give a good title, etc. Under this agreement the commissioners were appointed at special term, and they appraised the property at \$469,875; but, on appeal by the company from the order confirming the report, it was reversed, and the report of the commissioners was set aside; but the general term refused to appoint new commissioners, and the company appealed. 98 N. Y. 447. The commissioners then had a rehearing, when the company made a motion at special term to vacate the order appointing them, on the ground of their misconduct, on the ground that they declined to be governed by the opinion of general term, which laid down the rule that the owners were entitled to the fair market value only, whereas they had admitted evidence of a valuation based upon the probable earnings of a new elevator, and projected connections with lines of transportation; and the court below granted the motion. *Held* error.

**2. SAME—CONTRACT BINDING UPON THE COURT.**

That the provisions of the contract, so far as they bound the parties, were binding upon the court in carrying the contract into effect; that they required that the value of the real estate was to be ascertained by deciding upon its capabilities for any use whatever, and would fairly admit, as an element of value, evidence of the improvements of which it was capable, etc.; and that it was not misconduct in the commissioners to refuse to commit themselves, in advance, to a rule of decision which would exclude from their consideration matter to which it was expressly agreed they might have reference in reaching the result.

RUGER, C. J., and EARL, J., dissenting.

Appeal from judgment general term supreme court, Fifth department.

*Geo. F. Comstock and Norris Morey*, for appellants, Harriet A. Bennett and others.

*Sherman S. Rogers*, for respondent, New York, L. & W. R. Co.

**RAPALLO, J.** This proceeding was instituted in pursuance of a written contract between the petitioner, the railway company, and the appellants, bearing date the twenty-fourth day of May, 1883. By that contract the railway company agreed to purchase of the appellant Harriet A. Bennett the property known as the "Union Elevator" at Buffalo, and with due diligence to take proceedings under the general railroad law for the purpose of ascertaining the value of the premises, and of the erections thereon, and the compensation to be paid therefor, and of obtaining the title in fee thereto. It was stipulated in the contract that Nelson K. Hopkins, Robert Dunbar, and Brigham Clark should be appointed commissioners in said proceedings, to ascertain the compensation which ought justly to be made by the company to the party or par-

<sup>1</sup> See 2 How. Pr. (N. S.) 225.

ties owning or interested in said property, and that the decision of the majority of them should be binding on both parties. It was further mutually agreed that the said commissioners should be governed, in estimating said valuation and compensation, by the rules of law applicable to proceedings under said statute, (*"excepting as they might be modified by this agreement,"*) and that all rights of appeal given by law should be reserved to either party. It was expressly agreed that in said proceedings no damage should be allowed because of injury to the Bennett elevator property, or any adjoining or adjacent premises, or any compensation allowed for anything except the actual value of the premises and property described in the agreement; that, in ascertaining the compensation to be allowed, the commissioners should "take into consideration the capability of the premises and property for any use whatever;" and that they should determine such compensation without delay, and upon their own knowledge and information, as well as upon such evidence as might be produced before them. The contract then went on to provide that the value finally arrived at in said proceeding should "be the fixed purchase price" to be paid by the railway company. It prescribed the time of payment and of delivery of possession, and also provided for the execution and delivery, by the appellant Harriet A. Bennett, to the company, of a deed, with covenants of seizin and for quiet enjoyment, conveying a perfect title to the premises, except as to certain incumbrances for which allowance was to be made out of the purchase money. The contract contained further stipulations respecting mutual accommodations in the use of their docks by the Union elevator and Bennett elevator properties, and various other stipulations not affecting the main question presented upon this appeal, but to which it may be necessary incidentally to refer.

The proceeding for the appraisal of the property agreed to be sold, was instituted by the railway company, as it had agreed, and in October, 1883, in that proceeding, thus instituted, an order was made by the supreme court at special term in the Fourth department, appointing the three gentlemen named in the contract commissioners to appraise the property. They made a report in January, 1884, fixing the compensation to be paid at the sum of \$469,375, which report was confirmed at special term; but, on appeal by the company to the general term, the order of confirmation was reversed, and the commissioners' report was set aside. On that appeal an effort was made by the railway company to have new commissioners appointed; but the supreme court refused that relief on the sole ground that it had not the power to grant it because the parties had, by their contract, agreed upon the commissioners. From that decision the railway company appealed to this court. No appeal was or could have been taken by the property owners from that part of the order which set aside the report of the commissioners, and consequently there has been no review here by that part of the decision of the general term. The ground on which that tribunal refused to appoint new commissioners was, however, reviewed here, and the decision was fully sustained. 98 N. Y. 447. The case then went back for

a rehearing before the same commissioners, and, while that rehearing was pending before them, the railway company made a motion to the court at special term to vacate the order appointing the commissioners on the ground of alleged misconduct on their part. The allegations of misconduct contained in the moving papers were of two classes. One was that Mr. Robert Dunbar, one of the commissioners, had business relations with the claimants Bennett and wife which prevented him from being a disinterested appraiser. These charges were answered at the hearing at special term to the satisfaction of the presiding judge; and the counsel for the company does not now complain of the disposition made of that branch of the charges; but he confines himself on this appeal to the remaining branch, which is, in substance, that Commissioners Dunbar and Clark on the second hearing declined to be governed by the opinion of BRADLEY, J., who delivered the opinion of the general term on the appeal from the order confirming the report of the commissioners. This refusal was regarded by the court below as misconduct which justified it in vacating the appointment of commissioners, and thus necessarily terminating the proceeding.

The precise manner in which the alleged misconduct is claimed to have been committed is set forth in the brief of the counsel for the railway company, and in the moving affidavits, which, for the purpose of this appeal, we must assume to be correct. Evidence had been admitted, on the first hearing before the commissioners, of the manner in which the property in question could be utilized by expending a large sum in increasing the capacity of the elevator, and estimating the income which it would be capable, with these improvements, of producing, and these estimates were mainly based upon evidence of the income earned by other elevators in Buffalo; and opinions as to the value of the property in question had been given, based, not upon the market prices of the property as it was at the date of the contract, but upon what it might be made to pay by improving it as an elevator; also of its capacity to handle grain, if improved and operated in connection with the Bennett elevator, which was along-side. Evidence had been admitted, on that hearing, of estimates based upon projected connections with railroad companies, and facilities for transportation not under the control of the owners of the property in question, and other speculative matters.

In the opinion delivered by BRADLEY, J., and before referred to, the learned judge said that, when compared with other sales of property in the same locality, the value, as appraised by the commissioners, was exceptionally large; and he commented upon the evidence which had been given before the commissioners, and pointed out the contingencies to which some of the considerations on which the witnesses based their estimates were subject, and expressed the opinion that these estimates were matters of speculation, dependent on too many circumstances to be entitled to consideration as evidence of value. In these observations he referred, among other things, to the evidence as to the contemplated relation of the property to, and its operation in connection with, other property, and projects for connecting facilities with channels of trans-

portation not within the control of the then owner of the property in question; and he said that, in view of all the testimony, it was difficult to escape the conclusion that the commission reached the result which they did by the application of erroneous principles to the appraisal of the value of the property in question, and that the amount of compensation awarded by their report was by that means increased considerably in excess of the fair market value of the property. In this opinion the learned judge laid down the rule that the owners were entitled to be allowed the fair market value of the property, and that that was the basis on which the estimate should be made, and allowed, by witnesses and the commission.

On the second hearing before the commissioners, evidence of David S. Bennett was received of a valuation based upon the probable earnings of a new elevator of a certain capacity, if erected upon the lot in question, based upon the past earnings of two elevators, which were named, and upon projected connections with lines of transportation. After the examination of this witness had been concluded, the counsel for the railway company moved to strike out his testimony so far as it assumed to give a value in dollars to the property in question. The grounds of the motion were specified; one of them being that the testimony on which the estimate was founded was inoperative and worthless under the decision of the general term. The motion to strike out the evidence was finally denied; Commissioner Hopkins being in favor of striking it out, Commissioners Clark and Dunbar of retaining it; Commissioner Dunbar saying that he was inclined to receive the evidence, and give it the weight which he thought proper. The question was raised at other stages in the case, and the substance of the struggle was, on the part of the railway company, to maintain that the decision of the general term was that the evidence and the valuation should be confined to the market value of the property as it was at the date of the contract, and that this decision was binding upon the commissioners, and should be followed by them; while, on the other hand, it was claimed that they were not so restricted, but were entitled to consider the rights of the parties under the contract, and make a just award between them; and reference was had to the opinion of this court on the first appeal.

The commissioners were then requested, by the counsel for the railway company, to rule on three propositions, viz.: *First*, there cannot be taken into consideration, in arriving at the value of the property, the probabilities of a connection with the railroad of the petitioner as one element affecting that value; *second*, that the opinion of the general term in the proceeding is controlling upon the commissioners as to the principles which should govern them in making their award; *third*, that the measure of the award is the fair market value of the property as it was at the date of the contract. The commissioners then adjourned without ruling on the propositions, and at their next meeting, having consulted among themselves, Commissioner Dunbar announced that he did not consider himself bound by the supreme court decision, but did consider himself bound and sworn to ascertain and determine the compensation which

ought justly to be made by the company to the party or parties owning or interested in the property, and that he considered himself bound to do justice between the parties, and as much justice to the railroad company as to Mr. Bennett, as far as he knew. Commissioner Clark concurred with Commissioner Dunbar.

That the decision of Commissioner Dunbar, to the effect that he did not consider himself bound by the supreme court decision, had reference to that part of the opinion of Judge BRADLEY which held that the basis upon which the appraisement should be made was the market value of the property, is made very clear by the colloquy set forth in the moving affidavits, and by the request of the counsel for the railroad company to the commissioners to rule upon the point. Mr. Dunbar introduced the remark, by saying, "Mr. Hopkins spoke to me this morning in respect to following the general term decision;" and Mr. Hopkins stated that the particular point to which he had called the attention of Mr. Dunbar was as to the manner of arriving at the value of the real estate.

It is needless to go over the various forms in which the question was raised by the counsel for the company, as it clearly appears that the substance of the whole controversy was whether the commissioners were bound to follow the rule laid down in the quoted portion of the opinion of BRADLEY, J., at general term on the case as there presented to him, and to exclude from their consideration, in making their appraisal, all evidence except such as bore upon the market value of the property as it was at the date of the contract; thus excluding estimates based upon the development of the property by means of improvements of which it was capable, and the probable increase which might be derived therefrom by means of such improvements; and the question for our determination is whether the commissioners, in declining to hold, in advance of any appraisal, that they were concluded on the point referred to, were guilty of misconduct which authorized the court below to vacate the order appointing them, and thus terminate the proceeding.

In respect to these matters the position of the commissioners was peculiar. They were not acting merely as officers of the court, owing their appointment solely to it, but they had been selected by the solemn contract of the parties; and that contract established the principles by which they should be governed in making the appraisal. After the decision of the general term on the first appeal had been pronounced, the case had come before this court, and it had adjudged that the provisions of the contract, so far as they bound the parties, were binding upon the court in carrying the contract into effect. Even if it should be conceded that the court had it originally in its power to decline to lend its aid to the carrying out of the contract, by refusing to appoint commissioners; and thus disabling the company from taking the first step which was essential to give vitality to the contract, it does not follow that after the court had entertained the proceeding, and set the machinery in motion by which rights had accrued to the parties, it could of its own volition; or in its mere discretion, terminate those proceedings, or require them to be conducted in a different manner or on different principles from those

which had been agreed upon. On the former appeal to this court it was held that, notwithstanding the right of appeal was reserved to both parties, and notwithstanding that the statute authorized the court in ordinary cases, on the first appeal, not only to set aside the award of the commissioners, but to appoint new commissioners, yet that in this case it could not exercise the power to change the commissioners, because that would be a violation of one of the terms of the contract.

The same principle applies in respect to the rules which should govern the commissioners in making their appraisal. The contract provided, in that respect, that they should be governed by the rules of law applicable to proceedings under the statute, *except as they might be modified by the contract*. One of these modifications was that no damages should be allowed because of injury to the adjacent premises. Could it be seriously argued that the court could, at the instance of the property owners, have required the commissioners to allow such damages because the statute authorizes their allowance, or that it would be misconduct on their part, which would authorize their removal, to refuse to make such allowance if the court had, at some previous stage of the case, decided that it was proper? Assuming that the learned counsel for the company is right in claiming that the general rule in condemnation proceedings is, as he asked the commissioners to hold, "that the measure of the award is the fair market value of the property *as it was at the date of the contract*," and that this was a correct rendering of the opinion of the general term, we come back to the question whether the commissioners were bound so to decide in this case, in the face of the express stipulation of the contract "that, in ascertaining and determining the compensation to be allowed, the said commissioners shall take into consideration the capability of the premises and property for any use whatsoever, and that they shall determine such compensation upon their own knowledge and information, as well as upon such evidence as may be produced before them." This language is much more comprehensive than "the market price" or "market value" of the premises at the date of the contract, and shows that the real value was to be ascertained, predicated, not merely upon the condition of the property as it was at the date of the contract, or the uses to which it was devoted at that time, but upon its capabilities for any use whatever; and would fairly admit, as an element of value, evidence of the improvements of which it was capable, and of the revenues which might with reasonable certainty be expected to be derived from the development of those capabilities. The peculiar nature of the property might be such that it had no fixed market value, and the parties therefore agreed that the commissioners, who were persons of experience, acquainted with the means of rendering property of that description available, might take into consideration what it was capable of yielding with reasonable and judicious development and management.

Of course, as just and reasonable men, it would not be expected that they would calculate as certainties profits which were speculative, and contingent or variable, but the language of the contract certainly implies that they were not to be confined, in their estimate, to the sum which it



could be proved the property would bring if exposed for sale in the open market, or to a valuation based upon sales of other property in the vicinity. They were selected and agreed upon by the parties as competent judges of the real value of property of the description which was the subject of inquiry, and it is not to be assumed that they would omit to make due allowance for contingencies and uncertainties, and to properly weigh the evidence in connection with their own knowledge and information, to which, by the terms of the contract, they were expressly authorized to resort; and we are of opinion that, under the peculiar circumstances of this case, it could not be held to be misconduct in them to refuse to commit themselves, in advance, to a rule of decision which would exclude from their consideration matters to which it was expressly agreed they might have reference in reaching a result.

There is nothing in the case to show that, in declining to decide as required by the counsel for the company, they intended to be disrespectful to the court, or arbitrarily to overrule the opinion referred to, or to be contumacious or perverse; but, on the contrary, it would rather seem that they intended conscientiously to perform their duty conformably to the contract under which they were appointed. The contract was one which secured advantages to both parties in return for rights which they surrendered. The railroad company evidently desired to acquire the property; and, if it had been compelled to resort to proceedings *in invitum*, it would have been open to the owners to resist them, and to contest the questions whether the property was required for railroad purposes, and whether the railroad company could in any event acquire more than a right of user. These points the owners surrendered by covenanting to give a deed in fee, conveying a perfect title, with covenants of seisin and quiet enjoyment, which no law could have compelled them to do. They also abandoned their claim to damages to adjacent property, which the law would have allowed, and they also agreed to withdraw the suits which they were then prosecuting against the company in relation to Darkbasin alley, and to assign to the company all their rights in that alley; also to convey to the company all their rights in lands in and adjoining the Evans ship-canal, which the company were at the time seeking to obtain by proceedings under the railroad law. Various other arrangements for the mutual convenience of both parties were provided for in the contract, and the whole was based upon the assurance of a just compensation being made for the Music elevator property, by having it appraised by three gentlemen of experience, agreed upon by the parties, who were to value the property in the manner provided by the contract. To require those arbiters to adopt any different rule of valuation, after the contract had been partly performed, and when the company was in the enjoyment of some of the benefits which were to be granted to them on its performance, would be a subversion of the rights of the appellants under the contract, which is inadmissible.

It must further be observed that the application to vacate the appointment of the commissioners was made and granted before any appraisal or award had been made by them; and before it could be known what

effect they would give to the evidence on the question of value, which they admitted, and declined to strike out. Commissioner Clark stated, in answer to the motion to strike out, that he thought the evidence was in the same line as that which was admitted on the former trial, and that he thought it ought to be received, and Commissioner Dunbar stated that he was inclined to receive it, and give it the weight he thought proper. There was nothing in this which was final, or which showed that the commissioners might not, in arriving at a decision, be guided in their judgment by the reasoning of the general term as to the weight to be given certain portions of the evidence, and might not finally reach a just award. Some of the evidence on which Mr. Bennett had based his valuation related to facts explanatory of the capabilities of the property, which, in our judgment, was proper to be considered, and some to estimates and projects uncertain and conjectural in their character. It was certainly not impossible that, in weighing this evidence, the commissioners, enlightened by the opinion of the general term, might make the proper discriminations, and form a sound judgment in the end. There was no evidence impeaching their integrity in the matter, and the learned counsel for the respondent, in their argument in reply, expressly state that they do not charge actual dishonesty on the part of the two commissioners, but do charge an obstinate and perverse determination to follow in the forbidden paths, and on that ground claim the right to remove them before it can be ascertained, by their decision, to what result the paths alleged to be forbidden will lead them.

In answer to the objection that the removal was, to say the least, premature, they reply the finality of the second report, under the general railroad act; and on this ground demand that the appellants should be absolutely debarred of the means of enforcing their contract of sale in the manner provided by the contract, on the mere apprehension that the commissioners will, through mere obstinacy and perversity, make an excessive award against them, and that in that case they would be without remedy. Aside from other answers to this argument of the respondent, a sufficient one is that although, under the statute, the petitioners could not by appeal obtain a review, on the merits, of a second award, yet it would be within the power of a court of equity to set aside any excessive award obtained by fraud or the misconduct of the commissioners, or for any cause which would justify setting aside an award of arbitrators; and in a proceeding like this the same relief could be obtained on motion. If this application had not been made, and the commissioners had proceeded to a second award, it could have been set aside if misconduct could be shown; and the same remedy will again be open to the petitioners if the second award is impeachable for that cause. But it should not be assumed, in advance, that the commissioners will, in making their final award, be guilty of misconduct or bad faith, or willful disregard of the legal rights of either party. In this case the apprehension that they will do so is mainly founded upon the fact that their first award was unsatisfactory to the petitioners, and was set aside by the court as excessive. The court at general term had power, on that ap-

peal, to review the award on the merits, and order a rehearing, and that order was not reviewable in this court. What award they will make on the rehearing cannot now be known, and the mere apprehension that it will be excessive is not sufficient to justify their being prevented from making any. *Livingston v. Sage*, 95 N. Y. 289.

We have no doubt of the appealability of the order. It was final, as it necessarily terminated the proceeding; and it affected a substantial right, as it deprived the appellants of the fruits of their contract by rendering its enforcement impossible.

The orders of the general and special terms should be reversed, and the application to vacate the order appointing commissioners denied, with costs.

(All concur, except RUGER, C. J., and EARL, J., dissenting.)

(106 Ind. 555)

### MCLEAN v. HESS and another.

(*Supreme Court of Indiana*. May 25, 1886.)

#### FRAUDULENT CONVEYANCE—SETTING ASIDE PURCHASE IN NAME OF WIFE.

Although a husband, with fraudulent intent, shared in by both grantor and grantee, obtains a conveyance of property to his wife, joining her in a note therefor, such conveyance cannot be set aside by his other creditors as fraudulent, nor the property subjected to their claims, where none of his money or property goes to pay for it.

Appeal from Marion superior court.

Replevin for the possession of an engine, a boiler, and certain machinery, brought by appellant against the appellee Hess. Appellee Daggy was made a party on his own petition, and answered affirmatively, in addition to a general denial, that the appellant, being indebted to him, bought certain mill property out of his own means, and, for the purpose of defrauding his creditors, had the same taken in the name of his wife, who was a party to such fraud; that the property replevied was part of such mill property; and that the sheriff, Hess, held it by virtue of a writ of attachment sued out by appellee. The case was tried on this issue, and judgment rendered against the appellant.

V. Carter, for appellant.

R. O. Hawkins and A. Daggy, for appellee.

ZOLLARS, J. The evidence tends to establish the following facts: In 1881 one George W. Gibson was the owner of a mill property in Boone county. After some negotiation he agreed to sell it to Thomas S. McLean, the husband of appellant, for the sum and price of \$1,600. The last negotiations were between Gibson and appellant and her husband. It was then determined by all of the parties that the deed should be made to appellant. The object on the part of appellant and her husband was to put the property beyond the reach of Mr. Daggy, to whom the husband was indebted. Gibson's object was the same, as he feared that, if the husband should take the title, Mr. Daggy would take the property, and he (Gibson) would thus lose the amount for which he was

selling the property. At that time, the husband, Thomas S. McLean, was insolvent, and had no property out of which anything could be made by execution. The deed for the property was made to appellant. Nothing was paid to Gibson at the time, and nothing has at any time been paid by appellant's husband, unless the facts hereinafter stated show payments by him. Appellant and husband executed a note to Gibson for \$1,600, as it was agreed they should do. They also agreed to give him a mortgage upon the property to secure its payment, but after appellant got the deed she refused to execute the mortgage. Appellant and husband also agreed to have the property insured for Gibson's benefit. He furnished them money with which to pay for the insurance. A policy of insurance was procured, but in favor of and payable to appellant. Gibson had agreed with appellant's husband to furnish him money with which to operate the mill. The mill was for a time operated by the husband, and his and appellant's son, in the name of McLean & Son. During this time, Gibson furnished money to the husband, which was used in buying wheat, etc. The mill burned in 1883. At that time no part of the purchase price had been paid to Gibson. He sought to have the insurance policy assigned to him. Appellant declined to do so, and collected thereon from the insurance company \$1,770. When the mill burned, the boiler and engine, and some other machinery, of the value of \$600, were saved. These appellant and her husband offered to Gibson in payment of his note. It was finally agreed that they should be shipped to Indianapolis, in the name of Gibson, and sold. The husband, however, shipped them in his own name. Finally, in settlement of Gibson's note, appellant gave him \$950 of the insurance money, and her son conveyed to him a house and lot. While the boiler and engine, etc., were at Indianapolis, and before appellant's husband had consummated a sale of them, Mr. Daggy commenced a suit in attachment against him, and they were taken by the sheriff, Hess, upon a writ of attachment, as the property of the husband, Thomas S. McLean. Appellant replevied the property from the sheriff. To that action Mr. Daggy became a party, and made the defense that the mill property, of which the machinery in question was a part, was purchased and paid for by Thomas S. McLean, the husband; and that without any consideration, and for the purpose of defrauding his creditors, especially Mr. Daggy, he caused the property to be conveyed to appellant; she participating in the fraud.

It is provided by sections 2974, 2975, Rev. St. 1881, that where a conveyance is made to one person, and the consideration therefor paid by another, the same shall be presumed fraudulent as against the creditors of the person paying the consideration. The undisputed testimony is that Thomas S. McLean has paid no part of the purchase money to Gibson. Gibson furnished "to them" the money with which to procure the insurance, and "they used the money; not having it [the property] insured" in his name. The insurance was taken in appellant's name. However fraudulent the purpose may have been in having the property conveyed to her, that policy belonged to her. However fraudulent the

conveyance to appellant may have been, she had an insurable interest in the property. The insurance was taken in her name. The policy was hers, and the proceeds thereof cannot be taken from her by the husband's creditors. *Pence v. Makepeace*, 65 Ind. 345; *Lerow v. Wilmarth*, 9 Allen, 382; *Nippes's Appeal*, 75 Pa. St. 472; *Bernheim, etc., Co. v. Beer*, 56 Miss. 149. It is clear, therefore, that the \$950 of the insurance money paid upon the purchase-money note was paid by appellant, and not by her husband. The house and lot conveyed to Gibson was the property of her son, and not of the husband. Thus it appears that no part of the consideration for the conveyance of the mill property was paid by appellant's husband. This being so, it is difficult to see how Mr. Daggy, or any other creditor of the husband, could or can be injured by the conveyance to appellant, or by any fraudulent purpose therein.

There are sometimes injuries without remedy; but, in a case like this, the law will not afford a remedy where there is no injury. No property or money of the husband went into the property purchased from Gibson. It is not shown that it was in any way increased in value by any skill or labor of the husband. Mr. Daggy is in no worse condition, as respects his debt against the husband, than he would have been had the conveyance not been made to the wife. It is the settled law, we think, that a conveyance will not be set aside, nor the property conveyed be subject to the payment of the debts of the fraudulent debtor, where it appears, as it does appear here, that none of his property or money has gone into the property so conveyed. *Fulton v. Woodman*, 54 Miss. 158; *Bernheim, etc., Co. v. Beer*, *supra*; *Colgate's Ex'rs v. Colgate*, 23 N. J. Eq. 372; *Farnham v. Clements*, 51 Me. 426; *Leonard v. Barnett*, 70 Ind. 367; *Sherman v. Hoglund*, 54 Ind. 578; *Eagan v. Downing*, 55 Ind. 65; *Evans v. Nealis*, 69 Ind. 148; *Irwin v. Ivers*, 7 Ind. 308.

It is not a question of conflict in the evidence here. There is a total lack of evidence to make a cause against appellant, such as the law requires in order to take the property, and apply it to the payment of the husband's debts.

The judgment must therefore be reversed. It is accordingly reversed at appellee's cost, and cause remanded, with instructions to the court below to sustain appellant's motion for a new trial.

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(106 Ind. 504)

**BROSEMER and others v. KELSEY.**

(*Supreme Court of Indiana. May 25, 1896.*)

**1. DRAINS AND SEWERS—LIEN OF ALLOTMENTS ON LANDS AFFECTED—ACTION TO QUIET TITLE.**

Where assessments for constructing a ditch are placed upon the tax duplicate against the land affected, they are liens upon such land in an action to quiet title. The purchaser, at the sale of the same for failure to pay such assessments, may, if the proceedings were not void, and the deed proves ineffectual to convey title, have such liens enforced.

2. SAME—NOTICE—BURDEN ON PARTY ASSERTING LIEN TO SHOW SUBSTANTIAL COMPLIANCE WITH STATUTE.

The burden is upon the party asserting a lien for a ditch assessment to show a substantial compliance with the statute as to notice; and where the record fails to show any notice to a land-owner affected, or the finding of any such notice by the board, the proceedings are void as to such party.

3. SAME—VOID AS TO ONE TENANT IN COMMON, VOID AS TO ALL.

Where proceedings to establish a ditch are void as to one of several tenants in common, who are owners of the land affected, for want of notice, they are void as to all.

Appeal from Pulaski circuit court.

*Agnew & Borders*, for appellants.

*W. Spangler and H. A. Steis*, for appellees.

ZOLLARS, J. On the fifteenth day of May, 1883, appellee received from the county auditor a tax deed for appellants' land, based upon a sale made in February, 1881. In 1877 and 1878, two ditches, known as the "Kelsey" and "Hissong" ditches, were established by the board of county commissioners under the act of March 9, 1875. 1 Rev. St. 1876, p. 428. In each of the proceedings, allotments of work were apportioned to appellants' land; and, they not having performed the work, it was sold by the auditor as in section 12 of the act provided. It was sold to W. Kelsey. He did the work, which amounted to \$165.31 in the Hissong ditch, and \$135.60 in the Kelsey ditch. The work allotted in the Kelsey ditch was sold in November, 1878, and that allotted in the Hissong ditch in January, 1879. In August and September, 1879, the county auditor issued certificates to Kelsey, and entered the amounts upon the tax duplicate against appellant's land. These sums, amounting to \$300.91, without interest, were part of the \$342.15 for which the land was sold at the tax sale; the balance being state and county taxes and costs. In the trial of the case below the court found that the tax deed was ineffectual to convey title, and adjudged and decreed a lien upon the land in appellants' favor for \$496.37; thus decreeing a lien for the amount of the ditch allotments, with interest, as well as for the amount of the state and county taxes, with interest at the rate fixed by the statute in such cases.

Section 12 of the act under which the ditches were constructed, provided that, upon the completion and acceptance of the allotments of the work sold, the auditor should issue a certificate to the person doing the work for the sum due him, and enter the amount of such certificate upon the tax duplicate of the county against the tract of land benefited by the construction of the ditch, together with the legal interest; and that the amount so entered should be collected by the treasurer of the county as other taxes, and paid by him to the person holding the certificate.

It is plain that this section authorized the treasurer to collect the amount by the restraint and sale of personal property, and by the sale of the land in case the owner had no personal property, just as in the collection of state and county taxes. Appellants' counsel tacitly concede that this is so; but insist that if the land should be sold, and the deed for any reason should prove to be invalid, and ineffectual to con-

vey title, the court cannot declare a lien upon the land for the amount in favor of the grantee in the deed, in an action like this, brought by such grantee to quiet his title. The argument is that the amounts for which the allotments were worked, and thus placed upon the tax duplicate, do not become liens in favor of the state, and hence are not liens that are transferred to the purchaser in case his deed is ineffectual to convey title, as provided by 1 Rev. St. 1881, § 6488. Acts 1883, p. 95, §§ 2, 3.

That the amounts so placed upon the tax duplicate were a lien upon the land is settled by the case of *Baker v. Clem*, 102 Ind. 109. True, the amounts, when collected, are to be paid to the person holding the certificate; but he had no lien which he could enforce except through the instrumentality of the state. *Storms v. Stevens*, 104 Ind. 46; S. C. 3 N. E. Rep. 401. The amounts, were, however, a lien upon the land, and that lien was to be enforced, and the amount collected by the county treasurer as state and county taxes are collected. The lien, therefore, for the purposes of collection, may be said to be a lien in favor of the state. The statute in express words declared that the amounts so placed upon the tax duplicates should be collected as other taxes are collected. This, we think, included that provision of the tax law for the collection of taxes which provides that the amount paid shall be declared a lien upon the land in favor of the purchaser, in case the deed shall prove ineffectual to convey title. In this we are supported by the analogous cases of *Bothwell v. Millikan*, 104 Ind. 162; S. C. 2 N. E. Rep. 959, and 3 N. E. Rep. 816; *Millikan v. Ham*, 104 Ind. 498; S. C. 4 N. E. Rep. 60; *Justice v. City of Logansport*, 101 Ind. 326. Of course, if the ditch proceedings were void, the amounts placed upon the tax duplicate did not become liens in favor of any one. In an ordinary case to enforce a lien for state and county taxes, where the tax deed is ineffectual to convey title, the statute throws upon the land-owner the burden of showing that the assessed taxes do not constitute a lien. *Scott v. Millikan*, 104 Ind. 75; S. C. 3 N. E. Rep. 647. These liens for ditch assessments or allotments, however, stand upon a different basis in that regard. When a party asserts title under and through an allotment, under the act of 1875, or seeks to have a lien declared for the amount of the allotment when the tax deed is ineffectual to convey title, the burden is upon him to allege and prove that the law was substantially complied with in relation to notice to parties to be affected. *Pickering v. State*, 6 N. E. Rep. 611, (at present term); *Shaw v. State*, 97 Ind. 23; *Wishmier v. State*, 97 Ind. 160; *Vizzard v. Taylor*, 97 Ind. 90. Of course, where presumptions supply the place of proof, no other proof is necessary. All of the proceedings in the ditch case might be regular, and yet the sale of the land be invalid; as, for example, the failure to first levy upon personal property.

The land in controversy was owned by Frank, Emma, Edward, and Clara Brosemer, as tenants in common. The name of Clara Brosemer does not appear in the proceedings which led to the establishment of the Hissong ditch, the selling of the allotments, the placing of the amount

upon the tax duplicate, nor in any other part of the proceedings. Whatever may be said as to other portions of the proceedings, it was necessary that the names of the land-owners should appear in the notice, by the auditor, of the filing of the report of the viewers. 1 Rev. St. 1876, p. 429, § 2.

The commissioners' record, in the matter of the Hissong ditch, contains the following:

"Comes now F. B. Thomas, publisher of the Winimac Democrat, and files his affidavit and printed notice in these words, [insert,] that due and printed notice was given the owners of real estate herein affected by the construction of such ditch, \* \* \* by posting three printed notices in three of the most public places in the neighborhood of said proposed ditch; and also comes Jeremiah H. Falvey, auditor, and files affidavit that he sent a printed notice to each non-resident that could be ascertained."

Whatever might be said of the case did it affirmatively appear that the board of commissioners found that notice had been given to Clara Brosemer, it is clear that the above does not amount to such a finding. If it amounts to anything more than a statement as to what was contained in the affidavit, the statement, "the owners of real estate herein affected," limits the finding to those named in the proceedings. Clara Brosemer, as we have seen, was not named in any of the proceedings. As to her, therefore, there is not only no finding that notice had been given, but rather an affirmative statement that she had no notice, because the notice was to those named in the proceedings. The copy of the printed notice which we find in the record contains the names of other land-owners, but not the name of Clara Brosemer. Her rights could not be affected by the proceedings to which she was in no way a party, and of which she had no notice. *Young v. Wells*, 97 Ind. 410; *Vizzard v. Taylor*, *supra*; *Jones v. Cardwell*, 98 Ind. 331. If, as to her, there had been some notice, although defective, we should have a different case. *Jackson v. State*, 104 Ind. 516; S. C. 3 N. E. Rep. 863; *McMullen v. State*, *etc.*, 4 N. E. Rep. 903. It follows from the above conclusions that, under the evidence before us, Clara Brosemer was not bound by the proceeding in the matter of the Hissong ditch, and that her interest in the land cannot be subjected to a lien for the whole, nor for any part of the amount charged against it on account of the allotments in that ditch proceeding. Her motion for a new trial, therefore, should have been sustained; and, as the invalidity of the lien as to her interest in the land necessarily affects the interests of the other appellants as tenants in common with her, the judgment must be reversed as to all of them. No tenable objections have been urged against the proceedings and judgment below, so far as they rest upon the state and county taxes.

It is urged in argument that no valid claim against the land could grow out of the working of the allotments by William Kelsey, for the reason that, at the time the allotments were sold to him, he was the holder of a tax certificate for the land, having bought it at a previous tax sale. The record, we think, does not show the facts to be as contended. If, however, he held such a certificate, which was valid, and



has ripened into a title, appellants are not in a position to complain of the judgment, because they have no interest in the land to be affected by it. If the previous tax sale and certificate were invalid, the land belonged to appellant, and there is no reason that we can see why the allotments might not have been sold to and worked by William Kelsey.

A third ditch, affecting the land, was constructed under the circuit court act. An alleged assessment in that proceeding is set up in the second paragraph of appellee's complaint; but, as it is manifest that the court below found for appellants upon that paragraph, and as no cross-errors are assigned by appellees, we express no opinion as to the validity of that proceeding, nor as to the right of appellee to recover any amount of the alleged assessment in the manner here attempted.

Judgment reversed, at appellee's cost, and cause remanded, with instructions to the court below to sustain appellants' motion for a new trial.

(107 Ind. 266)

**SANDERS v. WEELBURG, Ex'x, etc.<sup>1</sup>**

*(Supreme Court of Indiana. June 5, 1886.)*

**1. JURY—TRIAL—CLAIM AGAINST DECEDENT'S ESTATE FOR CONTRIBUTION.**

A claim against a decedent's estate for money alleged to be due from the decedent for contribution as co-surety is triable by jury.

**2. PRINCIPAL AND SURETY—CONTRIBUTION—ADVANTAGE GAINED BY ONE INURES TO BOTH.**

Where a surety pays a judgment against his principal, and, upon execution sale procured by himself, purchases the principal's property at a comparatively nominal price, his co-surety may show, in bar of an action for contribution, that such property, at its fair value, was more than sufficient to satisfy such judgment.

**3. JUDGMENT—NON OBSTANTE VEREDICTO—SPECIAL INTERROGATORIES—ANSWERS TO—WHEN GENERAL VERDICT NOT CONTROLLED THEREBY.**

Where the facts found by a jury in answer to special interrogatories are indefinite and uncertain, or not necessarily inconsistent with the general verdict, a motion for judgment on such findings, notwithstanding the general verdict, is properly overruled.

Appeal from Marion circuit court.

A. F. Denny, for appellant.

Ayres & Brown, for appellee.

Howk, C. J. This was a claim in favor of the appellant, and against the appellee, as the executrix of the last will of Henry Weelburg, deceased. The claim was founded on a judgment which it was alleged that one Will F. A. Bernhamer, administrator, etc., recovered on the twenty-ninth day of January, 1879, in the Marion superior court, against one Frederick Weelburg, as principal, and against the appellant and the appellee, executrix, etc., as co-sureties, for the sum of \$1,957.20, and bearing interest at 8 per cent. per annum. The appellant stated in his claim or complaint that, as one of such co-sureties, on and before the ninth day of April, 1879, he paid on said judgment the aggregate sum of \$1,811.50, "in full of the balance of said judgment, interest, and costs," and the execution then outstanding, as to him, was returned

<sup>1</sup> Rehearing denied.

satisfied; that on the tenth day of April, 1879, an execution was issued on said judgment in favor of the appellant as such co-surety, and delivered to the sheriff of Marion county; that by virtue of said execution the sheriff, on April 16, 1879, levied on certain property of Frederick Weelburg, the principal in said judgment, which property the sheriff, on April 26, 1879, sold to the appellant for the sum of \$378, of which sum, after the payment of costs, there was credited on the judgment the sum of \$359.52; that on May 1, 1879, by virtue of the same execution, the sheriff levied on certain real estate and leasehold interests of Frederick Weelburg, the principal in said judgment, which property the sheriff, on May 31, 1879, sold to the appellant for \$50, of which sum, after the payment of costs, there was credited on the judgment the sum of \$43.20; that on July 14, 1879, the sheriff sold, on the same execution, to the appellant, for the sum of \$28.29, certain personal property of Frederick Weelburg, the principal in said judgment, of which sum \$21 was credited on the judgment; and that on April 2, 1880, the execution was returned, "No other property found of Frederick Weelburg, principal in the judgment, whereon to levy."

Upon the foregoing facts the appellant claimed that there was due him, by way of contribution from the appellee, executrix, etc., as his co-surety in the above described judgment, the sum of \$700, and 8 per cent. per annum interest thereon after the thirteenth day of March, 1879. The cause was tried by a jury, and a general verdict was returned for the appellee, the defendant below. Over the appellant's motions for judgment in his favor on the special findings of the jury, and for a new trial, the court rendered judgment for appellee on the general verdict.

The appellant has assigned as errors the following decisions of the circuit court: (1) In permitting the cause to be tried by a jury, over his objections; (2) in overruling his motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict; and (3) in overruling his motion for a new trial. We will consider and decide the several questions presented by these alleged errors in the order of their statement.

1. No sufficient reason occurs to us, and none has been suggested by appellant's learned counsel, why this cause should not have been tried, as it was, by a jury, at the request of the appellee. We have given the substance of appellant's claim or cause of action, and it will be seen therefrom that he has sued simply to recover money alleged to be due him by way of contribution from appellee's decedent as his co-surety. Like all other claims against a decedent's estate for a money demand merely, the case in hand was properly triable by jury, upon the request of either of the parties, plaintiff or defendant. The court did not err, therefore, in permitting this cause to be tried by a jury, over appellant's objections.

2. The second error of which appellant complains is the overruling of his motion for judgment in his favor on the special findings of the jury, notwithstanding their general verdict. It is shown by the record that, with their general verdict for the appellee, the jury also returned into

court their special findings on two questions of fact submitted to them by appellant under the direction of the court, in substance as follows:

"(1) Are the facts in the statement annexed to the claim or complaint herein, marked Exhibit A, down as far as the conclusion thereof, commencing with the words 'at the date of filing this claim,' true? *Answer.* Yes. (2) Has any money, other than the sums realized from the sheriff's sales specified in such Exhibit A, ever been paid to the plaintiff, Sanders, on the said judgment? A. No."

It is certain, we think, that the trial court committed no error in overruling appellant's motion for judgment in his favor on the facts specially found by the jury, notwithstanding their general verdict against him. The facts found by the jury in answer to appellant's interrogatories were entirely too vague, indefinite, and uncertain to constitute a sufficient basis for any judgment, and certainly were not so inconsistent with the general verdict as that they would necessarily control the latter, and authorize the court to give judgment accordingly. Section 547, Rev. St. 1881. In such a case, of course, under repeated decisions of this court, the general verdict must stand, and judgment must be rendered thereon. *Amidon v. Gaff*, 24 Ind. 128; *Detroit, etc., R. Co. v. Barton*, 61 Ind. 293; *Woolen v. Wishmier*, 70 Ind. 108; *Carver v. Leedy*, 80 Ind. 335; *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412. In determining the questions presented by a motion for judgment on the special findings of the jury notwithstanding their general verdict, we have uniformly held that all reasonable presumptions will be indulged in favor of the general verdict, while nothing will be presumed in aid of such special findings. *McCallister v. Mount*, 73 Ind. 559; *Cook v. Howe*, 77 Ind. 442; *Lassiter v. Jackman*, 88 Ind. 118; *Baltimore, etc., R. Co. v. Rowan*, 104 Ind. 88; S. C. 3 N. E. Rep. 627. It follows from what we have said that the second error of which appellant complains is not well assigned, and will not authorize the reversal of the judgment.

3. The important and controlling questions in this cause arise under the third alleged error; namely, the overruling of appellant's motion for a new trial. In this motion, many causes were assigned for such new trial, consisting chiefly of alleged errors of law occurring at the trial. There is but little, if any, controversy between the parties and their counsel, as we understand them, in regard to the actual facts of this case; but the controverted and disputed questions between them are, for the most part, in relation to the rules of law or equity which are applicable to such facts, and which must govern and determine their rights and liabilities respectively. We will consider and decide these controverted and disputed questions without special reference to any of the causes assigned by appellant in his motion for a new trial.

Appellant shows in his complaint, as we have seen, that he and the appellee were co-sureties of one Frederick Wheelburg, as principal debtor, in a certain judgment rendered against all of them on January 29, 1879, in and by the superior court of Marion county; that on April 9, 1879, appellant paid the balance then due of such judgment, interest, and costs, to-wit, the sum of \$1,811.50; that on the next day, April 10,

1879, an execution was issued on such judgment in favor of appellant, as such co-surety, and delivered to the sheriff of Marion county; that, by virtue of such execution, such sheriff offered and sold to appellant certain property of the principal debtor, on April 26, 1879, for \$378, and on May 31, 1879, certain real estate and leasehold interests of such principal debtor for \$50, and on July 14, 1879, certain personal property of the principal in such judgment for \$28.29; and that on April 2, 1880, such execution was returned, "No other property found of Frederick Weelburg, principal in such judgment, whereon to levy." On such several sales to appellant his complaint shows that he paid the costs, and credited the remainder of his several bids on the judgment. After his several purchases of the property of Frederick Weelburg, principal in such judgment, and after he had credited the judgment with the net amounts of his several bids for such property, as stated in his complaint, appellant filed his claim herein to recover of the appellee, as his co-surety in such judgment, by way of contribution, the sum of \$700, and interest thereon at the rate of 8 per cent. per annum from and after March 13, 1879.

It is claimed, on behalf of the appellant, that he purchased the property of the principal in the judgment, at public sales thereof by the sheriff of the county, where all parties, the appellee included, had the right to appear and bid therefor; that he had the lawful right to purchase such property at such sales, and, as no one would or did bid more therefor than he, to purchase the same at and for the amounts of his several bids, without regard to the actual value thereof; and that, having so purchased such property, he cannot be required to account therefor even to the appellee, as his co-surety, at its actual value, or at any greater value than the aggregate amount of his several bids. On the other hand, it is claimed, on behalf of appellee, that, as she was the co-surety of appellant in such judgment, equity, good conscience, and fair dealing exacted of him the utmost good faith in his transactions with her in relation to the judgment, and in connection with the property of the principal in such judgment; that as the judgment was a common burden to her and appellant, as such co-sureties, so the property of the principal in the judgment became and was a common fund for the benefit and protection alike of each and both of them; that by suing out and delivering to the sheriff of the county an execution on such judgment, in appellant's favor, he acquired a security for the payment of the judgment by the lien of the execution on the property of the principal therein, which security inured to the benefit and for the protection of the appellee, as his co-surety; that by appellant's acts in procuring forced sales of such property of the principal in the judgment, and in becoming the purchaser thereof at prices relatively nominal, the value of such security became and was largely depreciated, if not wholly lost; and that, by means of the premises, appellant became and was justly chargeable with the fair and reasonable value of such security to the appellee, as his co-surety, in the equitable adjustment of appellant's claim herein to contribution.

These conflicting claims of the parties respectively involve, as it seems

to us, the entire merits of the controversy in this cause. If appellant is right in his claim or contention, as we have heretofore stated it, the general verdict for appellee is wrong, and the judgment thereon cannot stand, but must be reversed, because the record before us clearly shows that the case was tried below upon a theory which antagonizes and is irreconcilable with appellant's claim or contention. If, on the other hand, appellee's claim or contention, as it is heretofore stated, is the correct one, as we think it is, the general verdict is right upon the evidence, and the judgment below must be affirmed.

It is abundantly shown by the evidence in the record that the fair and reasonable value of the property of the principal in the judgment, which was levied upon and sold by the sheriff upon the execution in favor of appellant, and of which he became the purchaser, as aforesaid, largely exceeded in the aggregate the full amount due him on such judgment, of principal, interest, and costs. Appellant, having fully paid and satisfied the judgment to the judgment creditor or plaintiff, by means of such payment, acquired, at the time, a cause of action against the appellee as his co-surety in such judgment; but in his suit on such cause of action it is clear, we think, that under our law he could not recover of the appellee any more than she was "equitably bound to pay." *Prima facie*, appellee, as the co-surety of appellant, was liable to him for the one-half of the sum paid by him to the judgment plaintiff in satisfaction of such judgment; but this *prima facie* liability was subject to reduction by whatever sums could be realized from the property of the principal in such judgment. The property of the principal in the judgment was a common fund for the benefit and protection of both the sureties alike,—the appellee as well as the appellant. By his payment of the judgment to the judgment plaintiff, appellant became and was, practically at least, the owner thereof, and was fully authorized to sue out execution thereon for his own use under the provisions of section 1214, Rev. St. 1881. The judgment was then a lien on the real estate and chattels real of the principal therein; and when, on the next day after his payment of such judgment, appellant sued out an execution thereon in his own favor, and delivered the same to the sheriff of the county, he thereby acquired a valid lien on all the personal property of such principal. These liens upon the real and personal property of the principal in the judgment were a security which appellant had acquired and held as aforesaid; but such security inured in equity to the benefit and for the protection of the appellee, as the co-surety of appellant in such judgment.

In Sheld. Subr. § 143, the law on the subject under consideration is thus stated:

"When one of two or more sureties obtains, in any manner, a security for the payment of the debt, he does this for the benefit of all the sureties. He is a trustee for his co-sureties as to such security, and is held for them to the duties which arise from that relation, and must do no act, nor voluntarily omit to do any act, by which such security will be depreciated or lost; but must faithfully apply it to the payment of the debt, or he will be chargeable to his co-sureties with the amount of the security in the adjustment of their proportions of the debt."

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The language quoted, and the doctrine declared, are fully supported by the numerous authorities cited in the foot-notes by the learned author.

In *Hall v. Robinson*, 8 Ired. 56, it was held by the supreme court of North Carolina that an action for contribution is an equitable one, "in which nothing can be recovered but what, *ex æquo et bono*, the defendant ought to pay." The court say:

"The relief between co-sureties in equity proceeds upon the maxim that equality is equity; and that maxim is but a principle of the simplest natural justice. It is a plain corollary from it that, when two or more embark in the common risk of being sureties for another, and one of them subsequently obtains from the principal an indemnity or counter-security to any extent, it inures to the benefit of all."

In *Owen v. McGehee*, 61 Ala. 440, it was held by the supreme court of Alabama that, whenever persons stand in such relation to a common burden that contribution between them may be compelled, neither can speculate on the common liability, and whatever benefits or advantages are acquired by one, in dealings with the common creditor, inure equally to the benefit of all.

In *Schmidt v. Coulter*, 6 Minn. 492, (Gil. 340,) it was held by the supreme court of Minnesota that where one of two or more co-sureties obtains, in any manner, a security for the debt, he holds it for the benefit of all the other sureties; and if, by any act or omission on his part, such security becomes depreciated or lost, he will be chargeable with the amount of such security in an adjustment with his co-sureties of their several proportions of the debt.

So, in *Comegys v. State Bank*, 6 Ind. 357, it was held by this court that sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against their joint liabilities. Story, Eq. Jur. (13th Ed.) § 499 *et seq.*

Where one surety obtains a security, it inures at once to the benefit alike of himself and his co-surety. He cannot deal with such security to his own advantage, and to the prejudice of his co-surety, without consulting the latter, and without his assent. He occupies the position of a trustee for his co-surety, and cannot deal with the fund, to the prejudice of the latter, without his authority or consent. In such case, where the surety has it in his power, for his own advantage, to sacrifice the common fund, which, in good conscience, he is bound to protect, the general doctrine is that he will not be permitted to avail himself of any such advantage to his own profit, and to the loss and detriment of his co-surety. We do not decide in this case that appellant did not have the right to sue out execution on the judgment, and procure the sale by the sheriff of the principal's property, for this right he clearly had. What we do decide is that if the appellant, at such sales, purchased the property of the principal at comparatively nominal prices, and then sued his co-surety for contribution, she had the right, in bar of such suit, to show, as she did, that such property, at its fair value, was more than sufficient to satisfy such judgment.

Applying the law, as we have stated it, to the case under consideration, as made by the evidence appearing in the record, we are of opinion that the jury reached a right conclusion in their general verdict. The cause seems to us to have been fairly tried on its merits, and a right result was arrived at, we think, in the circuit court. In such a case, errors in relation to the instructions, if any were committed, would not authorize the reversal of the judgment; for our statute imperatively requires, "where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," that the judgment shall not "be stayed or reversed in whole or in part." Section 658, Rev. St. 1881; *Norris v. Casel*, 90 Ind. 143; *Ledford v. Ledford*, 95 Ind. 283; *Daniels v. McGinnis*, 97 Ind. 549; *Perry v. Makemson*, 103 Ind. 300; S. C. 2 N. E. Rep. 713.

Our conclusion is that the court committed no available error in overruling appellant's motion for a new trial of this cause. The judgment is affirmed, with costs.

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(107 Ill. 2)

WESTERN UNION TEL. CO. v. LOCKE, Adm'r.

(*Supreme Court of Indiana*. June 15, 1886)

**APPEAL—ORDER TO PRODUCE WRITTEN INSTRUMENT.**

An appeal will not lie from an interlocutory order directing the production of a written instrument for inspection or for use as evidence on the trial.<sup>1</sup>

Appeal from Huntington circuit court.

C. B. Stuart, for appellant.

Shirk & Mitchell & Farrars, for appellee.

ELLIOTT, J. The appellant prosecutes this appeal from an order directing it to produce a written instrument, and the appellee denies that an appeal will lie. The question, therefore, is, will an appeal lie from an order requiring a party to produce a document? It is declared by the very great weight of authority that an appeal will lie only from final judgments unless the statute otherwise expressly provides. Mr. Powell says:

"The rule that an appeal only lies upon a final decree, order, or judgment seems to prevail throughout the states, and that it cannot be taken upon an interlocutory order unless expressly allowed by statute. A judicial decision is essential as the foundation of an appeal." Powell, App. Jur. 367.

Freeman says:

"The policy of the laws of the several states, and of the United States, is to prevent unnecessary appeals. The appellate courts will not review cases by piecemeal. The interests of litigants require that cases should not be prematurely brought to the higher courts. The errors complained of might be corrected in the court in which they originated; or the party injured by them, notwithstanding the injury, have final judgment in his favor. If a judgment interlocutory in its nature were the subject of appeal, each of such judgments rendered in the case could be brought before the appellate court,

<sup>1</sup>See note at end of case.

and the litigants harassed by unnecessary delay and expense, and the courts burdened by unnecessary labor." *Freem. Judgm.* § 88.

Another author says, "To authorize an appeal there must be a judgment;" and adds: "In addition to this requisite, appeal, like a writ of error, is generally confined to final judgments. It cannot be taken, unless expressly authorized by statute, from a judgment merely interlocutory or provisional." *Hil. New Trials*, (2nd Ed.) 712.

We do not think it necessary to refer to the numerous cases cited by these authors, for there is no diversity of opinion, and our own cases have recognized as correct the rule stated by them. *Miller v. State*, 8 Ind. 325; *Reese v. State*, Id. 416; *Reese v. Beck*, 9 Ind. 239; *State v. Ely*, 11 Ind. 813; *Hamrick v. Danville, etc., Co.*, 30 Ind. 147; *Northcutt v. Buckles*, 60 Ind. 577. It is indeed settled that the general rule is that parties cannot, by agreement, take a case by appeal to the supreme court, unless there is a final judgment. *Shroyer v. Lawrence*, 9 Ind. 322; *Wingo v. State*, 99 Ind. 343. We affirm, therefore, that the general rule is that appeals will lie only from final judgments.

The order directing the production of the contract between the appellant and the railroad company is an order made in the progress of the cause, and is not a final judgment. If it should be conceded that such an order is final, then it must be so held in every case where a written instrument is ordered to be produced, whether it be a promissory note, a receipt, a deed, a lease, or any other written instrument; and such a holding would enable litigants to vex their adversaries in the simplest cases, by groundless and expensive delays. The spirit of our cases and the principles of our law are against the practice here contended for by appellant; and upon a careful search we have found no case recognizing such an order as that appealed from as a final judgment. It is not a final judgment within any definition we have seen. A final judgment was thus described in one of our own cases:

"A final judgment is the ultimate determination of the court upon the whole controversy in the action. An order of the court, made in the progress of the cause, requiring something to be done or observed, but not determining the controversy, is an interlocutory order, and is sometimes called an interlocutory judgment." *Pfieffer v. Crane*, 89 Ind. 485.

Mr. Freeman says:

"The general rule recognized by the courts of the United States, and by the courts of most, if not all, the states, is that no judgment or decree will be regarded as final, within the meaning of the statutes in reference to appeals, unless all the issues of law and of fact necessary to be determined were determined, and the case completely disposed of so far as the court had power to dispose of it." *Freem. Judgm.* § 84.

At another place this author says:

"So far as any distinguishing test can be gathered from the numerous decisions, it is this: That if, after a decree has been entered, no further questions can come before the court except such as are necessary to carry the decree into effect, it is final; otherwise it is interlocutory." *Id.* § 86.



It is said by another author, citing many cases, that "the idea of an appeal is that it is for the purpose of a rehearing of the whole case upon its merits." Powell, App. Jur. 369.

We are referred to several cases decided by the supreme court of New York; but we find, on examination, that they are founded on a statute of a peculiar character, and that there is a direct conflict in the decisions of that court, so that the decisions referred to cannot be regarded as authority elsewhere than in New York, even if they can be so regarded in that jurisdiction. Wait, Ann. Code, 685-688.

The case of *People v. Caton*, 25 Mich. 388, was an application for a mandate to compel a judge to vacate an order of discovery, and in two essential respects it differs from the present: *First*, it was not an attack upon an interlocutory order made upon a party to produce instruments of evidence; *second*, the opinion proceeds upon the theory that the trial court had no jurisdiction to make the order, for it is said, in the conclusion of the opinion, that "the order was not a legitimate exercise of jurisdiction." Whatever may be thought of the correctness of the decision, it is evident that it is not of controlling authority in our state, where there is a statute expressly authorizing the court to make an order to produce papers and documents. Rev. St. §§ 479, 480. It is to be kept in mind that in this instance the court had jurisdiction of the subject-matter and of the person, and, although it may have erred, the error can only be corrected on an appeal properly taken, so that the question here is not one of jurisdiction.

The decision in *Taylor v. Sweet*, 40 Mich. 736, is not in point; for there the judgment fully and finally settled the rights of litigants to a fund claimed by them.

We do not regard the decision in *Drury v. Young*, 58 Md. 546, as favorable to the appellant, for the court there said:

"It was at the option of the defendants to have refused to produce the paper at the trial, and take the risk of a judgment by default; and if the court below should have determined to render one against them, upon an appeal from such a judgment the question would have been properly before us."

To us it seems clear that this language will justly bear but one construction, and that is that the opinion of the court was that the only way in which the question can come before the appellate court is by appeal after final judgment.

It is perhaps but just to appellant's counsel to quote their own expression of opinion. After reviewing the authorities they say:

"We confess to some doubts as to this being a final judgment, within the meaning of our statute, from which an appeal will lie; and yet, if the decision of the supreme court of Michigan lays down the correct rule, this order is, it seems to us, for the reasons stated, a final judgment."

The second position occupied by appellant's counsel is thus stated by them: "(2) But, however the court may determine that question, we do submit that the order in the case at bar is an interlocutory order, within the meaning of section 646 of the statute."

So far as that section is material to the present discussion, it reads thus:

"Appeals to the supreme court may be taken from an interlocutory order of any circuit court or judge in the following cases: *First*, for the payment of money, to compel the execution of any instrument of writing, or the delivery or assignment of any instrument of writing, evidences of debt, documents, or things in action." Rev. St. § 646.

It is quite clear that this provision cannot be construed to refer to the production of documents to be used as instruments of evidence, since no delivery, in the sense intended by the statute, is required by an order directing the production of a document for inspection or for use as evidence upon the trial. The delivery of a document is more than the production of it; for delivery imports a surrender or parting with possession for a permanent purpose. A familiar illustration of the meaning of the word "delivery" is found in the law upon the subject of the execution of deeds, as well as in the law of contract. Of its meaning in the law of contracts, Judge BOUVIER gives this definition: "The transfer of the possession of a thing from one person to another." Bouv. Dict. Tit. "Delivery." But the meaning of words is to be determined from those with which they are associated, or, as the maxim is, *noscitur a sociis*; and the words with which the word "delivery" is associated very plainly show that it was not used as meaning the production of an instrument of evidence for the purposes of the trial. The statutory provision quoted refers to an order compelling the person against whom it is directed to do an act divesting himself of possession and title; for no other meaning can be justly assigned to the words "execution," "assignment," or "delivery," and these are the words which control the provision. It cannot be even plausibly maintained that these words refer to the mere production of documents for inspection, for this would be to wrench them from their well-known and long-accepted meaning. We cannot bring our minds to the conclusion that this statute was intended to give the right of appeal in every case where there is an order for the production of a document for use as evidence on the trial; and unless this right of appeal exists in every case, whether the instrument directed to be produced be a promissory note, a receipt, a lease, or a deed, it exists in none. It is easy to see that the administration of justice might be seriously embarrassed, and vexatious delays secured, if appeals could be taken in every case where a written instrument is ordered to be produced for use as evidence on the trial of the cause.

It is very ingeniously and ably argued that great hardship might often result from the error of a trial court in directing the production of a document; but there are many cases in which the erroneous ruling of the trial court on a question arising in the course of the proceedings may produce great hardship, yet this consideration supplies no reason for allowing an appeal. The truth is that in every case much must necessarily be left, in the first instance, to the sound judgment of the trial judge; and although he may err, and thus cause serious injury to the party, still no appeal will lie until after the final judgment; for the case cannot be cut

up into parts, and tried by piecemeal. An error in compelling a party to give oral testimony may be as injurious as one made in directing the production of written instruments of evidence; but certainly in such a case there can be no appeal until after final judgment. So an error may be committed in compelling the disclosure of confidential communications, or in compelling a party to submit to a personal examination, and yet there can be no appeal from such a ruling. So, also, great hardship may arise from erroneously compelling a party to produce a letter, a receipt, a promissory note, a lease, or a deed; but the hardship of the case will not entitle the party to an appeal. On the other hand, to allow appeals from such rulings before final judgment would be a great hardship to the party rightfully demanding the production of the instrument. It would also be a great injustice to the public, and a burden to the courts, for it would enable litigants to take many appeals in a single cause.

It is safer to trust the trial judge than the interested parties. It is consistent with experience, and in harmony with sound principle, to trust to the judge, rather than to the parties having important interests at stake, and often angered by controversy. It is far better to presume that the judge will not unjustly require the production of a written document than to presume that a party will not abuse the right of appeal. It is therefore important that the right of appeal from all interlocutory orders should be carefully guarded, and the statutes conferring it strictly construed. On this point the authorities agree. Appeal dismissed.

## NOTE.

For a full discussion of the question of what orders are appealable, see *Farson v. Gorham*, (Ill.) 7 N. E. Rep. 104, and note, 106-108.

An order in an attachment suit that a plaintiff has discontinued his attachment by taking judgment on the merits, without filing a replication to a plea to the attachment, and striking the cause from the calendar therefor, is a final and appealable order. *Hemphill v. Collins*, (Ill.) 7 N. E. Rep. 496.

(117 Ill. 92)

## TODD v. TODD and others.

(*Supreme Court of Illinois*. May 14, 1886.)

## 1. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—TWENTY YEARS—ADMISSION HELD INSUFFICIENT.

An admission of adverse possession, in the form of a charge of possession, "from A. D. 1869 to A. D. 1881, both years inclusive, and also for previous years," is insufficient by itself to prove an adverse possession for 20 years.<sup>1</sup>

## 2. SAME—CO-TENANCY—MERE POSSESSION OF PREMISES, AND APPROPRIATION OF RENTS, NOT ADVERSE TO CO-TENANT.

The mere possession of the common premises by one co-tenant, and appropriation of the rents thereof, is not sufficient to make out a case of adverse possession against a co-tenant. Something more is required. There must be outward acts of exclusive ownership of an unequivocal character.

Error to Moultrie.

*John R. Eden* and *C. C. Clark*, for plaintiff in error.

*Mouser & Spüler*, for defendants in error.

<sup>1</sup>See note at end of case.

CRAIG, J. This was a bill brought by William H. Todd, the plaintiff in error, against Mary A. Todd, to partition a certain quarter section of land in Moultrie county. John Todd entered the land in the year 1854, and a patent issued to him on the first day of May of that year. On the twenty-seventh day of the following November, Todd died intestate, and without issue, leaving as his heirs a widow, Mary A. Todd, a father and mother, one sister, and one brother, William H. Todd. Since the death of John Todd, his father, mother, and sister have died, leaving the complainant as their sole heir.

From this statement of facts, which seems to be conceded on both sides, it is apparent that the complainant would be entitled to an undivided one-half of the land, subject to the dower rights therein of Mary A. Todd, unless something has occurred since the death of John Todd to deprive him of the title which descended to him under the statute, or to bar his right of action. In the answer, the defendant Mary A. Todd sets up as a defense to the case made in the bill, that since the death of her husband she has, by her agents and tenants, held possession of said tract of land, improved the same, and paid all taxes and assessments thereon, and she invokes the statute of limitations as a bar to a recovery. It is not claimed in the argument that the defendant made out a case under what is known as the "Limitation Act of 1835 or 1839," but it is contended that the defendant was in the adverse possession of the premises for over 20 years before the filing of the bill, and upon this ground the action was barred. The record before us contains but little evidence bearing upon this question. It will all be found in the answer of the witness W. H. Todd to interrogatories No. 16 and 17, as follows:

"*Interrogatory 16.* State, if you know, who occupies the land in controversy in this suit, and upon what tenure he holds. *Answer.* The man who lives on the land or rents it is named Nelson Lemmon. He is the tenant by arrangement with William G. Patterson, who claims to be the agent of Mary A. Todd, the defendant in this case. *Int. 17.* State, if you know, what improvements are on the land. *A.* A story and a half frame dwelling-house, a small barn or stable, and some other out-buildings and fencing."

Giving this testimony all the weight that it is entitled to receive in any court, it merely establishes the fact that the defendant was in the possession of the premises, at the time the deposition of the witness was taken, by or through a tenant, and that there is a dwelling-house, barn, out-houses, and fencing on the land. How long the defendant had been in the possession of the premises, or whether that possession was adverse to the complainant in the bill, is not disclosed. So far, then, as evidence is concerned, it must be conceded that the defendant failed entirely to establish such an adverse holding as would bar a recovery.

The complainant in the bill of complaint made the following allegation:

"Orator further charges that said defendant, Mary A. Todd, has had the use and occupation and has collected the rents upon said land from A. D. 1869 to A. D. 1881, both years inclusive, and also for previous years, and has collected a large amount of rent, but the precise amount is unknown to your orator, and has had the use of said money for many years; and orator alleges

that she ought to account to orator and said William H. Walker for the rents so collected, and reasonable interest thereon; and orator says that said parties are entitled to have said land partitioned."

And it is insisted that this averment in the bill, in connection with the evidence *supra*, is sufficient to establish an adverse possession of the premises for 20 years. This allegation, conceding it to be an admission which binds the complainant, falls far short of establishing 20 years' possession of the land, or that the possession was adverse. Possession of the premises from 1869 to 1881, both years inclusive, would not constitute 20 years' possession, nor will the other language used, "for previous years," under any fair construction, render the allegation sufficient to meet the object contemplated by the defendant. It may be asked, how many years, under the averment, did the defendant occupy the premises prior to 1869? If she occupied in 1867 and 1868, that might, under the allegation, constitute "previous years," and yet it would not be sufficient. But, however this may be, the allegation contains nothing under which it can be held that the possession of the defendant was adverse. The possession of one co-tenant will not be adverse to the other, where there is a mere possession of the premises and an appropriation of the rents. Something more is required.

In *Busch v. Huston*, 75 Ill. 347, where a similar question arose, it is said:

"It is not sufficient that he continues to occupy the premises; and appropriates to himself the exclusive rents and profits, makes light repairs and improvements on the land, and pays the taxes; for all this may be consistent with the continued recognition of the rights of his co-tenants. To constitute a disseizin there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as by their own import to impart information and give notice to the co-tenants that an adverse possession and an actual disseizin are intended to be asserted."

This ruling was affirmed in *Ball v. Palmer*, 81 Ill. 370, and it has been followed in subsequent cases, which it will not be necessary to cite.

Conceding the fact to be as alleged in the bill, that the defendant, who was a co-tenant with the complainant, went into the possession of the land, occupied the same, and appropriated the rents to her own use, this alone would not render her possession adverse. The law requires something more. Outward acts of exclusive ownership of a notorious character were required. The record, however, contains nothing of the kind. It nowhere appears that the defendant, when she went into the possession of the land, asserted or even claimed that she was the exclusive owner. For aught that appears, she may have occupied with the knowledge and consent of the complainant.

From what has been said it follows that the evidence in the record is not sufficient to sustain the decree dismissing the bill, and the decree will have to be reversed, and the cause will be remanded.

#### NOTE.

Adverse possession which will set the statute of limitations in motion must be open and continuous and notorious. *Mauldin v. Cox*, (Cal.) 7 Pac. Rep. 804.

Mere entry upon land, without open and adverse and continuous possession, is not

sufficient to stop the running of the statute of limitations. *Donovan v. Bissell*, (Mich.) 19 N. W. Rep. 146.

Going upon wild land, digging, and hunting for a corner and boundary lines, driving cattle on the land, and employing a man to break, in the following spring, are not such going into possession as will set the statute of limitations in operation so as to create a title by virtue of adverse possession. *Brown v. Rose*, (Iowa,) 7 N. W. Rep. 133.

The statute of limitations does not commence to run in favor of adverse possession of lands until after the issuance of the patent to such lands. *Ross v. Evans*, (Cal.) 4 Pac. Rep. 443.

The statute of limitations does not run against the owner of unoccupied lands until some one assumes to take adverse possession. *Gray v. Jones*, 14 Fed. Rep. 83.

Proof of a verbal sale of the interest of one of the heirs to an estate to another of the heirs, followed by 20 years' adverse possession in such other heir, held to create a sufficient title in the latter. *Hyne v. Osborn*, (Mich.) 28 N. W. Rep. 821.

For a full discussion of the question of the statute of limitations, when they begin to run, and what prevents them running, etc., see *Stewart v. McBurney*, (Pa.) 1 Atl. Rep. 639, and note, 641-654.

(117 Ill. 404)

### POTTER v. GRONBECK and others.

(Supreme Court of Illinois. June 12, 1886.)

#### 1. ASSIGNMENT—NEGOTIABLE INSTRUMENTS—INSTRUMENT DEPENDING ON EXTRINSIC PROOF IS NOT.

By the statute of this state on negotiable instruments, (2 Starr & C. St. c. 98, pars. 3, 4,) any instrument in writing for the payment of money or articles of personal property is assignable, as are bills of exchange. But an instrument depending on extrinsic proof to establish its character as a binding obligation is not so assignable. *Kingsbury v. Wall*, 68 Ill. 311, followed.

#### 2. SAME—COVENANT FOR RENT MAY BE—FOR RENT "FROM OCCUPANCY," OR "FOR RENT, AND PERFORMANCE OF OTHER COVENANTS," IS NOT.

A covenant for the payment of rent simply may be assignable; but a covenant for the payment of rent "from occupancy," or for payment of rent from such time, and the performance of other covenants as to the condition of leased property, is not absolutely assignable under the statute; and, *a fortiori*, a guaranty of such a lease is not assignable absolutely under the statute, so as to enable the assignee to sue in his own name.

#### 3. GUARANTY—JOINT GUARANTY—WITHDRAWAL OF ONE, BEFORE COMPLETION, WITHOUT NOTICE TO OTHERS, RELEASES THEM.

Where negotiations were made for the joint guaranty of a lease by several persons, and afterwards, before the completion of the contract, one of the proposed guarantors withdrew from the proposed agreement, and notified the lessor, who thereupon accepted the lease as guarantied by the others, without notifying them of the withdrawal of the proposed joint guarantor, he cannot enforce the guaranty against them.

#### 4. APPEAL—CERTIFICATE OF JUDGE THAT HE DID NOT CONSIDER CERTAIN EVIDENCE, IMMATERIAL.

In the consideration of a cause on appeal, the certificate of the trial judge, in a case tried by the court, that he did not consider certain evidence contained in the bill of exceptions, is immaterial. Where the court heard the testimony, it will be presumed that it was duly considered, and the judge will not be permitted, any more than a jury, to say he has disregarded his duty, and not considered the evidence.

Appeal from First district.

SCOTT, C. J. There would seem to be no reason why the present judgment should be affirmed, without any reference to the merits of the controversy. It is seen the suit was commenced by "Lauchlin McLean, for the use of Delonas W. Potter." Afterwards, by leave of court, granted for that purpose, Lauchlin McLean was dismissed out of the suit, leaving Delonas W. Potter the only plaintiff; and since then the

suit has progressed in the name of Potter, and he alone appealed from the decision of the trial court. It is obvious there can be no recovery against defendants on the common counts for rent due from the lessees. If any recovery could be had, it must be upon their guaranty of the payment of the rent, and the performance of the covenants of the lease. But can Potter recover on that guaranty in his own name? That depends upon the fact whether the alleged guaranty is assignable, under our statute, so as to enable the assignee to maintain a suit upon it in his own name. It is thought it is not assignable, as is negotiable paper, so as to vest the legal title in the assignee. It is true that, under the statute of this state, any instrument in writing for the payment of money or articles of personal property is assignable, as are bills of exchange, so as absolutely to transfer and vest the property thereof in each and every assignee succeeding. But the guaranty declared upon is not such an instrument. It is to be observed defendants undertook to guaranty the payment of the rent, and the performance of the covenants, by the party of the second part in the within lease, covenanted and agreed in manner and form as in said lease provided, for three years from the date of occupancy. One objection that appears upon the face of the instrument is, it is not an unconditional promise or obligation for the payment of money. Before any rent could be recovered, the fact of *occupancy* by the lessees must be averred and proved. An instrument depending upon extrinsic proof before it becomes a binding obligation for the payment of money is not assignable, under the statute, so as to vest absolutely the legal title in the assignee. *Kingsbury v. Wall*, 68 Ill. 311.

But a graver objection appears on the face of the guaranty. It is that the undertaking to guaranty the payment of the rent, and the performance of the covenants of the lease, is an entirety, constituting a single agreement. Certainly that clause that obligates defendants to guaranty the "performance of the covenants" of the lease by the lessees is not assignable under the statute, as are bills of exchange. It is not for the payment of money or articles of personal property. If the agreement contained no covenant other than for the payment of the rent, it would no doubt be assignable, and the assignee might maintain an action upon it in his own name. But this instrument contains other covenants, constituting one agreement, and it is not allowable to assign one covenant in an instrument containing other covenants not assignable. That would be to split up a cause of action, which the practice will not permit. In no event can the present plaintiff recover on the alleged guaranty of defendants.

But, without considering all the questions made on the argument, the decision affirming the judgment of the appellate court may be placed on the distinct ground, one of the grantors, Levin, revoked his guaranty without the knowledge or consent of the other guarantors before the lease was delivered, and so notified both the lessor and the lessees. Yet the lessor, after being notified, accepted the lease and guaranty without communicating that fact to the other guarantors.

No importance is attached to the amended bill of exceptions, in which

the trial judge recites "that, in announcing the finding for defendants, the court did not consider the evidence contained in the bill of exceptions." The process of reasoning by which the trial court may have reached its conclusion is a matter of no consequence. The court heard the testimony offered, and the presumption is it was duly considered; and certainly the judge who tried the cause, instead of a jury, will not be heard to say he disregarded his duty in that respect, and refused to consider the evidence introduced, any more than a jury would be permitted to make such a declaration.

The alleged guaranty was declared on in the special count of the declaration as the joint and several obligation of defendants. The fact of the joint liability of defendants, as well as their several liability, was distinctly put at issue by the pleadings. Upon some of the issues made, the evidence was squarely conflicting. There was evidence tending to show that Levin, whose name appears as one of the makers, revoked his guaranty before the lease was delivered, or accepted by the lessor; that the other guarantors had no knowledge of such revocation, and never consented to it, and that, after being so notified, the lessor accepted such lease and guaranty without notifying the other guarantors of the revocation made by their co-guarantor. As the evidence tends to establish these facts, it will be understood that both the trial and appellate courts, in finding the issues for the defendants, as the records show was done, found every fact the evidence tends to establish in favor of defendants, and the finding of facts by the latter court on all controverted questions of fact is of course conclusive upon this court. The law is, a guarantor may revoke his guaranty at any time before it is delivered or accepted; and if the lessor in this case afterwards accepted the guaranty, with knowledge of its revocation, without informing the other guarantors of such fact, that would release them also from any supposed obligation as joint guarantors with their co-guarantor, Levin. Assuming that to be the fact, as must be done as the record comes before this court, there could be no judgment against Levin, and of course there could be no judgment in an action of *assumpsit*, as this is, unless it could go against all of defendants.

The judgment of the appellate court must be affirmed.

(117 Ill. 339)

JOHNS v. BOYD.<sup>1</sup>

(*Supreme Court of Illinois*. June 12, 1886.)

APPEAL — BILL TO VACATE LEVY ON LAND — NO FREEHOLD INVOLVED.

This was a bill to vacate a levy of an execution upon certain lands on the ground that complainant, against whom the judgment and execution ran, had no interest in the land subject to levy. The bill was filed before any sale by the sheriff, and contained a prayer that, in case of a sale by the sheriff pending the hearing of the bill, the sale be vacated as a cloud on the title. The sheriff did sell the land, under the writ, before the hearing, and on the final

<sup>1</sup>A petition for rehearing is pending in this case.



hearing the sale was vacated. An appeal was prayed directly to the supreme court. This was error. The case involved no freehold, and the appeal should have been to the appellate court.

#### Appeal from Bureau.

SCOTT, C. J. The bill in this case was brought by Alexander Boyd, in the circuit court of Bureau county, against Charles Johns, and was to set aside a levy made on the right, title, and interest of complainant in certain premises by virtue of an execution issued on a judgment rendered in the circuit court in favor of defendant, and against complainant, on the ground complainant had no such interest in the premises as was subject to levy and sale on execution. The bill was filed before any sale was made by the sheriff, and the bill prayed that in case a sale should be made of the property before the cause should come to a hearing, that such sale might be declared void, and set aside as a cloud upon the title to the premises. It seems the property was sold by the sheriff after the bill had been filed; and on the final hearing of the cause the court found most of the allegations of the bill to be true, and decreed that the levy upon the sale of the premises on the execution, and the certificate of purchase issued to defendant in pursuance of such sale, be declared null and void, and that the same be set aside as a cloud upon the title to the premises. From that decree defendant prayed for and was allowed an appeal directly to this court, which he afterwards perfected by giving bond as required in the order of the court allowing the appeal. It is obvious the appeal in this case was inadvertently taken directly to this court, as no freehold is involved, nor, indeed, any other question that would give this court jurisdiction in the first instance to hear and determine the cause. It should have been taken to the appellate court. It is seen, the bill, in the first place, was simply to set aside a levy made upon certain premises by virtue of an execution. It contained also a prayer that in case a sale should be made by the sheriff of the property before the cause should be heard, that such sale might be declared null and void as a cloud upon the title to the property. No deed was ever made by the sheriff to the purchaser at such sale, or to any one else, for the property. The only question made is whether the interest which complainant has in the real estate levied upon, whatever that may be, is subject to levy and sale on execution. It is therefore plain no freehold is involved. Even if the property was sold, it might be redeemed by the defendant in the execution, or a judgment creditor of his, and so the sale might never ripen into title. Previous decisions of this court are conclusive of this question. Appeal dismissed.

(117 Ill. 218)

#### KIMBALL v. CUDDY and others.

(*Supreme Court of Illinois*. May 15, 1896.)

#### 1. EQUITY—VACATION OF DEED—INCAPACITY—UNDUE INFLUENCE—MERE WEAKNESS BY AGE OR DISEASE.

In order to vacate a deed on the grounds of mental incapacity of the grantor, and undue influence by the grantee, it is necessary to show such a

degree of mental weakness, as renders the maker of the deed incapable of understanding and protecting his own interests. The mere circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design, and effect of his acts, unless by reason of the undue influence of the grantee he was unable to exercise his will in that respect.<sup>1</sup>

2. SAME—EVIDENCE OF INCAPACITY AND UNDUE INFLUENCE, INSUFFICIENT.

The testimony in this case shows that the deed was made between three and four months before the death of the grantor, while he was in his last illness; that during portions of that time he was unfit to do business, while at other times he was clear, rational, and able to do business. The court hold that the allegations of the bill as to incapacity and undue influence are not made out.

Error to Will.

SCHOLFIELD, J. Hugh Kennedy died intestate, in Will county, on the tenth day of August, A. D. 1880, leaving surviving him his daughters, Ann Cuddy, Eliza Cunningham, Kate Kerwin, and Mary F. Kimball, his only children and heirs at law. Before his death, on the twenty-seventh day of April, A. D. 1880, he conveyed all his real estate,—an 80-acre tract of farm land in that county,—and gave all his personal property, to his daughter Mary F.; taking back from her an obligation to support, maintain, and nurse him during his life, and to pay all his debts and his funeral expenses, etc., after his death. This bill is filed by Ann Cuddy, Eliza Cunningham, and Kate Kerwin, their husbands joining them, against Mary F., to set aside the deed on the ground that Kennedy was imbecile and mentally incapable of making a deed at the time this deed was executed, and that it was caused to be executed by the undue influence of Mary F. She answered, denying the material allegations of the bill. On final hearing the court decreed in conformity with the prayer of the bill, and the case comes here by the appeal of the defendant.

We have given the evidence, as it is presented in the printed abstract before us, careful consideration, and we are of the opinion that it does not sustain the decree.

It must be kept in mind that the burden is upon complainants to prove the allegations of their bill; that they must show such a degree of mental weakness as renders the maker of the deed incapable of understanding and protecting his own interests; that the mere circumstance that the mental powers have been somewhat impaired by age or disease is not sufficient, if the maker of the deed still retains a full comprehension of the meaning, design, and effect of his acts, unless by reason of the undue influence of the grantee he was unable to exercise his will in that respect. *Willemin v. Dunn*, 93 Ill. 511, and cases there cited. Moreover, the undue influence which will avoid an instrument of this character must be such as to destroy the freedom of the maker's will. Mere advice or argument or persuasion would not vitiate it, if made freely and from conviction, though it might appear that the instrument would not have been made but for such advice or persuasion. *Roe v. Taylor*, 45 Ill. 485; *Carmichael v. Reed*, Id. 108.

<sup>1</sup> See note at end of case.

The general condition physically, and, to some extent, mentally, of Kennedy, is presented by the testimony of Dr. George H. Hosmer, his attending physician throughout his illness, embracing the time when the deed was made. He was called and examined in behalf of the complainants, and evidently testifies without feeling or bias. He testified:

"I attended Hugh Kennedy in his last illness; called about last of January until June; case of senile bronchitis, with asthma. First I treated him to relieve immediate suffering; that treatment extended through February. Then I became convinced that illness would be his last sickness. After that I called and prescribed for him with no hope of cure, but to relieve present suffering. In February found him up and sitting around; after that in bed; did not know if invariably confined to bed, but think he was after February; judge his age over 70. In March, April, and May found him in bed; generally more or less difficulty in conversation; at times he didn't appear to be very stupid, at times he did; had most of conversation with Mary, as it seemed to hurt him to talk. At first he could talk sensibly about himself, but gradually became weaker bodily and mentally until the end. Can't state whether, after February and March, his mind was in condition to transact important business. I didn't have that in mind, and made no test. There may have been times that it was,—probably not always. At times I visited him, in February and March, he may have been of capacity to execute a deed. If had that in view, could tell, but made no test. There were times when he was not of sufficient understanding. I recollect, too, when he was in a stupor. It must have been last of May or first of June. After February he seemed to comprehend my coming all but those two times. Could not say whether, at that time, I deemed him a man in full possession of his faculties; think at times his faculties were impaired. He told me it hurt him to talk, and I mostly talked with his daughter. Would press on some part, and ask him if it hurt him, and he would nod. I advised cough mixtures, opiates to relieve diarrhea, stimulants to relieve prostration, and suitable nourishment. I advised brandy and whisky,—suitable quantity,—and left it to herself. I always found her a good nurse. Six or eight ounces a day would be reasonable for a man in his condition. A quart would intoxicate and prostrate.

"*Cross-examined.* First visit found him sitting by stove, suffering from senile bronchitis; mental condition sound for man of his age; answered all questions directly and intelligently. First month he was in chair, after that in bed, and may have been in chair at times. Prescribed opiates in May for painful diarrhea; set in about May 1st; continued to death; resulted in involuntary discharges, due to general debility. Want of control of bowels may exist where patient has not lost mental faculties. Resumed visits in six weeks after March 1st; found him in bed, weakened down. After that saw him four or five times. During visit saw James P. Murphy, J. P., in house where Mr. Kennedy was, some time in month of February. On that occasion Mr. Kennedy was sitting in chair by the fire in sitting-room. Before illness he had been in habit of using whisky. It was understood to give him whisky when he was weak and sinking, and leave it a good deal to himself when he wanted it. She told me she had bought wine for his use, and I told her wine would gripe him, and to get whisky or brandy; I recollect that very distinctly. Persons in his condition, dying of general debility, are apt to be stupid and weak at times, and at other times revived, and more clear and active mentally. In May and April he had difficulty in bronchial region that made conversation painful; and for a person not a physician to judge of his mental condition would be necessary to observe him constantly or frequently when not under the influence of stimulants, and after periods of rest, and before, to form correct opinion of his mental condition. It was more

difficult to judge of his mental condition than of a person dying of general debility whose vocal organs were all right; nothing in his case more likely to affect mental faculties than any man sinking under asthma and bronchial affection. He exhibited no signs of mental disorder existing prior to illness, except such as naturally produced by his bodily ailments; nothing in his case likely to produce mental disease more than other ailments producing similar bodily and nervous prostration."

At such times as he was revived, and mentally more active, no reason is given in this evidence, though the doctor shows that he made no examination of Kennedy's mind with reference to an opinion upon that subject, why Kennedy could not make a deed. He thinks, after February and March, there may have been times when his mind was competent to make a deed,—probably it was not at all times.

Now, Murphy, the justice of the peace, an apparently intelligent and disinterested witness, visited him for the purpose of transacting business in February, and he also took the acknowledgment of the deed. This is what he says:

"Knew Hugh Kennedy over ten years. In 1880 saw him in Joliet. Saw him in Joliet, on Jefferson street, and shook hands with him: I wrote out his will and testament at Mrs. Kimball's house. He was sick. He got out of bed, and sat in a chair. He signed the will. It was witnessed by William Killeen and James Woods. Nobody present when will was drawn but Mr. Kennedy and myself. He gave me such directions as were necessary to the draft of the will. Nobody else gave me any directions. Once or twice his daughter came in, and asked if he wanted anything, but the old man did not say anything, nor I didn't say anything, nor either of us do anything until she went out. Two witnesses signed the will, and he gave it to me. He understood what he was doing. He was weak and sick, and as rational as anybody I could talk to. I think he was as sensible as anybody; had possession of his senses then, in my opinion, as perfectly as when I had known him in good health. Saw him again in same house. That will was changed a little. I drew what is called a codicil. Can't tell how long I talked with him then. When I was drafting the codicil, nobody present but Mr. Kennedy and I. He was in the same room, sitting in the same chair, as before. He signed the codicil, and the two persons that witnessed the will witnessed it. His mind was as clear then as when I drew the will. Saw him again in the same house; can't tell how long after. Went there with J. L. O'Donnell, near evening. I think O'Donnell requested me to go to acknowledge a deed. Mr. Kennedy was sitting up in bed. I got the deed, and went into his room,—next room to sitting-room. I asked the old man if that was his signature, and if he understood the contents of the deed, and he said, 'Yes.' Think O'Donnell drafted the body of the deed. Mr. Kennedy was sane and in his right mind then, but a little weaker than when I saw him previously. He and I talked about how comfortable he was, how well he was taken care of, and that it would probably be the last time I would see him, as the man expected to die in a short time. He told me to destroy the will and codicil after the deed was made. When he told me that, I think he was as sane and as reasonable as at any time I ever conversed with him. Near as I recollect, I stood close by his bed while there. Mary Kimball was grantee in that deed. I destroyed the will and codicil in obedience to his directions. There was land given to Mrs. Kimball in the will. He told me it was the same land mentioned in the deed; that for fear there would be trouble about the will, and to put an end to that, he thought he would make it into a deed. The real estate mentioned in the will was given by the will to Mary Kimball. There was notes, a watch;

a hat, and other things I can't remember in the will. The notes were given to his brother; the other little articles to his daughters and daughters' children. The codicil made some change, but I am positive it was not the real estate. I think he was at all times determined that Mary Kimball should have the land. Think codicil was that his funeral expenses be paid, and what was left of the notes be divided among his daughters. The will and codicil were in my writing, and after they were executed no person ever saw them but me. I destroyed them the same evening I drew the deed. When I drew the will, I learned his feelings were friendly towards Mary Kimball, and he was very grateful to her. I learned from him that Cuddy didn't treat him very well, and he wasn't very pleased with Kerwin either. Don't recollect he said anything about Kavanaugh. My impression is it was from Cuddy he feared trouble."

Mr. O'Donnell, an attorney at law, testified that he went to see Kennedy on request communicated to him by the husband of the defendant as having been made by Kennedy; that Kennedy talked intelligently of some general matters; and then told witness that he had made a will, and that he was afraid that his son-in-law Cuddy would make Mary trouble when he died; that he wanted to make it safe; that Mary had been very kind to him; that Kennedy then inquired if he could make a deed of the property to her, and upon being informed that he could, but that she would have to pay all his debts, Kennedy said: "Well, she can pay the debts. I want to make a deed to her." The witness then detailed some further conversation, showing an intelligent understanding of his property, after which the witness left, promising to return on a future day. This conversation all, the witness says, occurred in the absence of the defendant. Some days afterwards the defendant called upon the witness, saying that her father desired to see him. The witness then went again to Kennedy, taking Murphy, the justice of the peace who had drawn the will, with him. He testified that Kennedy then inquired why the witness had not come sooner, and he details conversation showing that Kennedy had an intelligent appreciation of his condition, and of the business in hand. The deed was then drawn, read over to Kennedy twice, and he signed it. He inquired what he owed the attorney, took out his pocket-book, which was within reaching distance, and paid five dollars, promising to pay the residue when informed of the amount. The witness then proceeds thus:

"Before the 'squire came in he said he wanted his daughter to pay his debts, give money to the priest for prayers, and build a monument, and wanted her bound in life to do that. I could get no paper but narrow note-paper the child had. I said I would come again, and 'Squire Murphy said: 'Yes; Mr. O'Donnell can come up here any time.' Then the 'squire and he commenced talking Irish, and I went out, and left them talking Irish in the room. The 'squire came out. I went back, and asked what to do with the deed. He said, 'Give it to Mary, and let her do what she likes with it.'"

On a subsequent day the witness drew the obligation binding the defendant to perform her part of the contract, and, after the witness read it over to Kennedy, the defendant signed it. The witness afterwards adds:

"I haven't any doubt Mr. Kennedy understood what he was doing, or I wouldn't have drawn the deed. I am one of the attorneys in this case. At time I drew the deed I was not the attorney of Mrs. Kimball. I was paid by Mr. Kennedy. Once when I was there, he said he trusted me to see that this thing was all right; said, 'I will trust you to see that my wishes are carried out as I want it; that my property goes to Mrs. Kimball, and she is not disturbed.'"

On cross-examination the witness further testified:

"He [i. e. Kennedy] asked me if he could give a deed. I never saw his will. Told him will was as good as deed. He said they was lawing about wills all the time. He never told me about his personal property except what I have said. Don't recollect he ever told me what the will contained. He said he might linger a long time; he was a great burden to Mrs. Kimball, and she was very kind to him. He said Mr. Cuddy was very fond of lawing, and would make her trouble."

E. F. Dunham, a witness called for the complainants, testified that he served a summons on Kennedy on the fourth of May, A. D. 1880, and that Kennedy said he was as helpless as an infant, and had to be lifted out and in every day; that the defendant then told the witness that she thought Kennedy was not getting any better; that he talked better than common that day; that there were days that he lay stupid, and did not say anything. The witness added that Kennedy seemed confused, and did not know what to do. This, however, it will be recollected, was some eight days after the deed was executed, and Kennedy was therefore necessarily weakened and impaired each day, gradually, slightly, though it may be, by the constant acceleration of the disease which was wearing his life away. Still, in what this witness shows that Kennedy then said there is no evidence of imbecility or serious mental impairment. The witness said:

"He was in bed. I read summons, and he did not know what he could do; asked my advice. I told him it was note of hand. He asked what he had better do. I told him it would not make any difference whether he was there or not."

On cross-examination the witness further said:

"Voice low and feeble. Asked my advice. He said he was too feeble and sick to attend to it; told him he was sued with McPartland, and it would make no difference whether he was there or not; they would get judgment anyway; and he said if that was so he would let it go."

It is clear that he knew what the summons meant, and, on being informed on what account the suit was brought, he seems to have as perfectly comprehended the situation as any one could. He talked as rationally as any one ordinarily would, lying physically helpless, in regard to a suit on a surety debt to which there was no legal defense.

Hugh McLaren testified that he saw Hugh Kennedy at several different times after he went to the house of the defendant, which other evidence shows was the twentieth of December, A. D. 1879. First time, he was sitting up; talked with him. Next time he was in bed. Kennedy then talked with witness. His mind was all right.

Peter Downey testified: Visited Kennedy in spring, and in July, A.

D. 1880. Had conversation with him. And he says: "He recognized me, and conversed the same as during the last seventeen years,—no difference, only I could see he was weaker. He was as rational, talking, and sensible as when I saw him in 1863."

Catherine Downey testified she saw Hugh Kennedy; saw him frequently before and after he was taken sick, and conversed with him. She saw and conversed with him in May. He was then sitting up, but very weak. She also saw him in June and July. She says, "All that time I seen him he was capable of transacting any business, up to the twentieth of July, by giving him a little time to talk."

Eliza Foley testified:

"His mind was clear and bright in April. He understood what he was saying; was weak, but his mind clear. So far as I was able to understand, he was able to sign a deed of land intelligently."

C. J. Kimball: Saw Kennedy almost every week during spring and summer of 1880; saw him short time before he died. And he says, "During all that time I know he was in his right mind."

John H. Foley says: Saw Hugh Kennedy at Kimball's very often; saw him sick in bed, and talked with him up to a week before he died. \* \* \* During that time he was in possession of his senses sufficiently to understand an ordinary business transaction.

William Stapleton testified that he saw Hugh Kennedy in February, A. D. 1880, and again 10 or 12 days before his death. In February, he was perfectly sane.

Mary A. Wood testified that after the middle of February, A. D. 1880, and until Hugh Kennedy died, she saw him sometimes every day, and sometimes two or three times a week. And she assisted in taking care of him from May until he died. She says: "In my opinion, there was no time before June 1st that he could not transact ordinary business."

John H. Kimball, the husband of the defendant, testified that Hugh Kennedy came to his house, without the knowledge of himself or wife that he was coming, in 1879. He was taken sick in February following. For the first two months of his illness he thought he would recover; after that he expected to die. He details how Murphy was sent for to draw the will, and how O'Donnell was afterwards sent for in regard to the deed; and that it was of his own volition, etc.; and that his mind was all right.

On the other hand, the complainant Eliza Cunningham testified that she was with her father at the time he died, and for three weeks before; that during that time she was in his room six or seven times a day; that he recognized her only about three times. He did not talk rationally at all times. He didn't talk much. They would ask him questions, and sometimes he would answer, and sometimes he would not; and she details some flighty and incoherent remarks that he made at one time. He lay all the time in a slumber. When roused, would wake with a wild look, say one word, and drop again into slumber. She says that no medicine was given him while she was there but whisky; that the defendant gave him a common-sized glass nearly full—always half full

—five or six times a day, and she said he drank a quart a day. The witness also further testified that defendant did not allow her to nurse her father, and tried to prevent her talking to him. In the opinion of the witness he was not able to comprehend the most ordinary business matters. She says, also, the defendant was a bad daughter,—not a favorite of her father,—and that she did not care for him well, and that he was not treated right. She admits that she does not feel kindly towards the defendant.

Three weeks before the death of her father, which was on the tenth of August, would not be earlier than the twentieth of July, lacking but a few days of being three months after the execution of the deed. Recalling the testimony of Dr. Hosmer that Kennedy “exhibited no signs of mental disorder existing prior to his illness, except such as naturally produced by his bodily ailments; nothing in his case likely to produce mental disease more than ailments producing similar bodily and nervous prostration,”—there is no conflict between this testimony and that of Murphy and O'Donnell, that Kennedy had sufficient mental capacity to execute the deed at the date it was executed. When this witness was with him, he was in the last stages of a lingering disease; and stupor and weakness were the necessary results upon a mind which otherwise would be unclouded and bright. That he was not *then* competent to make a deed proves only that fact; but no deed was *then* made.

The complainant Ann Cuddy saw her father four times in February, then again saw him in March for a few hours, then again in July; and she does not think he was, at any of these times, of sufficient mental capacity to transact business. How his mind was in April she does not, therefore, know; and she details flighty remarks that he made in her presence. She thinks the defendant tried to prevent her talking with him. She also says that the defendant was not a good and kind daughter. She says the defendant told her that her father drank a quart of whisky a day; saw him get no medicine, and saw the defendant give him a half a glass of liquor—sometimes less—five or six times a day. Both this witness and the preceding one say that they were in affectionate relations with their father, and this witness says that she never heard him, when well, express an intention to give his property to the defendant.

Mary Daley testified that she saw Hugh Kennedy in March two or three times, and once in April or May, and she says: “In the four times I saw him his mind was not fit to do business of any kind.” She says that defendant said that she gave him stimulating drinks; that she used a quart a day; but did not say what she used it for. The witness shows that Kennedy talked with difficulty on account of the asthma. She did not talk much to him, as it seemed to give him pain.

John Kennedy testified that he was at the house of the defendant from the fifteenth to the seventeenth of March. He spoke to Kennedy, “and said, ‘Uncle I am sorry to see you sick;’ and he said, ‘I know that, John;’ and asked how was my father; and that was all that he said. He went into a kind of a doze. I had no other conversation with



him. I saw him several times, and he did not appear to recognize me." All of which only proves that the witness, for two days, was about the house of a sick man, who, because of his sickness, or for some other reason, was not inclined to talk.

The complainant James Cuddy testified that he saw Hugh Kennedy in the middle of February sick abed, and not able to turn himself,—drowsy and stupid. Saw him again in February, four or five days afterwards; his face pale; had a sharp piercing look in his eyes. Saw him last of March; asked him how he felt; he said he would be well in a few days. Next saw him in July; was then weak, pale, and drowsy; did not think him able to talk much. Saw him get whisky every time was there,—half glassful. Heard defendant say that he used a quart a day. Gives some flighty talk of Kennedy that he heard. Says relations of father with daughter were friendly. Kerwin and family are in Kansas, suffering for something to eat. On cross-examination said: "I am not sure that defendant said he used or drank a quart of whisky a day."

A letter written for the defendant to Ann Cuddy, dated April 2d, and a letter written by the husband of the defendant, with her consent, to John Kerwin on the twenty-ninth of August, A. D. 1880, containing admissions that Kennedy was prostrated and unable to help himself from an early period in his sickness, were also read in evidence.

And this embraces the substance, as we understand the record, of all that was proved to sustain the bill. There is no evidence tending to prove that the defendant even requested a will or deed to be made in her favor; and there is evidence affirmatively showing that it was purely voluntary on the part of Kennedy. He was not even solicited to make her house his home; but Cuddy having sued him, and obtained a judgment against him on the twenty-fourth of November, A. D. 1879, which Kennedy seems to have regarded as unjust, he ceased to live with him. One of Kennedy's daughters lived in Kankakee county; another one in the state of Kansas; and the defendant only residing near by, it was quite natural that, being on good terms with her, he should go to her house, as he did. It is not improbable that his feeling against Cuddy was extended to Cuddy's wife; and, unjust as, in a moral sense, this may have been, it furnishes no excuse for setting aside the deed. Morrison, the justice of the peace before whom the suit of Cuddy against Kennedy was tried, says: "Cross words passed between both parties at the time. Mr. Kennedy said he could get that judgment out of him; all he got after that. He was going to cut him off,—something like that."

We have omitted to notice the testimony of another physician examined on behalf of the complainant because we do not regard it as of controlling importance; and Mrs. Downey testifies that when that physician visited Kennedy he was too drunk to attend to business; that he could hardly stand up.

It has been seen that the use of whisky by Kennedy was under the direction of his attending physician, Dr. Hosmer. The defendant's husband testified that whisky was never given to Kennedy except at his request, and then only two or three table-spoonfuls at a time; that he

gave him liquor, and his wife gave it to him, and Mrs. Cuddy gave it to him two or three times while she was there; that they used whisky with which to bathe him; that he has helped to bathe him with it two or three times in 24 hours.

Mary A. Woods testified that he was bathed every morning with water and whisky,—sometimes a pint of whisky was rubbed on his person with a sponge. That he was at all times under the influence of whisky is effectually disproved by the evidence.

The statement in the testimony of the complainants that Kennedy was not well nursed and cared for by the defendants is effectually disproved by the evidence of other witnesses who have no apparent motive for speaking untruly. Thus, Dr. Hosmer says: "He had the best of nursing and care. Mary Kimball is the best nurse of my acquaintance. He was in a good-sized room for such a house, on good bed, clean and neat. Surroundings, as to comfort and cleanliness, good." Peter Downey said: "I have seen many sick men, and never saw a sick man better taken care of for comfort and cleanliness." Eliza Foley said: "He received the best kind of care." John H. Foley testified to substantially the same. William Stapleton said: "He seemed to be cared for in the tenderest manner, with a great deal of affection, and everything about him exquisitely neat and clean." Mary A. Woods shows that very great care was taken in nursing him, and she and several other witnesses testify that Kennedy frequently spoke gratefully of the kind attentions he received.

It is to be taken into consideration that the complainants, honest as their intentions may be, testify under feelings and motives calculated to bias; and yet everything to which they testify may be conceded, and it will not follow that Hugh Kennedy was mentally incompetent to make a deed when this deed was made. Neither of them was present at that time. What the condition of his mind then was, necessarily they do not know. They do not even show affirmatively that at every time they saw him before that period he was incapable of making a deed. Dr. Hosmer says: "Persons in his condition, dying of general debility, are apt to be stupid and weak at times, and other times revived, and more clear and active mentally." And, according to the evidence of Murphy and O'Donnell, whom we are not warranted in disbelieving, it was at a time when he was "revived, and more clear and active mentally," when the deed was made. Seeing him in a paroxysm of pain, or in the stupor following relaxation from pain, could afford no accurate knowledge of the state of his mind at other and more favorable periods for mental operations.

It may be that Kennedy felt more grateful towards the defendant for her attentions than they deserved, and less kindly towards his other daughter than he should. There may have been many matters in the history of their lives and his, and many present considerations, also, that, to have been entirely just in a moral sense, should have been present in his mind, and carefully weighed before he made the deed, but the law does not compel men to be entirely just, in a moral sense, in their gifts

to their children. Neither wills nor deeds can be impeached because of injustice, in a moral sense alone. If the party be sane, he may, from caprice, causeless malice, or foolish prejudice, cut off his children, and give his property to strangers. The moral injustice or caprice, in such cases, may be considered as a circumstance on the question of insanity, but it is not a controlling one; and if, from other evidence, it be clear the party is sane, it is of no moment whatever. There is, especially with juries, and it may sometimes be even with courts, a disposition, originating in the better feelings, to step in where a parent or other relative does not make an equal division, or a satisfactorily meritorious division, of his property, and make the proper division for him. This is not warranted by the law. The property owner, unless an idiot or lunatic, must be allowed to make his own division and disposition of his property. Nor does the fact that a party is physically unable to look after his property, nor that his mind is enfeebled by age or disease,—if not to the point of lunacy or absolute imbecility,—take from him this power. It may be that such weakness, makes him an easier victim of undue influence, and it is proper to consider it in that view; but weakness and opportunity for undue influence do not prove that undue influence has been exercised. But there is nothing startling in its unreasonableness in what Kennedy here did. His nursing imposed a great labor and care. For several months before he died he was bedfast, and unable to control his bowels. This, of course, necessitated frequent removals from his bed, and changing of linen, bathing, etc., and imposed a kind and amount of labor and care that it would be difficult to buy. In his remark to O'Donnell he showed that he fully realized this, and acted upon it. He said: "He might linger a long time. He was a great burden to Mrs. Kimball, and she was very kind to him. He said Mr. Cuddy was fond of lawing, and would make her trouble."

The decree below is reversed, and the cause remanded, with directions to the court below to dismiss the bill.

## NOTE.

1. WHAT AMOUNTS TO. It appearing that the defendant used undue influence upon, and made fraudulent representations to the grantor, a person of weak mind, in order to procure the execution of a deed, it is declared to be void. *Oakley v. Ritchey*, (Iowa,) 23 N. W. Rep. 448.

Undue influence, for which a deed will be annulled, must be such that the party executing it has no free will, but stands *in vinculis*. *Conley v. Nailor*, 6 Sup. Ct. Rep. 1001.

The influence, to be undue, must be equivalent to moral coercion. *In re Will of Carroll*, (Wis.) 7 N. W. Rep. 434.

Where coercion is not sufficient to amount to duress, but a social or domestic force is exerted on a party which controls the free action of his will, and prevents voluntary action in the making of a contract or executing a deed for real estate, equity may relieve against the same on the ground of undue influence. *Munson v. Carter*, (Neb.) 27 N. W. Rep. 208.

An elder sister inducing a younger married sister to go, without the knowledge of her husband, to the office of the attorney of such elder sister, and execute a deed, the effect of which was to avoid a judgment entered in the county court in favor of the younger and against the elder sister, held to amount to undue influence, in *Watkins v. Bryant*, (Wis.) 1 N. W. Rep. 82.

Where a young woman of strong force of will, living in adultery with an old man,

procured certain property purchased by him to be conveyed to her, she must show that there was not undue influence. *Hanna v. Wilcox*, (Iowa,) 5 N. W. Rep. 717.

Any influence which induces a person to reach a wrong conclusion, is undue. *Webber v. Sullivan*, (Iowa,) 12 N. W. Rep. 319.

Taking advantage of position or good opinion of party confiding in, to disadvantage of such person or his estate, amounts to. *O'Neil v. O'Neil*, (Minn.) 14 N. W. Rep. 59.

Inducing an old and feeble person to do that which is just and for his own good, is not, even though advantage result therefrom. *Dailey v. Kastell*, (Wis.) 14 N. W. Rep. 635.

Where T. was an intimate friend of R.'s family, was R.'s guardian, and R. had utmost confidence in and friendship for him, and when R. became of age, T. settled his accounts as guardian, but R. employed the firm of which T. was a member as his real-estate agents. T. thus had the active management of most of his property. R. made two wills in favor of T.'s children. He afterwards married the complainant, whom he had long known as a prostitute. After the marriage, upon T.'s suggestion whether R. desired to carry out his former purpose, R. made a gift of property, amounting to \$40,000, about half of his estate, to T., as trustee of his children, reserving the income for life. Mrs. R. filed her bill, after R.'s death, to set aside the gift, on account of undue influence exercised by T. over R., and of R.'s mental weakness caused by his dissipation. The gift was upheld, and the bill dismissed. *Ralston v. Turpin*, 25 Fed. Rep. 7.

The allegation that a conveyance of real estate and personal property was obtained by undue influence of the grantee upon the mind of the grantor must be established by evidence, or it will not be considered. *Ireland v. Geraghty*, 15 Fed. Rep. 35. Respecting the sufficiency of the evidence to establish undue influence, see *Porter v. Throop*, (Mich.) 11 N. W. Rep. 174; *Shepardson v. Potter*, (Mich.) 18 N. W. Rep. 575.

Undue influence exerted upon an uncle by his niece, by reason of which he conveyed to her certain real estate upon a promise to reconvey, may be sufficient to justify a court of equity in setting aside the deed. *Hansen v. Berthelson*, (Neb.) 27 N. W. Rep. 423.

2. PRESUMPTIONS AS TO UNDUPLICATE INFLUENCE. The law presumes undue influence where a patient makes a will in favor of his physician, a client in favor of his lawyer, a ward in favor of his guardian, a person in favor of his priest or religious advisor, or where other close confidential relationship exists; and are viewed with great suspicion by the law, and some proof besides the *factum* of the will is required. *Marx v. McGlynn*, 88 N. Y. 357; *Thompson v. Heffernan*, 4 Drury & War. 285. See *Gass v. Gass*, 3 Humph. 278; *Ashton v. Thompson*, 18 N. W. Rep. 918; *Weir's Will*, 9 Dana, 434; *American Bible Soc. v. Stover*, 12 Wkly. Dig. 213; *Robinson v. Adams*, 62 Me. 369; *Smith's Will*, 52 Wis. 543; *S. C. & N. W. Rep.* 616, and 9 N. W. Rep. 665; and *Lyon v. Home*, L. R. 6 Eq. 655.

The burden of proof is on those seeking to probate the will to show that there was no undue influence. *St. Leger's Appeal*, 34 Conn. 434; *Hanna v. Wilcox*, (Iowa,) 5 N. W. Rep. 717.

Direct proof of undue influence is not required; it may be inferred from the circumstances. *Drake's Appeal*, 45 Conn. 9.

Where a Roman Catholic woman bequeathed the bulk of her fortune to a priest who resided at her house, it was held the burden of proof was on those alleging undue influence. *Parfitt v. Lawless*, L. R. 2 Prob. & D. 482; 41 L. J. Prob. & M. 68; 27 Law T. (N. S.) 215; 21 W. R. 200.

It was said in this case that the doctrine of the presumption of undue influence adopted in courts of equity relates only to gifts *inter vivos*, (see gift to Methodist minister, *Norton v. Rely*, 2 Eden, 286; to spiritual medium, *Lyon v. Home*, L. R. 6 Eq. 655; *donatio mortis causa* to a clergyman, *Thompson v. Heffernan*, 4 Drury & War. 285; see, also, *Nottidge v. Prince*, 2 Giff. 246.) and does not apply to the making of wills.

It is said that where the spiritual advisor of the testator takes advantage of that position to become the manager of his temporal affairs, a strong ground is made out for inquiry as to undue influence. *Middleton v. Sherburne*, 4 Younge & C. 358; *Huguenin v. Bascley*, 14 Ves. Jr. 273.

Such a presumption may arise although the one occupying such a relation to the testator is not a devisee or legatee. Thus the rector of a church which was residuary legatee, and had the nomination of two scholarships created by the will in the theological seminary, who superintended its execution, and was named therein as sole executor, was held to be so interested in the will as to raise a presumption of undue influence, and to require proof of spontaneity and volition; that is, affirmative proof on the part of the executor of good faith, and a proper use of the confidence placed in him. *In re Welsh*, 1 Redf. 238; *S. C. 1 Redf. Amer. Cas. Wills*, 506.

The presumption is one of fact, and if the will is fairly made the law does not condemn it. *Marx v. McGlynn*, 88 N. Y. 357. It has been held that the earnest presentation to a testator by a spiritual advisor of a proper argument, and the enforcement of

motives, whereby the intellect is persuaded and the conscience quickened, are legitimate influences, and the results praiseworthy, where they do not violate natural obligations. *Merrill v. Rolston*, 5 Redf. 220.

(1) *In Dealings between Parents and Children.* In *Bowe v. Bowe*, (Wis.) 3 N. W. Rep. 843, a son induced his parents, much advanced in age, to convey to him their farm, worth about \$1,500, in consideration of his providing for their wants, and giving them a home in his family during the remainder of their lives. The arrangement proved to be an unpleasant and unsatisfactory one to the parents, and the son finally reconveyed the farm to them upon their giving him a note for \$800, secured by a mortgage on the land. The amount of the note was made up in great part of charges for the support of his parents after the first deed was given, small sums paid for their use, and for work done and improvements made on the farm. In an action to set aside the mortgage, on the ground that it was obtained by undue influence and without consideration, it was held that the relation of the son, at the time the mortgage was given, was particularly one of guardianship, and that relief would be granted if it appeared that he had made use of his position to dictate unfair terms, though the evidence might not show fraud or even undue influence. And see, as to undue influence of child over parent, *Smith v. Smith*, (Wis.) 19 N. W. Rep. 47. Equity looks with special jealousy upon donations from a child to a parent when made recently after the child comes of age, or while he is under the constant and immediate influence of the parent, or while the property is in the parent's control. *Ashton v. Thompson*, (Minn.) 18 N. W. Rep. 918. See *Crawford v. Hoelt*, (Mich.) 24 N. W. Rep. 645.

3. **BURDEN OF PROOF.** As a general rule the burden of proof is on the person alleging the undue influence. *Webber v. Sullivan*, (Iowa,) 12 N. W. Rep. 319.

It may be shown by circumstantial evidence, and the relation of the parties. *Shepardson v. Potter*, (Mich.) 18 N. W. Rep. 575.

What evidence admissible to show, see *Dye v. Young*, (Iowa,) 7 N. W. Rep. 678; *Shepardson v. Potter*, (Mich.) 18 N. W. Rep. 575. Prior statements of testator as to how he intended to dispose of his property, disconnected from the act of making his will, are not evidence of the fact of undue influence. *Storer v. Zimmerman*, (Minn.) 8 N. W. Rep. 827. Neither are they when the testator was shown to be of unsound mind. *Estate of Lang*, (Cal.) 2 Pac. Rep. 491.

(117 Ill. 100)

**DROVERS' NAT. BANK OF UNION STOCK-YARDS, ILL., v. ANGLO-AMERICAN PACKING & PROVISION CO.**

(*Supreme Court of Illinois.* May 15, 1886.)

**1. CHECKS—CERTIFIED CHECK—CERTIFIER PRIMARILY LIABLE.**

In the case of a certified check, the bank certifying the check is primarily liable for its payment.<sup>1</sup>

**2. SAME—COLLECTION OF—AGENT FOR COLLECTION SHOULD NOT SEND CHECK TO CERTIFIER HIMSELF.**

A bank or agent for collection of a certified check should not send such check to the certifying bank itself for payment. This would be putting the instrument in the hands of the party primarily liable, and enabling him to destroy the evidence of debt, and repudiate the transaction. This would not be using reasonable care.

Appeal from First district.

*Sleeper & Whiton*, for appellant.

*Page & Booth*, for appellee.

SCHOLFIELD, J. Assuming, *first*, that appellant is not chargeable with knowledge of the existence of any other bank than that of Rice & Messmore, at Cadillac, Michigan; and, *second*, that all the information it had, or could reasonably obtain, at the time, in respect to the financial standing of Rice & Messmore, was that they were solvent,—were Rice & Messmore suitable agents to whom to transmit the certified check for collec-

<sup>1</sup> See note at end of case.

tion after it was placed by appellee in appellant's possession? We do not think it is of much consequence whether appellant took the check as a payment on account, or for the purpose merely of collection; for, in either view, it is entitled to show that the check, if it has discharged its duty by an effort to collect it, has availed nothing. Nor do we regard the evidence that certain banks in Chicago were in the habit of transmitting checks drawn on other banks, to those banks for collection, as affecting the present question. That evidence hardly comes up to the requirement of this court in regard to proof of a common-law custom, as laid down in *Turner v. Dawson*, 50 Ill. 85, and subsequent decisions of like import; but if it did, that custom does not include cases in which certified checks are sent for collection to the banks by which they are certified. In the cases to which the evidence relates there is no primary liability on the part of the bank to which the check is sent; but in the case of a certified check the bank is primarily liable for its payment. So far as affects the present question, its position is precisely what it is where it makes its promissory note, bond, or other evidence of original indebtedness. *Bickford v. First Nat. Bank*, 42 Ill. 242 *et seq.* The same person cannot be both debtor and creditor at the same time, and in respect of the same debt. How, then, can he who is debtor be at the same time, and in respect of the same debt, the disinterested agent of the creditor? Can it be said to be reasonable care, in selecting an agent, to select one known to be interested against the principal,—to place the principal entirely in the hands of his adversary? The interest of the creditor, when his debt is failing, is that steps be taken promptly, and prosecuted with vigor, to collect his debt. But at such a time the inclination of the creditor quite often, and, it may be, sometimes his interest, too, is to procrastinate. The debtor may often be interested in bringing about a compromise with his creditors whereby his debts may be discharged for less than their face. But the creditor whose debt can all be collected by legal proceedings can never be interested in producing that result. Surely it could not be held reasonable care and diligence, in an agent holding for collection the promissory note given by one individual to another individual, to send the promissory note to the maker, trusting to him to make payment, delay it, or destroy the evidences of indebtedness, and repudiate the transaction, as his conscience might permit. If this would not be held to be reasonable care and diligence, why should the same conduct be held to be reasonable care and diligence when applied to a bank?

It is to be borne in mind, appellant was not compelled to accept this check for collection. It assumed the burden voluntarily, and it ought to have known that the certified check was not delivered to it merely to have it exchanged for the draft of Rice & Messmore on some other bank; for, if this had been desired, it ought to have known that appellee would have obtained such a draft instead of the certified check. If appellant had no correspondent or agent at Cadillac, through whom to make collection, it should have so informed appellee, and then acted on the directions of appellee. This would have imposed no hardship, and would

have protected all. It is true that, when appellee placed the check in the hands of appellant, it was to be presumed that it was intended that appellant should collect by the ordinary and usual mode of collecting in such cases; but neither from facts proved, nor as a matter of law, was it to be inferred that the check was to be surrendered to Rice & Messmore to use their pleasure as to the time and manner of payment and the disposition of the check. If appellant was willing to take the check without special stipulations, appellee was authorized to assume therefrom that it was able to collect, and that it had a proper agent through whom to do it promptly.

*Indig v. City Bank*, 80 N. Y. 106, cited by counsel for appellant, is entirely different in its material facts from that in the present case, as we conceive. There the bank owed no primary duty to pay. The note was sent to it for collection, not from itself, but from the maker of the note. Its liability was solely that of an agent for collection. In the recent case of *Merchants' Nat. Bank v. Goodman*, 2 Atl. Rep. 687, the supreme court of Pennsylvania, however, lay down the rule directly the opposite of that laid down by the New York court of appeals in *Indig v. City Bank*. The suit there involved the question whether the bank on which a check was drawn, was a suitable agent to which to transmit the check for collection. And the court held that it was not. The court, among other things, said:

"We think the principle may be stated as a true one, as the plaintiff's counsel have presented it, that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce, in behalf of another, a claim against itself. The only safe rule is to hold that an agent with whom a check or bill is deposited for collection must transmit it to a suitable agent, to demand payment in such manner that no loss can happen to any party, whether he is depositor and indorser, or the indorsee and holder. \* \* \* We interpret the cases to which we have referred as establishing the rule of transmission to a suitable correspondent or agent, to mean that such suitable agent must, from the nature of the case, be some one other than the party who is to make the payment. By no other rule can the rights of indorsers be protected, if it is the interest of the party who is to make payment to hinder, postpone, or defeat payment. This imposes no hardship on the institution undertaking to transmit for collection, which can always protect itself by stipulating that special instructions by the depositor shall be given, which will save the collecting bank from all risk or peril."

It is unnecessary to say that we concur in these views any further than they are applicable to the facts before us.

We find no cause to disturb the judgment below, and it is therefore affirmed.

#### NOTE.

By certifying a check, a bank undertakes only that the signature is genuine; that the plaintiff has sufficient funds in the bank to meet it; and that such funds shall not be withdrawn. *Security Bank v. National Bank of the Republic*, 67 N. Y. 458.

A bank is liable on a check certified by it, whether the drawer had funds sufficient or not. *French v. Irwin*, 4 Baxt. 401.

(117 Ill. 376)

CHICAGO &amp; N. W. RY. Co. and another v. SNYDER, Adm'r, etc.

(Supreme Court of Illinois. June 12, 1886.)

## 1. TRIAL—INSTRUCTIONS—PROVINCE OF JURY—SPECIAL INSTRUCTION.

A separate and special instruction to the jury, informing them that they are not to regard anything contained in any of the instructions as intimating any opinion of the court as to what any of the facts are, but that they are to determine from the evidence, and from that alone, what are the facts, is held to cure any alleged defects in the other instructions in the nature of apparent misleading assumptions of the facts in issue.

## 2. SAME—ONE-SIDED INSTRUCTIONS.

An instruction which tells the jury that if they find from the evidence the facts relied on by a party, reciting them, then he is entitled to the verdict, is not objectionable, as giving undue prominence to the facts of one side.

## 3. MASTER AND SERVANT—RAILROAD CONDUCTOR—NEGLIGENCE OF FELLOW-SERVANT—COLLISION.

In case of a collision of trains, injuring the conductor of one train, it is not enough for him, in seeking to recover, to show that he acted with due care. He must also show that his fellow-servants in the management of the train acted with due care. Negligence on their part will be imputed to him.<sup>1</sup>

## 4. SAME—FAILURE TO STOP—STATUTORY DUTY TO STOP.

Where the plaintiff, a conductor, was injured by a collision, where it is alleged in defense that the collision was caused by his failure to perform his statutory duty to stop his train at least 200 feet before reaching the crossing, it is incumbent on him to show that he performed his duty in that behalf; and an instruction stating his statutory duty should be given if asked for.

## 5. SAME—FELLOW-SERVANTS—CONSOOCIATION.

Fellow-servants, within the rule exempting the master from liability for their torts to fellow-servants, must be directly co-operating with each other in a particular business, in the same line of employment, or must be so consoociated that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other, promotive of proper caution.

Appeal from appellate court, First district.

CRAIG, J. This was an action brought by Mary A. Snyder, administratrix of the estate of John H. Snyder, deceased, against the Chicago & Northwestern Railway Company and Chicago, Milwaukee & St. Paul Railroad Company, to recover damages caused by the death of her husband, who was killed on the seventh day of October, 1882, by a collision of two trains of said defendants at a crossing near Western avenue, in Chicago. It is averred, in substance, in the declaration, that the two defendants are corporations owning and operating lines of railroads that cross and intersect each other at grade in the city of Chicago; that said companies maintained at such crossing a joint agent, who was in the joint employment of both companies, whose duty it was to regulate, direct, and control the passing of all locomotive engines and cars over said crossing, so as to prevent accidents, by means of certain signals, well understood by and known to all the agents and employes of said companies, and that it was the duty of such employes to observe the signals; that John H. Snyder was a conductor in the employ of the Chicago & Northwestern Company, having the charge of a certain loco-

<sup>1</sup> Respecting the effect the negligence of a co-servant, causing injury, has on right to recover against the common master, see *Neubauer v. New York, L. E. & W. R. Co.*, (N. Y.) 4 N. E. Rep. 125, and note, 126, 127.



tive engine, and car thereto attached, belonging to said last-named company; that, at the time of the alleged injury, Snyder was in charge of and upon a certain train of cars and engine, and that he, and those engaged with him in the management of said train, were in the exercise of due care and diligence, observing the proper signals made by the joint agent or employe at said crossing, directing the said Snyder, as such conductor, to approach and pass over the said crossing with his said train of cars, and that, after Snyder had approached within so short distance of said crossing that it was impossible to stop his engine, the said joint agent, without due care, reversed or changed his signal, thereby directing a locomotive engine, and train of cars thereto attached, belonging to the said Chicago, Milwaukee & St. Paul Company, to pass over said crossing, and that in consequence of such signal said trains collided at said crossing, causing the injury to and death of said Snyder. In the second count it is averred that Torrence, the joint agent of the defendants, so carelessly, negligently, and improperly operated and controlled the semaphore, and the engine and car of the Northwestern Company, and the train of the St. Paul Company, that without the fault or negligence of Snyder, or those under his direction, there was a collision, by which Snyder was killed. To the declaration the defendants pleaded the general issue, and on a trial of the cause in the superior court of Cook county the plaintiff recovered a judgment for \$5,000, which, on appeal, was affirmed in the appellate court.

No question has been raised in regard to the decision of the court in the admission or exclusion of evidence; but it is claimed that the court erred in giving plaintiff's third instruction, and in refusing instructions Nos. 2, 4, and 5 asked in behalf of the St. Paul Company, and instruction No. 6 asked by the Northwestern Company.

The third instruction given for the plaintiff was as follows:

"(3) The jury are instructed that if they find from the evidence that John H. Snyder, the deceased, was injured by a collision of the cars of the Chicago, Milwaukee & St. Paul Railroad Company and the Chicago & Northwestern Railway Company, the defendants in this case, at the crossing of the railroad tracks of the said companies in the city of Chicago, on or about the seventh day of October, A. D. 1882, and that by reason of such injuries he, the said John H. Snyder, afterwards, on the same day, died; and if the jury further find from the evidence that said collision occurred solely by reason of the gross negligence of one H. E. Torrence in and about the management and operating of the semaphore, or signal light, at or near said crossing, and that, at the time of such collision and injury, he, the said H. E. Torrence, was in the joint employment of the two defendant companies in and about the management and operation of said semaphore or signal lights; and if the jury further find from the evidence that, at the time of such collision and injury, the said John H. Snyder was a conductor in the employ of the Chicago & Northwestern Railway Company, one of the defendants, having the control and management of the way car and engine of said last-named company in question, and was at the time aforesaid exercising due and proper care, caution, and diligence, as such conductor, in and about the control and management of said way car and engine, and for his own personal safety, and that at and before the time of said collision and injury the said John H. Snyder and H. E. Torrence were employed in different departments of labor, wholly disconnected

with each other, and were not associated with each other in the performance of their respective employment, and could have no control over or influence upon the conduct of each other; and if the jury further find from the evidence that the said John H. Snyder left surviving him a widow, who is still living, and that such widow was pecuniarily injured by reason of the death of the said John H. Snyder, as aforesaid, and that such widow is the plaintiff herein, and was, at the time of the commencement of this suit, the administratrix of the estate of the said John H. Snyder, deceased,—then the jury should find both of the defendants guilty, and should give to the plaintiff such damages as, from the evidence, the jury shall deem a fair and just compensation for the pecuniary injury, if any, resulting from such death to the said widow, not exceeding the sum of \$5,000."

Several objections have been made to this instruction.

First, that it assumes as true the negligence of Torrence. If the instruction was liable to the objection urged, it would certainly be erroneous, because it was for the jury to determine from the evidence who had been guilty of negligence, and it was not within the province of the court to direct the jury, in the instructions, that any person was negligent, or assume as a fact in the instructions the negligence of Torrence, or any of the parties alleged to be responsible for the accident. That the collision of the trains resulting in the death of Snyder occurred through the negligence of some one was a fact over which there was no controversy. It was for the jury to determine from the evidence who had been guilty of the negligent act. The language of the instruction complained of is, "if the jury find from the evidence that said collision occurred solely by reason of gross negligence of one H. E. Torrence in operating the semaphore," etc. No reasonable construction of this language could convey the idea to the mind of the jury that any one was negligent; but, on the other hand, the jury were in plain terms informed that such fact must be found by them from the evidence. But, if there was any doubt in regard to the construction of the language used, the jury could not be misled, as the court in the first instruction given informed the jury that they should not regard anything contained in any of the instructions as intimating, in the slightest degree, any opinion of the court as to what any of the facts are; but they should determine from the evidence, and from that alone, what are the facts. This was a qualification of every instruction in that branch of the case, and in such plain words that no jury of ordinary intelligence could be misled.

The second objection to the instruction is that it sums up all the facts on which plaintiff sought to recover, giving them undue and unfair prominence, and omits to state the facts in the defense. The instruction is somewhat lengthy, and may be liable to criticism for that reason; but that is not the point. The question is whether it is erroneous. This court has held in several cases that where the evidence is conflicting it is improper to select isolated portions of the evidence, and give them prominence by calling the attention of the jury especially to them in an instruction; but we do not regard this instruction liable to this objection. The instruction, in substance, informed the jury that if they found from the evidence the facts alleged in the declaration, and relied upon as

proven, reciting them, that then the verdict should be for plaintiff. Such an instruction was offered in *Frams v. Badger*, 79 Ill. 442, where it is said: "The court should always instruct that if the facts involved in the issue are proved, reciting them, then they should find for the party in whose favor they shall find the facts." Here no prominence is given to any particular fact in the case, but the jury are merely directed that if they find from the evidence the facts relied upon by the plaintiff have been proven, reciting them, then the plaintiff may recover. We perceive no valid objection to an instruction of this character.

There is, however, one serious objection to the instruction. It will be observed that it is averred in both counts of the declaration that Snyder, and those engaged with him in the management of the train, were in the exercise of due care. But by the instruction the jury were directed that, if they found from the evidence that the collision occurred solely by reason of gross negligence of Torrence, the plaintiff might recover, if the jury further found from the evidence that Snyder was exercising due and proper care, caution, and diligence as conductor of the train. Under this part of the charge to the jury the engineer and brakeman in charge of the train under Snyder may have been guilty of gross negligence in the discharge of their respective duties, which may have contributed to Snyder's death, and yet the plaintiff could recover. We do not understand this to be a sound proposition of law. If Snyder's co-employees, in charge of the train under him, were guilty of negligence which contributed to his death, he is chargeable with such negligence; and the negligence of those under Snyder would defeat a recovery. Suppose the brakeman had notified the engineer that they were signaled not to cross, in ample time to enable him to stop the train, but he refused to regard the notice, and recklessly ran upon the other train, it could scarcely be pretended that Snyder's representatives could recover.

The court refused an instruction asked by defendant Chicago, Milwaukee & St. Paul Company, as follows:

"(2) The court further instructs the jury that the law requires all trains upon any railroad in this state, which crosses or intersects, or is crossed by, any other railroad upon the same level, shall be brought to a full stop at a distance not less than two hundred feet, nor more than eight hundred feet, from the point of intersection or crossing of such road. And if the jury find from the evidence that the train of the Chicago & Northwestern Railway Company, under the charge of the deceased, as conductor of said train, was not brought to a full stop at a distance of more than two hundred feet from the crossing of the tracks of the Chicago, Milwaukee & St. Paul Railway Company, and if you further believe from the evidence that the failure to stop said train at said distance from said crossing contributed to the injury complained of, or if you believe from the evidence that, had said train been brought to a full stop at said distance from said crossing, the collision would have been avoided, then you must find for the defendant the Chicago, Milwaukee & St. Paul Railway Company."

At the place where the collision occurred, resulting in the death of Snyder, the Chicago & Northwestern Railway runs east and west; the Chicago, Milwaukee & St. Paul Railroad runs south-easterly, crossing the

Northwestern tracks at an angle. Ninety feet west of the crossing is a signal box, where a semaphore is operated, as is shown by a plat in the record. Torrence had charge of the semaphore, whose duty it was to direct the crossing of all trains on both railroads. When he threw the green light of the semaphore on the track, trains on that road had the right of way; while the red light on the track was a signal for trains not to move. At the time of the accident, which occurred about 4 o'clock in the morning of October 7, 1882, there were three trains at the crossing: one on the St. Paul road, going west; one on Northwestern, going west; and the train under the control of Snyder as conductor, going west. The latter train was last at the crossing, and consisted of an engine and a way car pushed in front of the engine. There is a conflict in the evidence in regard to the point where Snyder's train was stopped before undertaking to make the crossing. The fireman on the engine thinks that when the stop was made the way car was about even with the semaphore, which would make the stop only 90 feet from the crossing. There was other evidence that the stop was made sooner, and there was also evidence tending to show that the train made no stop before making the crossing. But, however the fact may be, the evidence was such that the defendants had the right to go to the jury on that question with proper instructions from the court. There was ample evidence upon which to predicate an instruction like the one in question; and if it contained a correct proposition of law, which it did, it was error to refuse it. The statute imposed the duty on Snyder, who had charge of the train, to bring his train to a stop not less than 200 feet from the crossing. If he failed to comply with this requirement of the law, and such failure contributed to the injury, it is plain that the plaintiff could not recover, for the obvious reason that the deceased was guilty of negligence which contributed to the injury. In refusing the instruction, the court, in effect, held that the defendants were liable, although the jury might find from the evidence that, if Snyder had observed the duty enjoined by the statute, the collision might have been avoided. We do not understand this to be the law.

It is, however, said that whatever fault there may have been in regard to the failure to stop the train is to be attributed to the engineer, and that his negligence would be no defense to an injury received by Snyder. The evidence shows that Snyder was the conductor in charge of the train, and that the conductor controlled the movement of the train, which, as we understand it, is always the case. It was therefore his duty to see that the train was stopped at such places as the law required; and, if he failed or neglected to perform that duty, it is right that the consequences resulting from such neglect should rest upon him.

The court refused defendant's fourth instruction, as follows:

"(4) If the jury find from the evidence that the semaphore signal was first given to the train of the Chicago & Northwestern Railway Company, going west, to make such crossing, and that, after such train had made the crossing, the semaphore signal was then given to the train of the Chicago, Milwaukee & St. Paul Railway Company to proceed and make the crossing,

and was not given to the train of the Chicago & Northwestern Railway Company, going east, you will find for the defendant the Chicago, Milwaukee & St. Paul Railway Company."

The west-bound train on the Northwestern road was first at the crossing, and hence had the priority of right to make the crossing over other trains which arrived at a later time, and there is no dispute in regard to the fact that the proper signal was given this train to make the crossing, which it did. As respects the train going east, upon which Snyder was conductor, it was contended, on the one hand, that Torrence had given the proper signal for this train to cross, and that it was attempting to make the crossing under the signal given, when Torrence changed the signal, but too late for Snyder to stop his train and avoid the collision; while, on the other hand, it was contended that, after the west-bound train had gone over the crossing, Torrence at once gave the proper signal to the train on the St. Paul road to cross, which was obeyed by the St. Paul train, and that Snyder negligently failed to observe such signal, and undertook to make the crossing in disregard of such signal. There was evidence introduced on the trial tending to prove that, after the west-bound train on the Northwestern road had crossed, the semaphore signal was then given to the St. Paul train to proceed, and that the train under the control of Snyder had no right then to move; and, under the pleadings and evidence, we see no reason why the instruction was not proper. It may be true, as suggested in the argument, that the semaphore signal to a Northwestern train to cross might be an invitation to trains to cross going east on the Northwestern road, as well as west; but, if this be true, such fact does not militate against the instruction, as it is based upon the theory that the Northwestern train going west had crossed, and the signal was changed in favor of the St. Paul road before Snyder's train started to make the crossing.

The refusal of the court to give defendant's sixth instruction is assigned for error. Without entering upon a discussion of this instruction, it is sufficient to say that a similar instruction was before us in a late case, (*Rolling-mill Co. v. Johnson*, 114 Ill. 59,) and it was there said:

"The ruling of this court requires that the servants of the same master, to be co-employees so as to exempt the master from liability on account of injuries sustained by one resulting from the negligence of the other, shall be directly co-operating with each other in a particular business, in the same line of employment, or that their usual duties shall bring them habitually together, so that they may exercise a mutual influence upon each other, promotive of proper caution."

We do not regard the instruction as conforming to the ruling indicated, and it was properly refused.

For the error indicated the judgment will be reversed, and the cause remanded.

(117 Ill. 370)

## BOOTH v. SMITH.

(Supreme Court of Illinois. June 12, 1886.)

## 1. EQUITY—FRAUDULENT REPRESENTATIONS INDUCING PURCHASE.

This was a bill to rescind a purchase of 392 shares of the capital stock of a coal company, induced, it is alleged, by fraudulent representations of the defendant and his agent as to the value of said stock, and of the investments and business of the company. The evidence in the case was conflicting. Without analyzing the evidence in detail, the court held that the preponderance of the evidence was with the complainant, and affirmed the decree sustaining the bill.<sup>1</sup>

## 2. ESTOPPEL—ACTS AS AGENT OF PURCHASER OF STOCK AND ACTS AS OFFICER OF CORPORATION DISTINGUISHED—PURCHASER NOT ESTOPPED BY HIS AGENT'S ACTS IN LATTER CAPACITY.

In this case the husband of the purchaser of stock acted as her agent in the purchase. He then became an officer of the corporation, and the funds paid in for the stock were paid out with his approval as such officer of the corporation. This does not constitute an estoppel against the purchaser's rescinding the purchase for the fraud of the seller.

Appeal from First district.

SCOTT, C. J. This was a bill in chancery, brought by Josephine C. Smith against Caleb H. Booth, Oliver M. Parsons, and the Western Indiana Coal Company. The relief sought, however, is principally as to defendant, Caleb H. Booth. It is set forth in the bill that complainant was induced, by false representations made by Oliver M. Parsons, as his agent, to purchase of Booth 392 shares of the capital stock of the Western Indiana Coal Company, paying therefor the sum of \$4,000; and the object of the bill is to set aside the sale on account of the alleged fraud practiced upon her, and for an account against Booth, from whom it is alleged she bought the stock through her agent transacting the business for her. The fraud charged is that Parsons falsely represented the company was successfully operating its mine, and paying its current expenses out of the proceeds of the coal taken from the mine, and that the capacity of the mine could be easily increased to 50 tons per day, when the mine would pay a large profit; that the coal taken from said mine was worth 25 cents a ton more than any coal mined in the state of Illinois; that the coal could be mined and placed on the cars at the mine at a cost not to exceed \$1.27 per ton; that there had been invested by the stockholders of the company in the plant and purchase of its property the sum of \$3,500; and that its indebtedness was \$1,500. The bill then charges that, relying upon and believing the representations so made to be true, she, through her agent, made the agreement to purchase the stock. The answer made to the bill was not under oath, and serves no other office than to put the matters alleged against defendant at issue, and it will not, therefore, be necessary to state the contents. On the final hearing of the cause upon the pleadings and the evidence, the court rendered a decree in favor of complainant, setting aside the sale of the stock to her, and adjusted the equities between her and defendant, Booth,

<sup>1</sup> Respecting fraudulent and false representations in the sale of goods, see *Dillman v Nadlehoffer*, (Ill.) 7 N. E. Rep. 88, and note, 93-95.

by taking an account, and rendering a decree against him for the balance found due from him after appropriating to complainant the amount in the hands of the receiver. That decree was affirmed, on the appeal of Booth, in the appellate court of the First district, and he brings the case to this court on his further appeal.

Most, if not all, the questions involved are purely questions of fact, and as to some of them the testimony is quite conflicting. It does not seem to be seriously controverted, either by Booth in his answer to the amended bill, which charged the fact of agency, or by the evidence that Parsons was his agent, and acted as such in making the sale of the stock to complainant. That fact in the case may be regarded as proved with such certainty that the agency will be taken as established in the further consideration of the case. Nor can it be seriously questioned that complainant relied upon the representations, whatever they were, in making the purchase of the stock. She could have had but little other information as to the value of the mines, and the plant owned by the company. Had it not been for the representations made to her agent, it is evident she never would have purchased the stock at the price she did. The sequel shows, past all doubt, the amount paid for the stock was out of all proportion to its real value. There must have been something other than the slight personal examination of the mines and plant made by her agent that induced the making of the purchase of the stock. The testimony touching the representations alleged to have been made will be considered further on in the brief discussion that is to follow. There is no ground for the objection the offer to rescind the sale was not made in apt time. No considerable delay was suffered to intervene in giving notice to Parsons of the intention to insist upon a rescission of the contract. The delay in filing the bill is satisfactorily explained, and it was perhaps done to favor Parsons himself, that he might be able to effect another sale of the stock. It was not practicable, in the first instance, to give Booth notice of the rescission of the contract. He lived in another state, and, under the circumstances in evidence, it is thought notice to the agent that transacted the business, and who continued to act for him, was quite sufficient.

Coming now to consider the alleged false representations made to complainant's agent to induce her to buy the stock, the most difficulty in the case is experienced. Most of the testimony bearing directly on that branch of the case comes from the agents of the parties that transacted the business for their respective principals. One of them (Smith) is the husband of complainant, and the other (Parsons) is the son-in-law of defendant, Booth. Much of their testimony is irreconcilably conflicting. It would answer no good purpose to enter upon any close analysis of the evidence. It is not necessary to do more than state the conclusions reached, after a careful study of the whole case as it appears in the record. There can hardly be a reasonable doubt that Parsons made certain statements to the agent of complainant as to the cost of mining the coal, the cost of transportation, and the price at which it could be sold when it reached the market, that were very material in reaching a con-

clusion as to the value of the stock it was proposed to sell. Other representations—for instance, as to the amount that had been invested in the mine and plant, and as to whether the mines were then paying expenses—were, no doubt, made, but whether to the extent insisted upon by complainant, the evidence is unsatisfactory. If the statements and representations as alleged by complainant were in fact made, they were vital and material, and affected, in a large measure, the value of the stock in the company.

There are some facts and circumstances that tend rather to support the testimony given by the agent, Smith, and if what he says concerning the representations made by Parsons is true, a rather strong case is made for relief. According to his testimony, what Parsons stated were not mere expressions of opinion as to value, but representations as to actual facts, within his personal knowledge, which if true vitally affected the value of the stock, and if untrue were hurtful to complainant, as they must have induced her to buy stock in the company that she would not otherwise have done. What representations Parsons may have made to complainant's agent to effect the sale of Booth's stock to her, and whether such representations were willfully false, and made with a view to deceive her as to its value, are questions depending, as they do, so much on conflicting testimony, this court can hardly say the decree of the court below is not warranted by the evidence, and for that reason should stand. If the representations as to matters affecting the value of the stock were in fact made as testified to by Smith, and as the courts below have found, not the slightest doubt is entertained that they are material, and were confidently relied upon by complainant's agent in buying defendant's (Booth's) stock for her. Conflicting as the evidence is, it is still thought there is sufficient to support the decree of the trial court; at least, no ground is perceived on which the decree can be reversed, and it must stand.

It is said, with some confidence, complainant is estopped to make any claim against defendant, Booth, for reimbursement. The facts relied upon as creating the bar to relief are that, after she had purchased the stock and paid for it, her husband, who had acted as her agent in buying the stock, became an officer in the corporation, and much of the money which she had paid in for the stock was paid out under the direction and with the consent of her husband, as an officer of the company. A sufficient answer to the position taken is that while her husband was paying out, or consenting to the paying out of, the money, he was not then acting as complainant's agent, but as an officer of the corporation. While acting in that capacity it would seem he was no more the agent of complainant than of defendant, Booth, or any stockholder in the company. In that capacity he was the agent of the corporation, and not the personal agent of complainant, and there can be no ground for an estoppel for that reason, as to complainant.

The judgment of the appellate court must be affirmed.



(117 Ill. 619)

**QUEENAN and others v. PALMER and others.***(Supreme Court of Illinois. June 10, 1886.)***1. EQUITY—JURISDICTION—MULTIPLICITY OF SUITS—COMMON FUND.**

Where a common fund exists, upon which numerous persons have claims, equity will seize hold of it, and pay it out ratably upon their respective claims, or pay them in full, if the fund shall be sufficient for that purpose, in cases where it is wrongfully withheld. It may not be always known in advance whether the common fund will be sufficient to satisfy all demands upon it, and to ascertain that fact is a well-recognized head of equity jurisdiction.

**2. BANKS AND BANKING—LIABILITY OF STOCKHOLDERS FOR CORPORATE DEBTS HELD NOT PENAL—PENAL STATUTE DEFINED.**

A liability of stockholders in a savings bank to the depositors and creditors of the bank, to an amount equal to the amount of their stock, respectively, until after a transfer of stock, published in a public newspaper, is not a penal liability. A penal statute is one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited. The provision in question here presents none of these features.

**3. CORPORATIONS—STOCKHOLDERS' LIABILITY, A COMMON FUND FOR CREDITORS—DISTRIBUTION, A GROUND OF EQUITY JURISDICTION.**

The statutory liability of stockholders creates a common fund as a security for the creditors of a corporation. The distribution of such common fund among creditors entitled to share in it is a proper subject of equity jurisdiction.

**4. BANKS AND BANKING—STOCKHOLDERS' LIABILITY FOR "LOSSES" OF DEPOSITORS HELD PRIMARY, AND NOT SUBSIDIARY TO REMEDY AGAINST CORPORATION.**

The liability of stockholders in this case was to "make good all losses to depositors or others." This creates a primary liability against the stockholder, and it is not necessary for the depositors first to exhaust their remedy against the corporation.

SCHOLFIELD, J., dissents.

Appeal from appellate court, Third district.

*Stuart, Edwards & Brown, Palmers, Robinson & Shutt, J. A. Chestnut, and N. M. Broadhurst, for appellees.*

SCOTT, C. J. As is seen from the record, the Springfield Savings Bank was incorporated by a special act of the general assembly approved February, 1867. It seems its capital stock was \$100,000, and was divided into shares of \$100 each. The charter of the incorporation was amended by an act of the legislature passed April 11, 1869, which amendment contained the following provision:

"That the stockholders of said corporation shall be responsible, in their individual property, in an amount equal to the amount of stock held by them, respectively, to make good all losses to depositors or others; and no assignment of their stock shall release them from such liability until after the fact of such an assignment, and the name of the person to whom made, and the amount of the stock assigned, shall have been advertised in some public newspaper, published in the city of Springfield, \* \* \* for the period of three months."

The capital stock was soon taken, the bank organized, and thereafter it continued to transact the usual business done by such institutions until the seventeenth day of December, 1877, when it suspended, and never again resumed. It seems the officers, notwithstanding the bank had suspended operations, continued in possession of its property, as

they had previously been, doing some business looking to the closing up of its affairs, until the ninth day of April, 1879, when the corporation made an assignment of its effects and assets under the insolvent act for the benefit of its creditors. The assignee appointed qualified in due time, and entered upon the duties of the trust. Afterwards the original assignee resigned, and John S. Bradford was appointed successor, and has since continued to act. At the time the bank suspended operations, its books contained the names of the stockholders, the number of shares owned by each, and the par value. The original complainants in this case were Mary Queenan and Theodore Kerger, who filed their bill in the circuit court on the twenty-first day of January, 1880, on their own behalf, and on behalf of all other creditors of the bank who might come in and contribute to the expense of the suit. Subsequently quite a number of persons, by leave of court, came in and became co-complainants with the original complainants. Mary Queenan alleged, by her bill, that she commenced to deposit money with the bank about the fifth of August, 1872, and continued to do so, from time to time, up to May 1, 1875; and that the bank, at the time of filing the bill, was indebted to her, on account of such deposits, in the sum of \$4,000. The other complainants, by appropriate allegations, stated the amounts, and when and how their respective claims accrued. It is charged that certain persons, all of whom are made defendants to the bill, were owners of stock in the bank at and before the deposits were made by complainants; but they say they do not know and cannot state the number of shares owned by each defendant. Complainants allege the loss of their respective deposits by the suspension and insolvency of the bank. A discovery of certain facts is sought, by requiring answers under oath to interrogatories propounded in the bill; and the prayer is that on the hearing of the cause the respective sums due to complainants may be ascertained by the court, and also the number of shares of stock held by each defendant, and that defendants may be required, by the decree of the court, to pay to complainants, within a time to be fixed, the sums of money due to each from the bank. A demurrer filed to the bill by a number of defendants was overruled by the court. Most of the defendants answered the bill, but a few of them failed to do so, and as to them a decree *pro confesso* was rendered. Aside from the fact defendants admit the number of shares of stock held by each of them, the answers contained little else, except it is charged, in some of them, the liability of the stockholders is by way of statutory penalty; and set up the two-years limitations as contained in the statute; and in respect to all intervening petitioners the five-years statute of limitations is insisted upon as a bar to any relief as to them.

The cause was referred to the master, and it seems exceptions were taken to his report by both parties; but, in the view that is to be taken of the case, it will not be necessary to consider them at this time. The court, on the master's report, found certain defendants were owners of stock in the bank, and the number of shares owned by each of them; and decreed that all of defendants found to be owners of and liable for

stock, "pay an amount equal to the value of the shares of stock owned by them, as hereinbefore found and stated; to be collected of the living by execution directly, and of those not living in due course of administration, as provided in the case of the estates of deceased persons." It was also found by the court in its decree that the bank was liable for the whole amount due to complainants, but that it was insolvent. This decree of the circuit court was, on the appeal of some of defendants, reversed by the appellate court of the Third district, and the cause remanded, with direction to that court to dismiss complainants' bill.

As this case now comes before this court, it will only be necessary to consider two of the principal questions made on the record: *First*, what liability, if any, does the amended charter of the Springfield Savings Bank impose upon the holders of shares of stock in the corporation? And, *second*, has chancery jurisdiction to entertain complainants' bill, and to afford the relief sought by it? Other minor questions raised on the hearing in the circuit court need not now be passed upon. Should the case ever come before the appellate court again, that court will no doubt give satisfactory answers to them, without any suggestions in advance from this court.

Naturally, the jurisdictional question made first presents itself as one of controlling importance. It is confidently maintained that, whatever may be the character of defendants' responsibility under the charter of the corporation, the remedy, if any exists, is at law, and hence the present bill should have been dismissed, on the demurrer of some of the defendants, for want of jurisdiction. This, it is thought, is a misapprehension of the law. The jurisdiction of the court does not rest on the ground the bill in this case may invoke a discovery of evidence of fact material to enable complainants to maintain their bill. It has a better understood principle of jurisdiction upon which to rest, and one uniformly recognized by the courts of this and other states. It may be that an action at law might have been maintained against defendants on their statutory liability, but that fact would not necessarily exclude a court of equity jurisdiction. The remedy at law, if any in fact exists in this case, is totally inadequate to afford the full measure of relief without the bringing of a multiplicity of suits, which the law does not favor where it can be avoided. Undoubtedly the law is, where a common fund exists upon which numerous persons have claims, equity will seize hold of it, and pay it out ratably upon their respective claims, or pay them in full, if the fund shall be sufficient for that purpose, in cases where it is wrongfully withheld. It may not be always known in advance whether the common fund will be sufficient to satisfy all demands upon it; and to ascertain that fact is a well-recognized head of equity jurisdiction. Treating the liability the statute creates upon the stockholders in this bank as a common fund out of which depositors may be paid, as well as out of the assets of the bank itself, the jurisdiction of a court of equity to seize such fund, and control it for the benefit of depositors, would hardly be questioned where an exigency arises that demands the exercise of such power.

It is said the alleged liability of the stockholders, under the statute, is penal. If this proposition can be maintained, it would, of course, exclude chancery jurisdiction, and depositors would have to resort to the law courts for whatever remedy might exist. Whether the liability of stockholders is primary, or a mere penalty, depends upon the construction that shall be given to that clause of the amended charter which imposes responsibility upon them as to their individual property. The language of that as rendered is broad and comprehensive. It provides the stockholders of the corporation "shall be responsible, in their individual property, in an amount equal to the amount of stock held by them, respectively, to make good losses to depositors or others." It will be perceived, from a close reading of the charter, the liability it imposes is upon the "stockholders" of the corporation as a class, and not separately as individuals. The imposition of a penalty is in the nature of punishment for wrongful or tortious conduct in an individual, and is never imposed upon a class of persons in the aggregate, as a body. The definition of a penal statute is well understood. It is "one which imposes a forfeiture or penalty for transgressing its provisions, or for doing a thing prohibited." A familiar illustration, often occurring, is where the charter requires certain things shall be done before any business shall be transacted by the corporation; and, if done, it will subject the corporators to a certain measure of liability, that has always been held to be penalty, as punishment for wrongful or tortious conduct on the part of the corporators, which can only be recovered in an action at law. But the clause of the statute being considered, has no element that brings it within the definition of a penal statute. The provision of the charter simply creates a liability in favor of depositors. What may be the extent of that liability will be considered further on. It simply creates a liability upon the stockholders to depositors or others; and, whatever that responsibility may be, it is primary, and exists with the liability of the bank to its depositors or other creditors. It is as much a fund for their security as the assets of the bank. This is declaring no new doctrine. It is simply the application of principles settled by the previous decisions of this court. It has been repeatedly held the statutory liability of stockholders, created by the charter, for the debts of the corporation, is a common fund for the security of its creditors. The securing of a distribution, ratably or otherwise, of such fund among creditors entitled to share in it, is a proper ground for the equitable jurisdiction of a court of chancery, as was expressly decided by this court in *Eames v. Doris*, 102 Ill. 350, for the benefit of depositors.

Assuming it is a correct construction of this clause of the charter that the liability imposed by its terms upon stockholders constitutes a common fund for the benefit of depositors or others, counsel do not question the fact that *Eames v. Doris* maintains the jurisdiction of a court of equity to administer such a fund whenever a proper case is made for so doing; for it is a familiar branch of equity jurisdiction. That it is the correct construction of the charter that the responsibility imposed upon stockholders is primary, and exists with the obligation of the corporation it-

self, and that it constitutes a common fund for the benefit of depositors or others, seems clear both upon principle and upon authority, and hence the jurisdiction of a court of chancery in such cases is equally clear.

The other branch of the case that has relation to the extent of the responsibility of the stockholders of the bank to depositors or others needs only a brief discussion. The question presented is entirely new in this court, and arises out of the peculiar and unusual language contained in the charter. The obligation, as has been seen, is to "make good all losses to depositors or others." It is said the word "losses" in the charter refers to all persons who may suffer losses by the default of the bank,—depositors or others. That is undoubtedly correct; but what is meant by the term "losses" as used in the statute? It would seem from the argument that defendants would restrict the meaning of the term "losses" to signify only the difference between the depositor's claim and what he might realize by an action or bill against the insolvent bank. There are many cogent reasons in the way of adopting this definition, some of which do not readily admit of any satisfactory answer. In the first place, it would require that the responsibility imposed upon the stockholders should be treated as secondary to that of the bank, and not primary. That, as has been seen, cannot be done. Again, it would render it necessary for the depositors, by bill,—for it could not be done otherwise,—to procure a ratable distribution of the assets of the insolvent corporation among all persons interested; after that should be done, then, in like manner, to proceed against the common fund arising from the statutory liability of the stockholders. The law has imposed no such duty upon the depositor. He may proceed against one or both funds at his election. A party having more than one remedy is at liberty to pursue either or all until he has obtained satisfaction of his claim. It cannot be that the term "losses" was used, in this connection, in that restricted sense as to mean that which can never be recovered; otherwise there might be no such thing as any "losses" to the depositors in this case, for there might exist a remedy against the bank for one portion, and against the stockholders for the residue; and what would there be left for the term to attach? Obviously, the term "losses" was used in a more general sense, and one usually attached to it by a common understanding. In its most general sense, the word "loss" means any deprivation. In some instances it may mean that which can never be recovered, and in others that which is simply withheld, or that of which a party is dispossessed. Often the context assists to a clearer understanding of the words employed in a statute or written argument. By another section this corporation was authorized to receive deposits from laborers and servants, and was obligated to repay such deposits when required. The suspension of the bank by reason of insolvency was an absolute refusal to repay the deposits to the owners, and operates as a deprivation—a withholding—of the same from the depositors; and that is a loss in the ordinary acceptance of that word. A portion of the value of such deposits, or all, might ultimately be recovered from either the bank or stockholders; but the deposits are lost to the owner. After the

suspension of the bank, nothing remained of his deposits but the obligation of the bank or the stockholders to pay the value. That obligation might or might not be of value to him, depending on the fact of the solvency or insolvency of both the corporation and the stockholders. At all events, the funds have been wasted by the corporation becoming partially or totally insolvent, and that is a loss to the depositor in the sense of that term as used in the statute; and his right to proceed against the stockholders arises at once. Any other definition of this word "losses" would be inconsistent with the context, and would afford no adequate security to the depositors or others dealing with the bank.

There is another view that may be taken, that leads to the same conclusion. The phrase "to make good all losses" is equivalent "to make good all deposits." As before seen, the second section of the charter authorized the bank to receive deposits from laborers, servants, and others, to be repaid when required. What would commonly be understood by the phrase "make good all losses," or what is the same thing, "make good all deposits?" Obviously, considered in connection with the duty imposed by the second section of the charter, to repay deposits when required is to pay them to the parties entitled to receive them on the bank making default. How else can the "losses" or "deposits" be made good? The charter has imposed upon the stockholders the responsibility to make good all losses to depositors or others, to an amount equal to the amount of stock held by them; and the legal effect of the liability created, is to that extent they shall be required to pay back deposits to the owners when the bank suspends, and refuses to pay depositors or others.

This view of the law seems to have been tacitly adopted by the court in *Eames v. Doris*, *supra*. The bill in that case was to enforce the stock liability against the stockholders of the State Savings Institution in respect to trust funds deposited within it. It does not seem the charter imposed any stock liability for anything other than trust funds. Section 9 of the charter provides each stockholder in the corporation shall, as to the trust funds or saving funds deposited therewith, be individually liable to the amount of his share or shares of the capital stock, for all "losses or deficiencies" that may occur while he was such stockholder. It will be noticed that the only difference in the words employed in this section to indicate for what the stockholders shall be liable, and in the charter of the Springfield Savings Bank, is the addition of the words "or deficiencies." The use of these words in no way enlarges or changes the degree of responsibility created. It is obvious the words "losses" and "deficiencies" are used, in this connection, as convertible or equivalent terms, and as meaning precisely the same thing. Without any discussion of the meaning of the words "losses" and "deficiencies," it was held in *Eames v. Doris* the stockholders, to the extent specified in the statute, were *primarily* liable for the trust funds deposited in the institution, and that a bill in equity would lie to enforce that liability. That is the only case, to which the attention of this court has been called, bearing even remotely on the questions being discussed, and it is thought it should control.

The judgment of the appellate court will be reversed, and the cause remanded to the circuit court for further proceedings, not inconsistent with this opinion.

SCHOLFIELD, J., dissents.

(102 N. Y. 523)

MASSEY and others v. MUTUAL RELIEF SOC. OF ROCHESTER, N. Y.

(*Court of Appeals of New York*. June 1, 1886.)

LIFE INSURANCE—MUTUAL BENEFIT SOCIETIES—LAWS 1875, CH. 267—BENEFIT NOT RESTRICTED TO FAMILY OF DECEASED.

There is nothing in chapter 267, Laws 1875, which restricts the object of the societies formed under it, to the relief of families or their members; and where, by its laws, defendant directed that aid be afforded to the members, their families or assigns, in case of a member's death, etc., the society cannot escape the payment of the stipulated sum to a person because he is not a member of the family of the deceased.

Appeal from a judgment of the general term supreme court, Third department, affirming a judgment upon a verdict for plaintiff.

*John M. Dunning*, for appellant, Mutual Relief Soc. of Rochester, N. Y.

*N. C. Moak*, for respondents, Samuel Massey and others.

RAPALLO, J. The defendant was organized under chapter 267 of the Laws of 1875, entitled "An act for the incorporation of societies or clubs for certain lawful purposes." The purposes enumerated in the act for which societies may be incorporated under it are quite numerous, including social, political, sporting, literary, and other objects, and also "mutual benefit" and "benevolent" purposes. The subject of life insurance is not among the enumerated objects, unless it is embraced in the term "mutual benefit" or "benevolent." There is no restriction in the act which requires that the benefits or benevolence be confined to members of the families of the members. Any five or more citizens of full age may form themselves into such a corporation, by making and filing the prescribed certificate, stating the name of the society, and its particular business and objects; and they may adopt a constitution, by-laws, and rules.

The certificate of the incorporation of the defendant, which was filed April 21, 1877, states the object of the society to be "to combine the efforts of all its members with the view to effect mutual relief, aid, and systematic contributions of benevolence and charity *during their life-time*, and to their respective families, from time to time, *when rendered necessary by sickness or pecuniary distress*." Here, again, there is no specific mention of life insurance, nor any restriction of beneficiaries to the families of members, except when aid is rendered necessary by *sickness or pecuniary distress*; and from the context it is evident that this clause of the certificate treats of aid contributions to be furnished during the life-time of the members, respectively.

In the by-laws appears the first direct reference to anything of the nature of life insurance. Section 2 of article 1 of these by-laws declares

that the objects of the society shall be to secure mutual benefit and protection to its members, and to furnish aid to their families or assigns in case of a member's death, and section 3 states that "the plan of the society will be to issue certificates for a sum not to exceed \$2,000, to be paid to heirs or beneficiaries of deceased members, named in their certificates, from funds arising from assessments for the payment of death claims, according to the schedule of rates hereinafter adopted." The by-laws then proceed to organize a system similar to that of a mutual life insurance company. A medical examination is required as a condition of admission to membership; an entrance fee and small annual dues are payable; and members are also required to pay assessments, to meet death losses, on a scale graduated according to the age of the member at the time of his admission; and upon the death of each member, after the filing of the required proofs, the treasurer is required to pay to the legal representatives of the deceased member, or to such *heirs or beneficiaries* as are named in his certificate, the sum of \$2,000. There is nothing in the by-laws which requires that the beneficiaries named in the certificate should be members of the family of the deceased member; and, if no beneficiaries are designated, the payment is to be made to his legal representatives.

The power of the company to create a fund for the insurance of the lives of its members is not questioned on this appeal, and we do not, therefore, discuss it. The act of 1875 authorizes the incorporation of societies for purposes of "mutual benefit," and it must be under this head that the power is claimed to contract for the application of the joint contributions of the members to the payment of a gross sum to the legal representatives of each member, or to such beneficiary as he may designate to receive it, upon his death. There is nothing in the act which restricts the object of the societies formed under it, to the relief of families of their members. They may be formed for general purposes of benevolence, and for many other objects, such as social, political, athletic, sporting, etc. Neither does the certificate of association of the defendant restrict the application of its funds to the relief of a member or his family, except where such relief is to be extended during the life of the member. But the by-laws disclose the plan by which the society propose to carry out the object stated in the certificate, viz.: "To combine the efforts of all its members with the view to effect mutual relief, aid, and systematic contributions of benevolence and charity during their lifetime;" and this plan was to combine their contributions so as to secure mutual benefit to the members, and to afford aid to their families or *assigns* in case of a member's death, by issuing the certificates of membership, before referred to, whereby the payment of \$2,000 was secured to the legal representatives of each member on his decease, or to such other beneficiaries as he might cause to be designated in the certificate. By this means each member, in consideration of the sums contributed by him to the funds of the society, became entitled to an instrument similar to a policy of insurance upon his life, and was empowered to designate the person to whom the stipulated sum should be paid upon his



death. This power was a present benefit to the member, as he might use it for the purpose, not only of making future provision for some member of his family, or some other object of his benevolence, but even to raise money to supply his own immediate necessities, and it was no concern of the society in what manner he made it available. The society could not, in any event, escape the payment of the stipulated sum; for if, as it now claims, the designation of a person not a member of the family of the deceased was void, the payment would, according to the terms of the by-laws and certificate, be due to his legal representatives.

For the reasons stated, we are of opinion, however, that the designation of Massey as a beneficiary was not in contravention of the certificate of incorporation. That certificate did not contain the restriction which appears in the certificate of incorporation referred to in the case of *State v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 403. In that case the certificate stated the objects of the association to be "for the mutual protection and relief of its members, and for the payment of stipulated sums of money to the families or heirs of the deceased members of the association." And in *Folmer's Appeal*, 87 Pa. St. 135, the charter of the relief association declared: "The object of this association shall be the relief of widows, orphans, or families of deceased members." The language in the cases cited, was clearly restrictive, but in the present case the certificate of incorporation is much more broad. It declares the objects of the association to be to combine the efforts of the members with a view to effect mutual relief, leaving the details of the plan to be provided in the by-laws; and these by-laws provided for the system of life insurance before detailed, with the power to each member to designate any person he might choose to receive payment.

The judgment should be affirmed, with costs.

(All concur.)

(102 N. Y. 531)

WING v. ANSONIA CLOCK Co., impleaded, etc.

(Court of Appeals of New York. June 1, 1886.)

PATENTS FOR INVENTIONS—LICENSE—CONTRACT FOR ROYALTIES—CONSTRUCTION OF.

In a contract for royalties on musical instruments, defendants agreed to pay the patentees, on each of two patents, "at least the sum of \$4,000 per annum, for each and every year from January 1, 1882, by way of royalty above provided for, or otherwise, for the manufacture of pianos," etc., "or else forfeit the right to manufacture pianos," etc., "under the foregoing license, if the patentees shall so elect, by a notice in writing to that effect within ten days after the close of any year in which less than \$4,000 is paid." Held, that the undertaking of the company was not absolute to pay the amount in each year so long as the patentees elect to continue the license in force, but was in the alternative to pay the sum stated, or else to forfeit its right to manufacture; that the liability of the company was absolute as to royalties, but conditional as to payment in excess of royalties.

Appeal by plaintiff from a judgment of the supreme court at general term, Second department, affirming a judgment in favor of defendant upon a demurrer to the complaint, on the ground that it failed to state facts sufficient to constitute a cause of action.

*Edward M. Shepard*, for appellant, Charles W. Wing.

*Marshall P. Stafford*, for respondent, Ansonia Clock Co., impleaded, etc.

ANDREWS, J. It is a just inference from the contract, giving due force to all its provisions, that the primary purpose of the patentees, in entering into it, was to procure the defendant, on its own account, to undertake the manufacture of musical instruments, under the patents, subject to the payment to the patentees of a specified royalty on the manufactured articles, as a consideration for the grant of the right to use the invention. The contract, therefore, commences by granting to the company the exclusive right to manufacture and sell two specified classes of musical instruments, containing the patented improvements, during the whole time of the patent, in consideration of the payment by the company of a specified royalty on instruments of each class. The company on its part covenants to promptly commence and diligently prosecute the manufacture of instruments under the license, and to make quarterly returns, under oath, of all instruments manufactured thereunder; and quarterly payments of the royalties specified. It is provided that on the failure of the company to make returns, or pay the royalties, the patentees may terminate the license; but the right to recover any royalties due at the time notice of the termination of the license is given, is expressly saved. Following the clause last referred to are two clauses which raise the question presented by the demurrer. By the first the company promises and agrees to pay the patentees "at least the sum of four thousand dollars per annum, for each and every year from the first day of January, 1882, by way of royalty above provided for, or otherwise, for the manufacture of piano-fortes, containing five or more octaves, with said patented improvements, or *else* forfeit the right to manufacture piano-fortes containing five or more octaves under the foregoing license, if the parties of the first part [the patentees] shall so elect, by a notice in writing to that effect within ten days after the close of any year in which less than four thousand dollars is paid." The second clause contains a similar provision for the payment of another sum of \$4,000, under the same conditions, on account of other classes of instruments mentioned in the contract.

The question is whether the undertaking of the company is absolute to pay at least \$8,000 in each year, so long as the patentees elect to continue the license in force, although the specified royalties do not amount to that sum, or, on the other hand, whether the company has the alternative to pay the excess over the royalties, up to the sum mentioned, or to refuse to pay beyond the amount of the royalties, subject only to the hazard of forfeiting its right to manufacture, at the election of the patentees. We think the latter is the true construction. The covenant of the company is to pay the sum stated, or else to forfeit its right to manufacture. The contract plainly contemplates alternative situations. The company, in the natural order of events, is first to decide whether it will pay beyond the royalties, or, in default of so doing, subject itself to a liability to have the license revoked. It is not strictly a covenant by the

company to do one of two acts; but having, by the contract, an exclusive right to use the patents, on performing the conditions, its election not to pay the gross sum would terminate its right under the contract, at the election of the patentees. A mere right of forfeiture attached to a contract is, of course, no answer to an action on a covenant of payment, or other covenant of the defaulting party. The forfeiture may be waived, and the remedy is alternative, and not exclusive. But parties may make a forfeiture the only remedy. The contract may give a right upon condition of payment, with a clause of forfeiture if the payment is not made, and make that the only consequence. This, we think, was the intention of the parties in this case. It is quite conceivable that the patentees, under given circumstances, might deem it for their interest to continue the contract, although the royalties in a particular year might be less than \$8,000. By the clause in question they reserved the right to resume the control of the patents in case the royalties did not amount to that sum, and the company elected not to pay anything in excess of the royalties. So, also, the company, in view of the prospects of the business, might deem it for its interest to retain the exclusive right given by the contract, although to do so might require, in a particular year, the payment of a sum beyond the royalties.

The construction insisted upon by the plaintiff gives no force to the alternative words "or else" in the covenant in question. It is quite significant that in the clause immediately preceding, providing for a forfeiture for non-payment of royalties, the right to recover royalties unpaid at the time of the forfeiture is expressly reserved. It strengthens the construction that the remedy by forfeiture, given in the succeeding clauses, was intended to be exclusive. By the plaintiff's construction, the company bound itself absolutely to pay each year, during the life of the patents, the sum of \$8,000, whether the patents proved to be valuable or not, and although not an instrument was manufactured. If it was the intention that the company should each year pay a minimum sum of \$8,000 absolutely, we should expect to find that intention expressed in direct and unambiguous language. We think the reasonable construction of the contract, and one which gives force and meaning to all its provisions, is that which, while it makes the liability of the company absolute as to royalties, makes it conditional as to payment in excess of royalties. The judgment should therefore be affirmed.

(All concur.)

(102 N. Y. 716)

**BARTHOLOMEW v. NEW YORK CENT. & H. R. R. Co.**

(*Court of Appeals of New York. June 1, 1886.*)

**1. CARRIERS—OF PASSENGERS—INJURY BY TRAIN STARTING SUDDENLY AFTER APPARENTLY STOPPING.**

In an action for injury caused by a sudden jerk of a railroad train, after the station had been announced, and the train was moving so slowly as to appear to the passengers to have stopped, the judge charged that, "if the train appeared to have stopped, then, for all practical purposes and for the consideration of this case, it had stopped." *Held* no error.

**2. SAME—EVIDENCE OF NEGLIGENCE.**

After the announcement of the station, the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped; and ordinary care for the safety of the passengers required the train to be so managed as not to endanger their lives; and a sudden jerk or a start, without any warning, when the passengers were upon their feet moving towards the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant.

Appeal from judgment general term supreme court, Fifth department, affirming order special term denying motion for new trial.

*Edward Harris*, for appellant, New York Cent. & H. R. R. Co.

*Wm. S. Oliver*, for respondent, Amelia A. Bartholomew.

EARL, J. The only ground of error alleged by the defendant is the exception taken to the following phrase in the judge's charge: "If the train appeared to have stopped, then, for all practical purposes and for the consideration of this case, it had stopped." This phrase was followed and explained by this language:

"If from the evidence you shall say that, when this woman stepped out upon the platform, the train had stopped, or appeared to persons of ordinary intelligence and observation to have stopped, following, as it did, the conceded announcement, the fact that an announcement had been made that the station had been approached, and by a sudden jerk, of which she had no warning, she was precipitated, and received this injury, she has a right of action."

There was no error in the portion of the charge excepted to. The plaintiff was in a strange place in the night-time, and upon her inquiry, as the train neared Rochester, the conductor informed her that she must change cars at the first place at which the train would stop; that "Rochester" would be called, and she must take the second right-hand train. Some time after this the brakeman called, "Rochester; change cars." The train was then either stopped or slowed down, so that to her, in the inside of the car, it appeared to have stopped. She was bound to act upon appearances, and after making the announcement, if the train was run so slow as to appear to a person of ordinary intelligence and observation to have stopped, ordinary care for the safety of the passengers required the train to be so run and managed as not to endanger their lives, and a sudden jerk or start, without any warning, when the passengers were upon their feet, moving towards the platform of the cars, was sufficient evidence of carelessness to impose liability upon the defendant. As to any one in the cars when the train appeared to have stopped, it was the same as if it had stopped, and the same duty rested upon the defendant to care for the safety of the passengers.

The judgment should be affirmed, with costs.

(All concur.)

(117 III. 50)

PEOPLE *ex rel.* SWIGERT, State Auditor, v. ANDERSON.*(Supreme Court of Illinois. May 14, 1886.)*

## 1. TAXATION—EXEMPTION OF CHURCH PROPERTY—TITLE MUST BE IN CHURCH SOCIETY.

In order to make property exempt from taxation as church property under the provisions of the constitution and revenue act, the title to the property must be in a religious corporation or church society as a body. A church edifice, and the lot upon which it stands, owned by a citizen individually, and regularly used for religious services, is not exempt from taxation.

## 2. SAME—DEDICATION OF PROPERTY BY RELIGIOUS SERVICES, IMMATERIAL TO QUESTION OF EXEMPTION.

The fact that such property has been dedicated to religious uses, by the holding of religious services of a dedicatory character therein, is immaterial to the legal question concerning its exemption from taxation.

Original suit to McLean.

*Geo. Hunt*, Atty. Gen., for the People.

*Tipton & Beaver*, for defendants.

CRAIG, J. At the July term of the board of supervisors of McLean county, begun and held at Bloomington on the thirteenth day of July, 1885, W. G. Anderson presented a petition to the board to vacate and set aside the assessment on lots 6, 7, and 8, in block 3, in the village of Colfax, which had been assessed for the taxes of 1885, on the ground that the property was exempt from taxation, being church property. The board, under section 97 of the revenue law, decided that the property was exempt from taxation, and entered an order vacating the assessment. The county clerk, as provided by clause 3 of section 97, made out and transmitted to the auditor a complete statement of the facts in the case for his approval. The auditor, upon an examination of the facts, did not approve the action of the board, and so notified the county clerk. Upon being informed of the action of the auditor, the clerk served the proper notices upon Anderson; and the auditor, under the provisions of the statute, has presented to this court a statement of the facts for our decision. Under the statute which provides for a proceeding of this character, the regularity of the assessment by the local assessor does not arise. The only question for discussion is whether the property was liable to be assessed for taxation, and that question we will consider.

It is claimed in the argument that the lots in question are church property, and, as such, are exempt from taxation under the constitution and laws of the state. From the statement of facts it appears that the three lots were on the first day of May, 1885, owned by William G. Anderson; that he had erected a meeting-house on two of the lots, which was used exclusively for religious purposes; that Sabbath-school was held in the church every Sunday, and preaching was had two Sundays in each month. It also appears that the "congregation worshipping at the church, and the name of the church, is the Christian Church;" but the congregation was not incorporated, or in any manner organized. It

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also appears that the building had been dedicated as churches are usually dedicated by religious denominations. Under these facts, were the lots, with the buildings erected thereon, exempt from taxation. The solution of this question must depend upon the construction to be placed upon the act of the legislature exempting certain property from taxation. It may be regarded as a general rule that all property is liable to taxation for the purpose of raising revenue for state, county, and municipal purposes, except such property as the legislature has seen proper, by the enactment of a general law, to exempt. Section 3 of article 9 of the constitution of the state makes provision for the enactment of a law, exempting certain property from the burdens of taxation, in the following language:

"The property of the state, counties, and other municipal corporations, both real and personal, and such other property as shall be used exclusively for \* \* \* school, religious, cemetery, and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."

This provision of the constitution, as is apparent from its language, does not exempt any property; but only provides that the legislature may, by general law, exempt certain property from taxation. Under this provision of the constitution the legislature, in section 2 of the revenue law, proceeded to determine what property might be exempt from taxation; and, as to church property, the section provides that all church property actually and exclusively used for public worship, when the land (to be of a reasonable size for the location of the church building) is owned by the congregation shall be exempt. Here the property was actually and exclusively used for public worship, and it was of a reasonable size for the church building. So far the property falls clearly within the terms of the act. But the act contains the further requirement that the property, in order to be exempt, must be owned by the congregation. This property was not owned by the congregation; but the title rested in W. G. Anderson. The congregation that assembled at this church for worship was not organized under the statute so as to own real estate, and had no power to purchase or own real estate; but if it had been an organized body, so long as Anderson owned the property it was subject to taxation. The fact that the building on the lots had been dedicated as a church has no bearing on the question. The title to the property was not changed by the dedication, but it remained in Anderson as it did before. Anderson did no act which changed the ownership of the property, and at any time he saw proper the congregation might have been excluded from the use of the property. Under such circumstances, we could not hold that the property was exempt from taxation without disregarding the plain and obvious meaning of the legislature, which we have no right to do. If it had been desired to place the property in a position where it would not be subject to taxation, a religious society might have been organized under the statute, and the property conveyed to it, or to some person in trust for such society. Had this been done, the action of the board might have been sustained; but, as the title to the property remained

in Anderson, it was liable to be taxed, and the action of the board was erroneous.

The decision of the board of supervisors of McLean county must be reversed, and the proceeding remanded.

(119 Ill. 141)

VILLAGE OF HYDE PARK v. OAK WOODS CEMETERY ASS'N.

(*Supreme Court of Illinois*. May 14, 1896.)

1. CEMETERY—STREETS—PROHIBITION AGAINST LAYING OUT "THROUGH" CEMETERY GROUNDS, PROHIBITS TAKING OF BORDER OF GROUNDS.  
An amendatory act (P. L. 1887, p. 227) to the charter of the Oak Woods Cemetery Association (P. L. 1853, p. 550) provided: "No road, street, alley, or thoroughfare shall be laid out or opened through said grounds, or any part thereof, without the consent of the directors." This prohibits the taking of a portion of such grounds along the border thereof.
2. STATUTES—REPEAL BY IMPLICATION NOT FAVORED—GENERAL ACT NOT A REPEAL OF A SPECIAL ACT EXCEPTING TERRITORY FROM GENERAL POWER.  
The repeal of a statute by implication is not favored. A general act authorizing a village to open and lay out streets will not repeal, by implication, a previous special act incorporating a cemetery association, granting it the right to acquire certain land in such village, and prohibiting the opening of streets through the land so acquired.
3. CONSTITUTIONAL LAW—STATE CANNOT BARGAIN AWAY POWERS OF SOVEREIGNTY—STATUTE DIVESTING STATE OF POWER OF EMINENT DOMAIN VOID—CONSTITUTIONAL PROTECTION OF CONTRACTS INAPPLICABLE.  
The state cannot bargain away its sovereign powers. A statute attempting to divest the state of the power of eminent domain would be void; and a charter granting a corporation an exemption from the liability to have its property taken by the power of eminent domain would be so far void. The provision of the federal constitution that the obligation of contracts shall not be impaired, has no application to such a case.
4. SAME—EMINENT DOMAIN, A LEGISLATIVE POWER—LEGISLATIVE EXCEPTION OF CEMETERIES FROM, MUST BE REPEALED, TO SUBJECT TERRITORY TO.  
The power of eminent domain is lodged solely with the legislative department of the government. A legislative exception of property devoted to public use as a cemetery, from the liability to be taken by the exercise of eminent domain, is an exercise of the legislative discretion which must be repealed in order to subject such property to such liability.

Error to superior court of Cook.

*Willard & Driggs*, for plaintiff in error.

*Richard & Thompson and Jas. P. Root*, for defendant in error.

CRAIG, J. This was a proceeding instituted by the village of Hyde Park, under the eminent domain act, in the superior court of Cook county, to condemn certain lands owned by the Oak Woods Cemetery Association, for a highway or street which had been laid out by the village. The village of Hyde Park, as is conceded in the argument, is a corporation organized under the general act for the incorporation of cities and villages approved April 10, 1872. The petition to condemn the lands was filed April 18, 1878, and the appearance of cemetery association was entered October 7, 1878. But, so far as is disclosed by the record, no steps were taken in the case until the second day of December, 1885, when a motion was made to dismiss the petition, based upon an agreed

statement of facts. Under the facts embodied in the stipulation of the parties it appears that the Oak Woods Cemetery Association was incorporated under an act of the legislature entitled "An act to incorporate the Oak Woods Cemetery Association," approved February 12, 1853. Priv. Laws 1853, p. 550. The act provides that the association shall have power to own property, not exceeding 160 acres of land, for a cemetery, to survey and lay out the same into lots suitable for the burial of the dead; that the proceeds arising from the sale of lots shall be applied to such improvements in the property as the directors may deem necessary and appropriate. The act also provides that all property and effects of the association shall be exempt from taxation. By an amendment to the act, approved and in force March 7, 1867, (Priv. Laws 1867, 227,) it was further provided as follows: "Sec. 5. The said board of directors shall have power to make such improvements in the said cemetery, *or the streets adjoining the same*, as they shall deem proper; and may regulate and control" the improvements, ornaments, etc. "Sec. 6. The said association may purchase and own lands for their said cemetery, not exceeding in all five hundred acres, and may subdivide the same into lots, *and no road, street, alley, or thoroughfare shall be laid out or opened through said grounds, or any part thereof, without the consent of the directors; nor shall any corporation now existing or hereafter created, be authorized to take, hold, or possess any portion of said cemetery by condemnation without such consent.*"

January 21, 1864, said corporation, having been duly organized, became, by purchase, the owner of the S. W.  $\frac{1}{4}$  of section 23, township 38, range 14 E. On February 28, 1868, the said corporation became the owner, by purchase, of the undivided half of a piece of land immediately adjoining on the east, to-wit, that part of W.  $\frac{1}{4}$  S. E.  $\frac{1}{4}$  W. of railroad, of section 23, township 38, range 14 E.; and by a decree in partition, on July 2, 1881, in the circuit court of Cook county, the north 21.606 acres of this last-named tract were set off to said association. The lands purchased were occupied and used exclusively for cemetery purposes. Under the petition filed, the village of Hyde Park seeks to condemn, for the purposes of a public street, the east 33 feet of the tract of land acquired by the second purchase as aforesaid.

In the superior court it was contended that under section 6 of the act of March 7, 1867, *supra*, the lands of the association were not liable to be condemned for public use by the village of Hyde Park. This view the court sustained, and dismissed the petition.

Before proceeding to a consideration of the question involved, it may be proper to state that there are no graves on the line of the proposed street, nor has the land on the line been specially improved for burial purposes; the only improvement being a fence inclosing the lands on the line between the two tracts owned by the association. The power to open and extend streets is conferred on the city council in cities, and the board of trustees in villages, by paragraph 7, § 62, c. 24, of the statute entitled "Cities, Villages, and Towns," as follows: "To lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve



streets, alleys, avenues, sidewalks, wharves, parks, and public grounds, and vacate the same." Under this section of the statute the village of Hyde Park claims the right to condemn the lands described in the petition; while, on the other hand, the cemetery association claims that under section 6, *supra*, the lands are exempt, and cannot be taken for street purposes. It will be observed that the language of section 6 is not of doubtful meaning, and it is plain that it was the intention of the legislature, in adopting the section, to prevent the lands of the association from being appropriated to road purposes without the consent of the directors of the corporation.

There is no force in the suggestion that the proposed street does not violate the act, because it may be constructed on the division line of two tracts of land, and hence it is not "laid out through the lands." The language of the act is: "No road, street, alley," etc., "shall be laid out through said grounds, or any part thereof." We think the word "through," as here used, was intended to mean the same as the word "over;" the obvious intention being to protect the cemetery lands, or any part thereof, from being taken for road or street purposes.

If we are correct in the construction placed on section 6 of the act, two questions remain to be considered: *First*, has that section been repealed or modified by the general law which authorizes cities and villages to lay out and extend roads, streets, etc.? *Second*, had the legislature the power to empty the property from the operation of the law of eminent domain, which has been conferred on the village?

If section 6 was repealed by the general act of 1872, the repeal was by implication, as the general act does not in any manner whatever allude to the act incorporating the association. In the construction of statutes it is a rule of law well settled that a repeal by implication is not favored; and, where two acts are seemingly repugnant, they should, if possible, be so construed that the latter may not operate as a repeal of the former by implication. *Town of Ottawa v. La Salle*, 12 Ill. 339. In the same case it was also held that a subsequent statute which was general, does not abrogate a former statute which was particular. The act conferring the powers on the association was special, and, under the rule announced, was not abrogated by the general law. The act of 1872 confers general powers to lay out and vacate roads and streets in cities and villages within their corporate limits; but within the village of Hyde Park, by special act the association had previously been authorized to acquire certain lands for a public purpose, and such lands, by the terms of the act, were not liable to be taken for road purposes. The two acts may stand together. Under the general law all roads and streets in the village are under its control, except the lands of the association, and as to these lands the association has exclusive control.

We now come to the question whether the statute exempting the lands acquired by the association from being taken for road or street purposes was a valid enactment. It is claimed that the acts of the legislature creating the cemetery association, when accepted, and the purchase of the lands under said acts, and the dedication of the same to public use,

constituted a contract between the state and the corporators of the association, within the provision of section 10 of article 1 of the constitution of the United States, which prohibits legislation impairing the obligation of contracts. If this position was correct, it is plain that any future legislation authorizing the taking of the lands could not be sustained, as the legislature has no authority to enact a law impairing the obligation of a contract. But the rule invoked has no application to a case of this character. The right of eminent domain is an element of sovereignty, and a contract in restraint of a free exercise of this right is not obligatory on the state, and does not fall within the inhibition of the constitution of the United States. Cooley, in his work on Constitutional Limitations, (3d Ed. 525,) in the discussion of this question, says that any legislative bargain in restraint of the complete, continuous, and repeated exercise of the right of eminent domain is unwarranted and void; and that provision of the constitution of the United States which forbids the state violating the obligation of contracts could not be so construed as to render valid and effectual such a bargain, which originally was in excess of proper authority. See, also, *Id.* 343; *Railway Co. v. Railroad Co.*, 97 Ill. 506; *West River Bridge Co. v. Dix*, 6 How. 531. There are cases where the state might bind itself, and where it would be powerless, under the provisions of the constitution cited, to pass future laws releasing itself from assumed obligations; but this is not one of them. The state had no power to divest itself of the right of eminent domain by any act it might pass which would prevent the exercise of that right in the future, when, in the opinion of the legislature, a case arose wherein the public interest demanded the exercise of the power. But, while we hold that the state cannot divest itself of the power of eminent domain, it by no means follows that the village of Hyde Park has the right to condemn the lands in question. The necessity or propriety of exercising the right of eminent domain is a political question,—one which belongs exclusively with the legislature to determine. *Chicago, R. I. & P. R. R. v. Town of Lake*, 71 Ill. 333. It is a question with which the courts have no concern, as it is not judicial.

By keeping this principle in view, the question involved in this case is freed from difficulty. Here the legislature, believing that the public good to be secured was sufficient to authorize the cemetery association to take and hold the property inclosed for burial purposes, conferred the power on the association, and in the grant it was provided that the lands should be exempt from taxation, and that streets or highways should not be laid out through such lands. Under this power the lands were taken and appropriated to a public use. Now, the legislature has never determined, by any subsequent act, that the right of eminent domain shall be exercised as to this property; and, until such time as the state shall otherwise determine, the association has the clear right to hold the lands free from taxation, or the laying out of streets or highways through them. As was said before, the act of 1872 authorizing cities and villages to lay out streets did not repeal section 6 of the act conferring certain powers on the association; and the only determination of the state that

the lands in question shall be devoted to public use is to be found in that act.

*Eastern R. Co. v. Boston & M. R. R.*, 111 Mass. 125, is a case in point. In speaking on this question of eminent domain the court there said:

"It belongs exclusively to the legislature to determine whether the public benefit to be secured is sufficient to warrant the taking; and this is not a judicial question. \* \* \* The right itself may be delegated to corporate bodies, public or private; and when the enjoyment of two public rights would, to some extent, interfere, it is, in the language of Chief Justice SHAW, 'for the legislature to determine which shall yield, and to what extent, and whether wholly or in part only to the other; and such question will ordinarily be determined by the legislature according to their conviction of the greater preponderance of public necessity and convenience.'"

Here two corporations are claiming the enjoyment of the exercise of the same right, over the same lands. It was within the province of the legislature of the state to determine which one of the corporations should exercise the superior right and which should yield. This the legislature has done. It has determined that the grounds of the cemetery association, devoted to the burial of the dead, shall not be taken and appropriated for the purpose of streets or highways; that the superior right for the good of the public is in the cemetery association; and that determination will have to prevail.

The judgment of the superior court will be affirmed.

(117 Ill. 294)

#### MILLETT v. PEOPLE.

(*Supreme Court of Illinois.* June 12, 1886.)

**1. CONSTITUTIONAL LAW—MINING COAL—ACT COMPELLING MEASUREMENT OF COAL BY WEIGHT AS BASIS OF WAGES, UNCONSTITUTIONAL.**

The act of June 29, 1885, amendatory of the act of June 14, 1883, to provide for the weighing of coal at the mines, requiring the owners and operators of mines to provide scales, and weigh all coal taken out, and making such weight the basis of wages, is unconstitutional. It is depriving such owners and operators, who made contracts for wages on the basis of a certain rate per box, of their property without due process of law. See Bill of Rights, § 2; Const. 1870, art. 2, § 2, (1 Starr & C. St. 99.)

**2. SAME—RECORD OF WEIGHT FOR PUBLIC INFORMATION—COMPELLING KEEPING OF, A TAKING FOR PUBLIC USE.**

Such act is indefensible on the ground that it requires the keeping of a public record for the information of the public. The requirement that such a record be kept is a taking for public use, and, unless compensation be provided, the act so taking is void. Const. 1870, art. 2, § 18, (1 Starr & C. St. 105.)

**3. SAME—COAL MINING NOT A PUBLIC EMPLOYMENT.**

Such act cannot be sustained on the ground that the mining of coal is a public employment, and subject to necessary regulations for the public good. The mining of coal was not at common law affected with a public use, and is not, like the business of warehousing grain, or of common carriers, a business, upon the followers of which the public are compelled to call. The references to coal mining in the constitution, for the protection of miners, (Const. 1870, art. 4, § 29; 1 Starr & C. St. 122,) and for the laying of railway switches to mines, (Const. 1870, art. 18, § 5; 1 Starr & C. 165,) impose no such character on the mining.

Appeal from St. Clair.

*Wilderman & Hamill*, for appellant.

*Geo. Hunt*, Atty. Gen., and *R. D. W. Holden*, State's Atty., for the People.

SCHOLFIELD, J. The defendant was indicted and convicted of failing, as the agent of the owner of a certain coal mine, to cause to be furnished and placed upon the railroad track, adjacent to the coal mine, a track-scale of standard measure, upon which to weigh the coal hoisted from the mine, as provided by section 1 of "An act to provide for the weighing of coal at the mine," approved June 14, 1883, and the several sections of the act to amend sections 2, 3, and 4 of that act, approved June 29, 1885.

We held in *Jones v. People*, 110 Ill. 590, that it was competent to show, in defense of a person indicted under the same section, before the approval of the amendatory act of June 29, 1885, that at the time the act took effect, and long prior thereto, the corporation in that case owning and operating the coal mine had a contract with all the men employed to mine coal in that mine, during that period to receive, as the wages for their labor, from said coal company, the sum of 40 cents per box for each box of coal mined and taken from said mine; that all the persons employed in the mine to mine coal for said company had always been and were then perfectly satisfied to work under said contract; and that they did not want the coal taken from the mine weighed as a basis upon which to compute their wages, etc. It was, in considering this question, among other things, then said:

"Although section 2 does provide that the weight determined by weighing on the scales furnished shall be considered the basis upon which the wages of persons mining coal shall be computed, we do not regard this as requiring that in all contracts for the mining of coal the wages of the miners must be computed upon the basis of the weight of the coal mined. That would be a quite arbitrary provision,—seemingly an undue interference with men's rights of making contracts,—and we cannot ascribe to the legislature the making of such an enactment unless it be plainly declared, which is not done in this case."

The second section of the amendatory act, approved June 29, 1885, requires that all coal produced in this state shall be weighed on the scales, as provided in section 1 of the act approved June 14, 1883, and that a correct record of the same shall be kept, in a well-bound book furnished by the owner, agent, or operator of such mine for that purpose, by a competent person, at the expense of such owner, agent, or operator; said record to be subject to the inspection (at all reasonable business hours) of the miner, operator, carrier, land-owner, adjacent land-owner, member of the bureau of labor statistics, mine inspectors, and all others interested. Section 3 provides that it shall be lawful for the miners employed in any coal mine or colliery in this state to furnish a check-weigher at their own expense, whose duty it shall be to balance said scales, and see that the coal is properly weighed, and keep a correct account of

the same, and for this purpose he shall have access, at all times, to the beam-box of said scales while such weighing is being performed. The fourth section provides that a fine, or fine and imprisonment, as prescribed, shall be enforced on any owner or agent operating a coal mine failing to comply with these provisions. And another section provides that all contracts for the mining of coal in which the weighing of the coal as provided for in that act shall be dispensed with, shall be null and void.

The court, at the instance of the people, instructed the jury that since the first day of July, 1885, the law prohibits the making of any contracts between the operators of the coal mines and the miners in which the weighing of coal as provided by law is sought to be avoided, and the court refused to instruct the jury that "if they believed from the evidence that the company for which the defendant is working does not sell nor offer to sell coal by weight at its mine at which defendant is employed, and that it has contracts with all the men employed in its mine to mine coal at 25 or 20 cents per box, then the jury should find the defendant not guilty." There was evidence before the jury on which to predicate this instruction.

The question is thus presented whither it is competent for the general assembly to single out owners and operators of coal-mines, as a distinct class, and provide that they shall bear burdens not imposed on other owners of property or employers of laborers, and prohibit them from making contracts which it is competent for other owners of property or employers of laborers to make.

It is declared in section 2, art. 2, of our constitution, that "no person shall be deprived of life, liberty, or property without due process of law." And section 13 of the same article provides that private property shall not be taken or damaged for public use without just compensation. The words "due process of law," in this connection, are held to be synonymous with the words "the law of the land,"—Cooley, Const. Lim. (1st Ed.) pp. 352, 353;—and this means general public law, binding upon all the members of the community, under all circumstances, and not partial or private laws affecting the rights of private individuals, or classes of individuals. *Janes v. Reynolds*, 2 Tex. 251. See, also, *Wynehamer v. People*, 13 N. Y. 432; *Vanzant v. Waddel*, 2 Yerg. 269. "Every one," says Cooley,—Const. Lim. (1st Ed.) p. 391,—"has a right to demand that he be governed by general rules; and a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government. Mr. Locke has said of those who make the laws: 'They are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough;' and this may justly be said to have become a maxim in the law by which may be tested the authority and binding force of legislative enactments."

And, again, the same authority says, (page 393:)

"The doubt might also arise whether a regulation made for any one class of citizens, entirely arbitrary in its character, and restricting their rights, privileges, or legal capacities in manner before unknown to the law, could be sustained. Distinctions in these respects should be based upon some reason which renders them important,—like the want of capacity in infants and insane persons; but if the legislature should undertake to provide that persons following some specified lawful trade or employment should not have capacity to make contracts, or to receive conveyances, or to build such houses as others were allowed to erect, or in any other way to make such use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even if it did not come in conflict with express constitutional provisions. The man or the class forbidden the acquisition or enjoyment of property in the manner permitted to the community at large would be deprived of liberty in particulars of primary importance to his or their pursuit of happiness."

See, also, *Budd v. State*, 3 Humph. 483, where the sections of the act incorporating the Union Bank, which provided that if any of the officers, agents, or servants of that bank should embezzle the funds of the bank, or make false entries, they should be guilty of felony, was held unconstitutional because it did not apply generally to officers, agents, or servants of banks committing like offenses; and *Wally's Heirs v. Kennedy*, 2 Yerg. 554, where an act authorizing the court to dismiss Indian reservation cases, where prosecuted for the use of another, was held unconstitutional. In the last case the court said:

"The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic or land under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law; the mass of community, and those who made the law, by another; whereas a like general law, affecting the whole community equally, could not have been passed."

On like principles is also *People v. Marz*, 99 N. Y. 377; S. C. 2 N. E. Rep. 29.

What is there in the condition or situation of the laborer in the mine to disqualify him from contracting in regard to the price of his labor, or in regard to the mode of ascertaining the price? And why should the owner of the mine, or the agent in control of the mine, not be allowed to contract in respect to matters as to which all other property owners and agents may contract?

Undoubtedly, if these sections fall within the police power, they may be maintained on that ground; but it is quite obvious that they do not. Their requirements have no tendency to insure the personal safety of the miner, or to protect his property, or the property of others. They do not meet Dwarris' definition of police regulations. They do not have reference to the comfort, the safety, or the welfare of society. Potter's Dwar. St. 458. In *Austin v. Murray*, 16 Pick. 121, it was said: "The law will not allow the rights of property to be invaded, under the guise of a police regulation for the promotion of health, when it is manifest that

such is not the object and purpose of the regulation." See, also, to like effect, the language of COLT, J., in *Watertown v. Mayo*, 109 Mass. 315, and the opinion of the court, and cases referred to, in *Re Application of Jacobs*, 98 N. Y. 109 *et seq.*, and *People v. Marx*, *supra*.

But it is suggested in argument that one purpose of the sections is to furnish needful information to the public. If that be so, then, under section 13, art. 2, *supra*, there must first be made compensation to the owner of the property thus to be devoted to public use; for it must be too apparent to need argument in its support that, to compel the purchasing of scales, and the employing of a person to use them, for the benefit of the public, is to appropriate the private property, i. e., the money which this will cost, to public use. *Morse v. Stocker*, 1 Allen, 150; *State v. Glen*, 7 Jones, (Law,) 321.

The main reliance of the counsel representing the state to sustain the ruling below seems, however, to be on the ground that mining for coal is affected with a public use, so that it may be regulated by law, like public warehouses, as held in *Munn v. Illinois*, 94 U. S. 113. It cannot be claimed that mining for coal was by the common law affected with a public use, and therefore specially regulated by law, like the business of innkeepers, common carriers, millers, etc.; and, in our opinion, it is not, like the business of public warehousing, within the principle controlling such classes of business. The public are not compelled to resort to mine-owners, any more than they are compelled to resort to the owners of wood or turf, or even to the owners of grain, domestic animals, or to those owning any of the other ordinary necessities or conveniences of life which form a part of the commerce of the country. The owner of a coal mine is under no obligation to obtain a license from any public authority, and therefore, when he chooses to mine his coal, he exercises no franchise. We are aware of no case wherein it has been held that the owner or operator of a coal mine stands on a different footing, as respects the control and sale of his property, than the owner or operator of any other kind of property in general demand by the public. We are not unmindful that our constitution, in section 29, art. 4, enjoins legislation in the interest of miners; but this is solely as respects their personal safety,—the enactment of police regulations to promote that end. It recognizes that the business is dangerous to life and health, but it nowhere intimates that there is anything in it which disqualifies parties engaged in it from contracting as they may in regard to other matters, or that gives the public a use in it. There is also in section 5, art. 13, a provision requiring railroad companies to permit connections to be made with their tracks, so that coal-banks or coal-yards may be reached; but the same provision also applies to consignees of grain, and it affects the duty of the carrier alone, for no duty or obligation is enjoined on the owner of the coal-bank or coal-yard in that respect.

We recognize fully the right of the general assembly, subject to the paramount authority of congress, to prescribe weights and measures, and to enforce their use in proper cases, but we do not think that the general assembly has power to deny to persons in one kind of business the

privilege to contract for labor, and to sell their products, without regard to weight, while at the same time allowing to persons in all other kinds of business this privilege; there being nothing in the business itself to distinguish it in this respect from any other kind of business. And we deny that the burden can be imposed on any corporation or individual, not acting under a license, or by virtue of a franchise, of buying property and hiring labor merely to furnish public statistics, unless upon due compensation to be made therefor.

So far as the owner or operator of a mine shall contract for the mining of coal or the selling of coal by weight, we see no objection to the statute as imposing upon him the duty of procuring scales for that purpose; but we do not think that he can be compelled to make all his contracts in these respects to be regulated by weight; and, when he has no necessity for the use of scales in these respects, he cannot, in our opinion, be compelled to keep and use them.

We think the court erred in its ruling in giving the one and refusing the other instruction. The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

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(117 Ill. 362)

DITCH and others v. SENNOTT and others.

(*Supreme Court of Illinois*. June 12, 1886.)

**ELECTION—PARTY CLAIMING UNDER WILL MUST ABIDE BY WILL AS WHOLE.**

There is an implied condition that he who accepts a benefit under an instrument, *e. g.*, a will, shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. This rule has no application where the testator has only a part interest in the property devised, and devises the property by general terms. In such case that interest only is devised. But in this case the testator intended to devise the whole, and the will must be taken or rejected as a whole.<sup>1</sup>

Error to Monroe.

*Spencer Tompkins* and *Thomas Quick*, for appellants.

*Winkelman & Talbott*, for appellees.

CRAIG, J. This was a bill brought by the plaintiffs in error to partition certain lands in Monroe county. The lands were located in survey No. 564, claim No. 620, and consisted of two tracts, one of 114 acres and one of 80 acres, and they were owned originally by Stephen W. Miles, Sr. Miles, the owner of the land, had a daughter, Amanda C., who married James Sennott. He also had two sons, Stephen W. Miles, Jr., and Alonzo N. Miles. On the twenty-ninth day of November, 1851, Stephen W. Miles and wife executed a deed which purported to convey the two tracts of land to Amanda C. Sennott. The deed was acknowledged on the day of its date, before a justice of the peace, but it was never recorded until September 3, 1884, and it is insisted by defend-

<sup>1</sup>See note at end of case.



ants in error that the deed was never delivered to the grantee. It will not be necessary to pass upon this question, as the decision of the case may properly be placed on other grounds.

On the seventeenth day of December, 1854, Amanda C. Sennott died intestate, and without issue, leaving as her heirs her husband, James Sennott, her father, Stephen W. Miles, Sr., and two brothers, Stephen W. Miles, Jr., and Alonzo N. Miles. On the thirty-first day of December, 1859, Stephen W. Miles, Sr., died intestate, and in his will he devised a large portion of his estate to his two sons, Stephen W. and Alonzo N. Miles, but the two tracts of land embraced in the deed to his daughter, Amanda C., he devised to his son-in-law, James Sennott. It appears from the record that James Sennott went into the possession of the lands as early as 1851, and he and his wife occupied the same together until the death of the wife, in 1854, and after her death he continued to occupy the lands until he died, on or about the sixth day of December, 1862. Sennott died intestate, and from the time of his death his heirs, and those claiming under them, have continued to occupy the lands until the present time, claiming them as their property. Stephen W. Miles, Jr., died April 16, 1872, and Alonzo N. Miles died about February 27, 1877; and plaintiffs in error, who were complainants in the bill, claim title in the lands as heirs of the said Stephen W. and Alonzo N. Miles, deceased. The claim of plaintiffs in error is based—*First*, on the deed from Stephen W. Miles, Sr., to Amanda C. Sennott, made in 1851; *second*, that upon the death of Amanda C. Sennott, in 1854, without issue, two-fourths of one-half of the lands descend to her two brothers, Stephen W. and Alonzo N. Miles. On the other hand, defendants in error claim that the title to the lands remained in Stephen W. Miles, Sr., until his death, and then, under his will, passed to James Sennott as a devisee in fee.

So far as appears, no claim whatever was ever made to these lands by either Stephen W. or Alonzo N. Miles, and the claim of title interposed by the complainants in the bill, who claim through and under them, is of recent date. But while we do not hold that complainants are concluded by laches, or barred by the 20-years statute of limitations set up as a defense in the answer, for the reason that the decision of the case may properly be placed upon other grounds, yet the long-continued possession of the defendants under claim of title, sanctioned and acquiesced in by Stephen W. and Alonzo N. Miles, and those claiming under them, may be referred to for the purpose of showing that, when Stephen W. and Alonzo N. Miles accepted the provisions of the will of their father, they relinquished any and all interest they might have in the lands in controversy to James Sennott, to whom they were devised by Stephen W. Miles, Sr., as his own property.

That part of the will of Stephen W. Miles, deceased, which relates to James Sennott is as follows:

"I give and bequeath to my son-in-law, James Sennott, *bona fide*, forever, about one hundred and fourteen acres of land, be the same more or less, being part of the east side of survey number five hundred and sixty-four, and

claim number six hundred and twenty, and part of the north-east fractional quarter of section number twenty-seven, in township number two south, of range eleven west, to be set off to him so as to include all the land I own in said claim and survey, excepting the part of the same already reserved for Alonzo Miles, and also to include all the lands in said quarter section which I own lying south of the road recently located from Trout Hollow to Eagle Prairie Union Church. I also give and bequeath to him the south-east fractional quarter of section number seventeen, township number two south, range number eleven west, containing sixty-two acres and seventy-six hundredths of an acre; and also part of the north-west fractional quarter of section number twenty-one, same township and range, containing eighteen acres."

As before observed, Stephen W. Miles, Sr., by the same will, devised a large quantity of property to his two sons, Stephen W. and Alonzo N. Miles, and Stephen W. Miles was named as executor of the will. The provisions of the will were accepted by them, and the question presented is whether, after having accepted the provisions of the will favorable to them, they can reject such portions of the will as may be in conflict with their interest. The doctrine of election as between inconsistent rights, in its application to wills, has been long established, and it is well settled by the authorities.

In *Iley*, Eq. § 1077, the author, after a concise discussion of the doctrine of election, says, in short, courts of equity adopt the rational exposition of the will: that there is an implied condition that he who accepts a benefit under the instrument shall adopt the whole, conforming to all its provisions, and renouncing every right inconsistent with it. In *Wilbanks v. Wilbanks*, 18 Ill. 19, where a testator devised property belonging to his son to a third person, and in the same will made a devise to the son, it was held that the son might either relinquish his claim to his own property or to the legacy; that the son might elect which he would take, but he would be concluded by his election. This decision was based on the rule established by the authorities, that a devisee could not at the same time take under a will and contrary to it. The doctrine of election again arose in *Brown v. Pitney*, 39 Ill. 468, and, after referring to the authorities bearing upon the question, it was held that the beneficiary under a will cannot insist that the provisions in his favor shall be executed, and those to his prejudice annulled. He must accept the instrument in its entirety, or not at all. In 1 Jarm. Wills, 386, the doctrine of election is stated thus: That he who accepts a benefit under a deed or will must adopt the whole contents of the instrument, conforming to all its provisions, and renouncing every right inconsistent with it.

It is true that the doctrine of election has no application to a case where the testator has but a part interest in an estate, and such interest only was devised; but in such case, where it is apparent from the terms of the will that the intention of the testator was to devise the whole estate, including the interest of a third person, then the doctrine of election will apply. Here we think the intention of the testator was manifest to convey the whole estate. As to the two last tracts devised, there can be no doubt in regard to the intention of the testator. The language used is:

"I give and bequeath to him the south-east fractional quarter of section number seventeen, township number two south, range number eleven west, containing sixty-two acres and seventy-six hundredths of an acre; and also part of the north-west fractional quarter of section number twenty-one, same township and range, containing eighteen acres."

By this devise the testator does not devise an undivided interest, or a part of the title, but the whole of two tracts of land, consisting of 62.76 acres, and 18 acres. The language used will admit of but one construction,—a clear intention to dispose of the whole estate regardless of who might be seized of the title.

As to the first tract devised, the intention is not so clear; but, when all the language used in the devise is considered, we think the intention was to give to James Sennott the whole estate in the tract of land containing 114 acres. In the first part of the devise the testator says: "I give and bequeath to James Sennott 114 acres of land," (describing it.) Had nothing more been said, there could be no doubt in regard to the intention to devise the whole estate in and to the tract containing 114 acres; but following the description is this language:

"To be set off to him so as to include all the land I own in said claim and survey excepting the part of the same already reserved for Alonzo Miles, and also to include all the lands in said quarter section which I own lying south of the road recently located from Trout Hollow to Eagle Prairie Union Church."

The word "own," as used, did not refer to the undivided interest of the testator in and to the title of the tract of land, but it had reference to the extent of the entire claim in survey 564. If this was not the case, the testator would not have devised 114 acres of land which embraced the entire claim in the survey. This view is strengthened by reference to a former clause in the will, wherein a part of this claim was devised to Alonzo Miles, which is excepted from this devise. By referring to that clause it will be found that the testator devised, without any qualifications whatever as to his interest in the entire 80 acres of land off the west side of said claim and survey, to Alonzo Miles. This clause of the will, considered in connection with the entire clause following, we think, shows plainly that the intention of the testator was to devise, not an undivided interest in the claim and survey in question, but the whole estate.

We more readily adopt this construction of the will from the fact that it is apparent from the record that Stephen and Alonzo Miles, who alone were interested in defeating this construction of the will, acquiesced and assented to that provision of the will in which the lands in question were devised to Sennott. They never set up any claim to the lands devised to Sennott, although he was in the open and notorious possession and use of the same, claiming as owner. One of them leased a portion of the lands from Sennott or his heirs, and paid rents therefor. In addition to these facts, after the death of Sennott, the lands in dispute were partitioned, by decree of court, among his heirs; and Stephen Miles, Jr., acted as one of the commissioners in making the division, and never in-

timated that he or his brother had any claim or interest therein. These and other facts of a kindred character show plainly that Stephen and Alonzo Miles assented to the devise made to Sennott; and, when they accepted the provisions of the will of Stephen W. Miles, Sr., they released all interest they had or might have in the lands devised by the same will to Sennott.

This view of the case rendered it unnecessary to consider whether the deed from Miles to his daughter was delivered or not. Upon what ground the circuit court dismissed the bill the record does not disclose, nor is it material. It is enough that complainants failed to establish proper ground for relief.

The decree of the circuit court will be affirmed.

#### NOTE.

Where a widow expressly claims under her husband's will, she cannot have a distributive share also, if the will is inconsistent with such distribution. *Severson v. Severson*, (Iowa,) 27 N. W. Rep. 811.

For a full discussion of the question of the right of the widow to take under her husband's will, and claim her statutory share also, see *Langley v. Mayhew*, (Ind.) 6 N. E. Rep. 317, and note, 321.

(117 Ill. 251)

#### CAMPBELL and others v. GODDARD.

(Supreme Court of Illinois. June 12, 1886.)

#### 1. JUDGMENT—COGNOVIT—REASONABLE ATTORNEY'S FEE—MUST BE DETERMINED BY COURT.

A judgment note providing for a reasonable attorney's fee provides for a judicial proceeding by the court entering the judgment, by which the amount of the fee shall be ascertained. A *cognovit* by the attorney appearing under such power, fixing the amount of such fee, is in excess of authority and void.

#### 2. SAME—COGNOVIT IN VACATION—NO PRESUMPTION OF ACTION BY COURT TO SUPPORT—JUDGMENT REVERSED.

Where a judgment is entered in vacation on such a *cognovit*, fixing the amount of the fee, there is no presumption in support of any hearing or action by the court to support such *cognovit*, and the judgment will be reversed.

Appeal from appellate court, Fourth district.

*Clemens & Warder*, for appellants.

*Young, Barr & Lemma*, for appellee.

MAGRUDER, J. On April 4, 1885, a judgment by confession was entered in vacation, before the clerk, in the circuit court of Williamson county, in favor of appellee and against appellants, for \$4,651.10, and costs, including an attorney's fee of \$125. Afterwards, at the May term, 1885, appellants made a motion to set aside or modify the judgment, as to the attorney's fee embraced in it. This motion was overruled on June 17, 1885, and the decision of the circuit court overruling it was, on appeal to the appellate court of the Fourth district, affirmed by that court at the August term, 1885. Appellants prosecute their further appeal to this court.

The judgment was rendered upon two notes, one for \$3,000, and one for \$1,461.85. The phraseology of the warrants of attorney is the same in both notes. They differ only in amounts, dates, and times of pay-

ment. One of the notes and warrants of attorney upon which the judgment was confessed, is in the words and figures following, to-wit:

"3,000.

"Thirty days after date we, or either of us, promise to pay to the order of L. A. Goddard the sum of three thousand dollars; and to secure the payment of said amount we hereby authorize and empower any attorney at law of the state of Illinois to appear before any court of record, in term-time or in vacation, at any time hereafter, and confess judgment for the above-mentioned sum, and 8 per cent. from maturity, and a reasonable attorney's fee, and to release all errors, and waive all proceedings in the nature of a stay of execution, appeal, or petition in error. The indorsers, signers, and guarantors severally waive presentation for payment, protest, and notice for protest, and notice of non-payment of this note, and diligence in bringing suit against any party to this note, and sureties agree that time of payment may be extended without notice or other consent.

"In witness whereof we have hereunto subscribed our names, and affixed our seals, this twenty-second day of December, A. D. 1884.

"O. S. TIFFY.

[Seal.]

"Z. HUDGENS.

[Seal.]

"M. C. CAMPBELL."

[Seal.]

The objection urged against the judgment in this case arises out of the use of the words, "and a reasonable attorney's fee," in the foregoing instrument. We have held that a judgment by confession may include an attorney's fee, where the amount of the fee is fixed by the warrant of attorney, which authorizes it to be so included. *Ball v. Miller*, 38 Ill. 110. In this case, however, a fee is authorized, the amount of which is not fixed by the warrant of attorney. The question arises how and by whom the reasonableness of the fee is to be determined.

The declaration makes no allegation that any particular amount would be a reasonable fee. The *cognovit*, however, recites that "the defendants, by their attorney, waive service of process, and confess that \* \* \* the plaintiff, on occasion of the non-performance of the several promises in the declaration mentioned, including the sum of \$125 for his reasonable attorney's fees in this behalf, has sustained damages to the amount of \$4,651.10, and costs," etc., "and the defendants agree that judgment may be entered \* \* \* for that amount," etc. The clerk thereupon entered judgment upon the record for the amount of debt, attorney's fees, and costs so confessed in the *cognovit*. It thus appears that the amount of the fee was fixed, and its reasonableness decided upon, by the attorney confessing the judgment. Was this mode of determining it authorized by the power of attorney?

In *Frye v. Jones*, 78 Ill. 632, we said: "The authority to confess a judgment without process must be clear and explicit, and must be strictly pursued." In *Keith v. Kellogg*, 97 Ill. 147, we again said: "The doctrine is well settled, and has often been recognized by this court, that the power to confess a judgment must be clearly given and strictly pursued, or the judgment will not be sustained."

If it were a fair matter of doubt whether the power to fix a reasonable fee in this case was conferred upon the court which should render the

judgment, or upon the attorney who should confess it, that doubt, under the rule of strict construction laid down in the authorities cited, should be solved in favor of the court, and not of the attorney, as the donee of the power. These judgment notes are often given by debtors when their obligations are pressing upon them, and when they are unable to resist any conditions, however exacting, that may be imposed upon them. It is also true in fact, and as a matter of practice, whatever the theory may be, that the attorney signing the *cognovit* is generally selected, not by the debtor, but by the holder of the note. To give such an attorney the power of fixing whatever fee he should consider reasonable, and adding it into the judgment confessed, would be to place the debtor too much at the mercy of his creditor.

We think that the warrant of attorney above set forth is to be fairly construed as conferring upon the court the power of determining the reasonableness of the fee. The attorney is authorized to appear before a court of record, and confess judgment for such a fee as that court may decide to be reasonable. In order to decide correctly, it may be necessary to hear evidence, and draw conclusions therefrom. This is pre-eminently the business of a court, acting as such. Inasmuch, therefore, as it was the intention of the makers of the warrant of attorney to give to a judicial tribunal the right to fix the fee to be taxed against them, it is clear that the attorney who signed the *cognovit* exceeded his authority, or, rather, acted without authority, in first determining upon \$125 as a reasonable fee, and then confessing judgment for that amount.

It is to be noted that the judgment was not rendered in term-time, but was entered up upon the record by the clerk in vacation. Hence it cannot be assumed that any proof was introduced or heard as to the reasonableness of the fee. The clerk, not possessing judicial power, had no authority to determine that question. He acts only as a ministerial officer. The plea of *cognovit actionem* was indispensable to his authority to make the entry of judgment. He could not determine the amount from evidence. He could only look to the *cognovit*, and enter judgment for the amount there confessed. *Tucker v. Gill*, 61 Ill. 236.

As the amount there confessed, so far as the attorney's fee embraced in it was concerned, was not determined in accordance with the authority conferred by the warrant of attorney, nor in the mode there designated, it necessarily follows that the judgment was to that extent wrong, and should have been set aside or modified. The judgments of the appellate and circuit courts are reversed, and the cause remanded to the circuit court for further proceedings in accordance with this opinion.

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(117 Ill. 282)

TEMPLE and others v. WHITTIER.

(*Supreme Court of Illinois*. June 12, 1886.)

1. MORTGAGE—ASSIGNEE TAKES SUBJECT TO EQUITIES—DEBT IS NOT DUE.

The assignee of a mortgage or deed of trust does not occupy the position of an assignee of commercial paper, but takes and holds subject to all the equi-

ties that could have been urged against it in the hands of the original holder. This rule is applied in this case, though the debt was not due at the time of the assignment.

**2. SAME—POWER—SALE UNDER—PURCHASER TAKES AT PERIL.**

A purchaser at a sale under a power takes with the peril of the sale's proving void if a material condition for the exercise of the power does not exist. Where the validity of the sale and of the deed depends on some fact, or the absence of some fact, *in pais*, as, in this case, the non-payment of the notes, it is the purchaser's duty to ascertain whether that fact exists. Application to the debtor *held* necessary in this case.

**3. SAME—EXISTENCE OF NOTE PRIMA FACIE PROOF OF NON-PAYMENT, BUT SUBJECT TO REBUTTAL.**

The existence of the note secured by the instrument containing the power, in the hands of one claiming to hold it as a purchaser, is *prima facie* proof that it has not been paid; but is subject to rebuttal; and is rebutted in this case by proof of actual payment, and subsequent fraudulent circulation.

**4. SAME—MERGER—CONVEYANCE BY MORTGAGOR TO MORTGAGEE.**

A conveyance by a mortgagor to a mortgagee will not operate as a merger in equity unless it was intended to have that effect. But here it was so intended, and the merger was complete.

Error to Madison.

*Metcalf & Metcalf*, for plaintiffs in error.

*Happy & Travous*, for defendants in error.

SCHOLFIELD, J. On the tenth day of January, 1871, W. F. Brink, who was then owner, executed a deed of trust of the land in controversy and other land to Henry D. Hatch, to secure \$5,000 indebtedness to John W. Southerland. Subsequently the land was conveyed to Jonathan Jones, and he thereafter conveyed it to Charles H. Jackson, and the latter, on the twenty-third day of August, 1873, conveyed the land in trust to John W. Johnson, to secure one principal note for \$6,000, due three years after date, and six interest notes for \$200 each, executed by Jackson, and by him delivered to Jones, and by Jones delivered to Brink, for payment, in part, of purchase money. Some time after this, but in the same year, Clark Whittier, in a transaction between him and Brink, bought the Jackson notes, as thus secured, and assumed the payment of the amount secured by the trust deed to Hatch. On the fourteenth of December, 1874, Jackson, having paid nothing on his notes, entered into an agreement with Whittier whereby he agreed to convey the land in controversy by warranty deed, subject to the Hatch deed of trust, to Whittier in full payment and satisfaction of his notes in the hands of Whittier, and Whittier agreed to accept such conveyance in full payment and satisfaction of Jackson's notes. The deed was accordingly then made by Jackson, and delivered to and accepted by Whittier, and the same was placed on record on the twenty-second of the same month. Whittier then delivered to Jackson his notes, and it was agreed between them that Jackson should take the notes to the trustee, Johnson, and have him execute and place on record a formal release of the trust deed. On the eighteenth day of April, 1876, Whittier paid the amount due on the trust deed to Hatch, and Hatch executed a final release of that deed, which was placed on record on the tenth of June 1876. Jackson neglected to notify the trustee, Johnson, of the pay-

ment of his notes, and to obtain a release of that deed of trust; but, on the contrary, he afterwards placed these notes, uncanceled, in the hands of one Henderson, or at least in some way Henderson obtained their possession; and Henderson, on the third of July, 1876, placed them in the hands of one Stagg as collateral security for Henderson's individual note for \$215. In October, 1876, Stagg sold the Jackson notes for \$906 to Judlin, appropriating the proceeds as far as necessary to the payment of Henderson's note, and the balance to the payment of an individual account of Henderson. Judlin pledged the notes, as collateral security for his own note for a loan of \$1,000, to John N. Temple. On the twenty-sixth of November, 1878, Johnson, the trustee, on the request of Temple, assumed to sell the property described in the deed of trust for the payment of the Jackson notes. Temple being the only bidder, Johnson conveyed to him on the same day. On the twenty-third of October, 1879, Temple conveyed the property to Abijah Johnson. On the same day Johnson conveyed the property to James M. Pearce, and on the twenty-second of October, 1880, Pearce conveyed to Joseph Shippen. The bill is filed by Whittier to set aside the deed of the trustee, Johnson, to Temple, and the subsequent deeds in that line, because, being void and colorable, they are clouds upon his title. The court below decreed in conformity with the prayer of the bill.

The fact that Jackson's notes were payable to himself, and not indorsed by any one but himself, and were not due when pledged by Henderson as collateral, though important in an action upon the notes, are unimportant here. The assignee of a mortgage or deed of trust does not occupy the position of an assignee of commercial paper, but takes and holds it subject to all the equities that could have been urged against it in the hands of the original holder. *Olds v. Cummings*, 31 Ill. 188; *Walker v. Dement*, 42 Ill. 272; *Cramer v. Willets*, 61 Ill. 481; *Haskell v. Brown*, 65 Ill. 29. In this case John W. Johnson had no interest in the land. He had a mere power to sell and convey. The conveyance was to him and his successor in trust, and the sheriff of Madison county was empowered to act in the event he declined, or was absent, or unable to act. It was expressly stipulated:

"If the party of the first part, or any one for him, shall well and truly pay off and discharge the debt and interest expressed in said notes, and every part thereof, when the same became due and payable, according to the true tenor, date, and effect of said notes, then this deed shall be void."

The rule is familiar, and strictly applicable here, that a purchaser under a power purchases at the peril of the sale being void if a material condition precedent to the exercise of the power does not exist. A sale without the existence of such material condition precedent is a sale not authorized by the power, and no title can pass by it. See *Perry, Trusts*, § 785. Payment of the debt extinguished the power of sale; in the language we have quoted from the trust deed, that instrument was thenceforth "void." *Lycoming Ins. Co. v. Jackson*, 83 Ill. 307; *Wood v. Colvin*, 2 Hill, 566; *Cameron v. Irwin*, 5 Hill, 272; *Jackson v. Morse*, 18 Johns. 441; *Breckenridge's Heirs v. Ormsby*, 1 J. J. Marsh. 257; *Towner v.*



*McClelland*, 110 Ill. 542; *Redmond v. Packenham*, 66 Ill. 434. See, also, *Jones, Mortg.* § 1899; *Walker v. Carleton*, 97 Ill. 582; *Ryan v. Dunlap*, 17 Ill. 40; *Harris v. Mills*, 28 Ill. 44. "It is a general principle," said MARSHALL, C. J., in *Williams v. Peyton's Lessees*, 4 Wheat. 79, "that the party who sets up a title must furnish the evidence to support it. If the validity of a deed depends on an act *in pais*, the party claiming under that deed is as much bound to prove the performance of the act as he would be bound to prove any matter of record on which its validity might depend. It forms a part of his title. It is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. These facts should be examined by him before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title."

As applicable to the present case, it was incumbent on Shippen to show the existence of a debt at the time of the claimed trustee's sale at which Temple bought. In the first instance, the production of the note described in the deed of trust, unattended by any suspicious circumstances, would be *prima facie* sufficient; but that is entirely rebutted and overcome by the evidence that the note had been paid, and was afterwards fraudulently put in circulation. It is true the conveyance of the mortgagor's estate to the mortgagee does not operate as a merger in equity, unless it was intended to have that effect. *Campbell v. Carter*, 14 Ill. 288; *Jarvis v. Frink*, Id. 396. But here it was intended to have that effect, and so the merger was complete. Jackson's debt was paid, and Whittier was the owner of the entire property, subject to the Hatch deed of trust, which he subsequently paid.

This case is not analogous to those where a title passes which is subject to be defeated on the ground of the fraudulent acts of the parties, and in which it is held that a *bona fide* purchaser without notice is to be protected. In this case no title passed. What appears to be a conveyance is not a conveyance, any more than the deed of a person in nowise connected with the title to the property.

We find no sufficient evidence of any fact creating an equitable estoppel to conclude Whittier on that ground. He is not shown to have had any knowledge of Jackson's fraudulent conduct. The law does not require that he should examine the record subsequent to the time that Jackson's deed to him was placed on record, and that deed was constructive notice, to all subsequently acquiring title, of the rights which it assumed to vest in him. It is a general warranty deed, covenanting that these lands "are free and clear from all former and other grants, bargains, sales, liens, taxes, assessments, and incumbrances, of what kind or nature soever, \* \* \* except a certain deed of trust for \$5,000 on this and other lands, which the party of the second part assumes to pay." The excepted deed of trust is, of course, that to Hatch, and so it is clear that it was assumed in some way, as between the parties, that the trust deed to Johnson was out of the way. By applying to Whittier, the extent of his claim would have been ascertained; and since it is incumbent on those who claim under the sale by Johnson to know that, at the time

of the sale, he had the power to sell, it is clear no conclusive presumption could arise from the negligence of Whittier to cancel the notes, and obtain and place on record the release of the deed of trust. The possession of the notes by Temple, and the absence of a release from the record, were simply strong circumstances tending to prove that the notes were unpaid; but it was competent to rebut and overcome these circumstances, and this was done.

It is claimed the evidence does not sufficiently prove that Whittier was the owner of the Jackson notes, and that the deed by Jackson to him was delivered in payment and satisfaction of them. We think otherwise.

The decree is affirmed.

(117 Ill. 324)

### HOUSTON v. BUER.

(*Supreme Court of Illinois. June 12, 1896.*)

**1. TAXATION—REDEMPTION BY ONE AS AGENT WITHOUT AUTHORITY—RATIFICATION PRESUMED—REASSIGNMENT TO TAX PURCHASER WILL NOT DEFEAT REDEMPTION.**

The agent to pay taxes in this case was a general real-estate agent. He turned over his business to another, including that for the lands in question. At this time these lands had been sold for taxes. The agent and his successor both wrote to the owner for ratification. Pending reply, the successor tendered redemption to the tax purchaser, and obtained an assignment of the certificate to his own use. He then advertised that he would apply for a deed himself. Under threat of prosecution from the purchaser, he then reassigned to the purchaser. *Held*, that the redemption was complete, a ratification must be presumed, and such redemption could not be undone by reassignment.

**2. SAME—STATUTE LIBERALLY CONSTRUED TO SUPPORT REDEMPTION.**

Sections 210 (last paragraph) and 215 of the revenue act (2 Starr & C. St. c. 120, pars. 212, 217) provide that any redemption shall inure to the benefit of the owner, and that a receipt of redemption money, or a return of the certificate for cancellation, shall constitute a redemption. While these do not authorize a stranger to redeem, yet the redemption of a stranger with color of authority will inure to the benefit of the owner.

Appeal from Gallatin.

*Roedel & Sisson*, for appellant.

*Silas Rhoades*, for appellee.

SHELDON, J. This was a bill of complaint filed in the Gallatin county circuit court by Peter W. Buer against Hayes Houston, to remove an alleged cloud of a tax deed upon the title to land. The circuit court decreed in favor of the complainant upon his paying to the defendant the sum of \$164.24, and the defendant appealed. The bill charges there was a redemption from the tax sale, and, further, that the tax deed was invalid for non-compliance with the statute in giving the notice of the tax sale, and in making the required affidavit under the revenue law.

It appears that Buer was the owner of the land, and in 1875, and ever since, resided in Texas; that for that year he paid the taxes on the land through H. C. Barger, of Gallatin county, who was his agent for the land to pay taxes on it, and sell timber from the land for the purpose, if he

did not have the money to pay them. For the years 1876 and 1877 Barger failed to pay the taxes, and the land was forfeited to the state for the taxes of those years, and in 1879, in the month of September, one Mariah L. Houston became the purchaser of the land for the taxes of 1878, and the back taxes of 1876 and 1877. In the latter part of 1880, or early in 1881, Barger died; but, some eight or nine months before, he sold his abstract books and real-estate agency, including that of the land in question, to one John R. Boyd, of Shawneetown, and thereupon Boyd took charge of the land. Barger gave Boyd a list of the lands for which he was agent, in which was this Buer land. They then both wrote to all the owners, for the purpose of getting them to ratify Barger's action in making Boyd agent. Neither of them heard from Buer until the summer of 1882, when he came to see his land. At the time Barger turned over his business to Boyd he informed the latter that Mrs. Houston had bought this Buer land for taxes; he not having any funds in his hands to pay taxes, and not being willing to advance money for that purpose. Boyd afterwards applied to Mrs. Houston, through her son John, to redeem the land, representing himself as Buer's agent. John Houston bought in the tax certificates, and Boyd redeemed the land, and took an assignment of the certificates through Mrs. Houston's son John. He signed her name for her. The form of the assignment was "to the use of John R. Boyd." Afterwards Boyd, as assignee of Mariah L. Houston, gave notice of the tax sale, and that he would apply for a tax deed, by publication in a newspaper. After seeing the notice, Mrs. Houston applied to Boyd for a reassignment of the certificates, claiming he had no right to redeem the land; that he was not the agent of Buer in redeeming; and tendering him back the redemption money which he had paid. Boyd first refused the money, and to make a reassignment, but afterwards accepted the money, and reassigned the certificates to Mrs. Houston, who obtained the tax deed, and subsequently made a quitclaim deed of the land to her son, the defendant. She had threatened Boyd that, if he would not reassign the tax certificates, she would have him indicted for obtaining goods under false pretenses. After he had reassigned the certificates, Boyd saw Buer, and the latter ratified the action of Barger in making Boyd agent. Boyd had not heard from Buer before the reassignment, and had no funds of Buer in his hands.

There is no doubt that Boyd assumed to redeem from the tax sale for and on behalf of Buer, as his agent, and that, as between these two, the transaction would have been taken to be a redemption, and not a purchase by Boyd for himself, and that, as against Buer, Boyd could not have held the land further than as security for the redemption money paid, although the assignment of the tax certificates was taken "to the use of Boyd." It was so taken by him for the purpose of such security. Mrs. Houston evidently did not so understand it, supposing, from the assignment of the tax certificates that was made, that Boyd was purchasing and acquiring the title to the land for himself exclusively. Had she rightly understood the legal effect of what was done, there is reason to

believe she would have remained content. As she herself testifies: "If John had signed my name by way of canceling certificates, that would have been all right;" and, again, she says before Boyd reassigned the certificates "I told him I would be satisfied if he would enter on the record that the land was redeemed for Peter Buer." What was done was, in legal effect, just this, and no more, except to give Boyd security on the land for the money he advanced; so that to establish there was a redemption would be but to carry out what was the substantial desire and purpose of both the parties, Boyd and Mrs. Houston, in paying and accepting the redemption money. And, a redemption having been made, it could not be undone by subsequently reassigning the tax certificates, and taking back the redemption money; especially when the reason thereof was the mistaken supposition on the part of Mrs. Houston that a redemption had not been effected.

The denial of there having been redemption is of course upon the ground that Boyd was not the agent of Buer, authorized by him to make the redemption. Barger, at a former time, was such agent, having charge of the land to pay taxes on it. Quitting the real-estate business, he sold out to Boyd, and placed in the latter's hands, to manage and care for, all the lands which Barger had the agency for, including this land in question. Thenceforth Boyd assumed to take care of the land, Buer residing in a distant state. Both Barger and Boyd wrote to him informing him of the change of agency, but it so happened that Buer was not heard from until after the redemption was made. To make the redemption was a mere ministerial act. It was beneficial to Buer, and his ratification of it might be presumed. We do not think that the rule of a strict legal agency should be applied in defeat of a redemption attempted to be made under such circumstances, but, rather, that a liberal view should be taken so as to sustain the redemption if it may consistently be done. The last clause of section 210 of the revenue law, in relation to redemption from tax sales, is:

"Any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject to the right of the person making the same to be reimbursed by the person benefited."

Section 215 is:

"The receipt of the redemption money of any tract of land or lot by any purchaser, or the return of the certificate of purchase for cancellation, shall operate as a release of all the claim to such tract or lot under or by virtue of the purchase."

We would not wish to be understood as holding that any mere stranger may redeem from a tax sale. But Boyd was more than a mere stranger to the land. He had some color of authority to act in the premises, and no doubt did act in good faith as agent. His effort to save the land for his unheard-from expected principal was well intended, and a very proper act, and we think should be sustained. We are of opinion that he was enough of an agent, in respect to the land, to redeem from the tax sale, and that he did make a valid redemption.

Mariah L. Houston made but a quitclaim deed of the land to her son,

the defendant, who paid nothing for it, and stands in no better position than his grantor.

The decree will be affirmed.

(117 Ill. 271)

SCHOOLCRAFT and others v. PEOPLE.

(*Supreme Court of Illinois*. June 12, 1886.)

1. HOMICIDE—MURDER—EVIDENCE REVIEWED AND CONVICTION SUSTAINED.

The evidence in this case is reviewed, and the conviction of the defendants of the crime of murder is sustained.

2. SAME—THREATS BY ACCUSED AGAINST DECEASED ADMISSIBLE.

Threats by the accused against the deceased previous to the homicide are admissible against accused.<sup>1</sup>

3. SAME — APPREHENSIONS OF DECEASED AS TO HIS LIFE NOT ADMISSIBLE FOR DEFENSE.

Apprehensions of the deceased, expressed shortly before his death, as to the safety of his life, pointing to some other cause of death than the acts of the accused, *held* inadmissible on behalf of the accused.

4. CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE — INSTRUCTION AS TO NATURE AND EFFECT OF, SUSTAINED.

An instruction as to the nature and effect of circumstantial evidence is reviewed and sustained.

*T. B. Steele* and *Wilson & Leslie*, for plaintiffs in error.

*George Hunt*, Atty. Gen., for defendant in error.

SHELDON, J. At the February term, A. D. 1886, of the Hamilton county circuit court, George C. Schoolcraft, James H. Schoolcraft, and Marion Schoolcraft were indicted, tried for, and convicted of the crime of murder of John Mann, and were sentenced each to imprisonment in the penitentiary for the term of 25 years. By writ of error they bring the record here for review. It is insisted the verdict of the jury was contrary to the evidence.

It appears that on the Friday morning of February 19, 1886, John Mann was shot on the public highway leading south from McLeansborough to Broughton, in this state, from ambush, apparently with a shotgun, and afterwards with a pistol, and died almost immediately from the effect of the shots. He was struck on the neck, shoulder, and back with 110 shot, and was shot twice in the left side of the face apparently with a pistol. The deceased was on horseback when he was shot, and was crossing a swamp about two miles wide. He left his home about 7 o'clock that morning, to go along the public road south, to the Bullard place, to measure some corn. He put his paper money in his vest pocket, and his silver in his pants pocket. A witness who was passing along on the road with a team that morning testifies that while crossing the swamp he saw deceased's horse loose in the road, with saddle on, and deceased lying in the road, and when he came up to him he was breathing his last; that he heard two loud reports of a shotgun, and then two pistol

<sup>1</sup>See note at end of case.

shots, before coming to the body, when about a quarter of a mile away; that he heard the shots a little after 8 o'clock; that the right pants pocket of deceased was turned wrong side out, the vest was open, and the inside vest pocket turned wrong side out. No money was found on the body. There was what the witness describes a "blind" erected west of the road, 23 steps from the body, behind a large stump, and a log on the north side, and leafy brush on the other side, and the brush cut away between the blind and road. Hazel and brier thickets were on both sides of the road where deceased was killed. Tracks were found going north-west 100 yards or more, then south-west. It is four miles from Broughton to where deceased was killed; Broughton being south-east. George C. Schoolcraft lived two and a half miles west of Broughton, and two and one-half miles south of where deceased was killed; James H. Schoolcraft lived with George; and Marion Schoolcraft lived with his mother, about one mile or one mile and a half north-west of the place of the homicide. The three defendants are brothers; George being married, and having a family; James H. a young man; and Marion a boy, as said by defendant's attorney. All three stayed at George's the night before the homicide. They ate breakfast there on the morning of the homicide, and, as testified by themselves and others of the family, James H. started to his work on that morning, where he and a relative of his were making ties, on the Sanders land, north of George's, and near the swamp. Marion started home, and accompanied James H. until they came to a turn in the road, when they separated; James H. going towards his work, and Marion going north along the road. George started to Broughton. The person with whom James H. was to work did not come, and the latter went on to Broughton. Afterwards, in the course of that day, they were all three together in Broughton.

The witness Kendall testified that he lived on the south side of the swamp, north of Sanders, and one and a half miles from where deceased was shot; that about 7 or 8 o'clock on the morning of February 19, 1886, he saw two persons going north through his clearing, whom he took to be James H. and Marion Schoolcraft. Jacob Ross, Sr., who lives three-quarters of a mile from where deceased was killed, and north of Kendall, testifies that deceased was killed north-west of his house; that on the morning in question he saw two men in Mary Mann's field, going north-west, in the direction to left of where deceased was killed. Three other witnesses testify to seeing those two persons together in the same vicinity that morning, going north. There is no doubt, from all the evidence, that the two persons were James H. and Marion Schoolcraft. They were not seen to have a gun.

George Trout testifies that on that morning he and his boys were going down into the bottom to make ties; that before they got to the bridge they saw Marion Schoolcraft coming up the road; that the latter came on till he got to the bridge, and waited there till witness came up; that witness and his boys stopped there, and talked with Marion, and while so talking, John Mann, the deceased, came along, and spoke; that Marion Schoolcraft started on towards his home, and they started to

their work; that just after Marion left he sung or nallooed at the top of his voice; that witness went on to his work, and before he got there he heard two big guns in rapid succession, and then, in a little time, two smaller ones; that it was a half mile from the bridge, where deceased passed, to the place where he was killed; that Marion usually sung loud, "more of a halloo than a song," and was almost always singing. The witness testified that that night Marion Schoolcraft, on his return from Broughton, stopped at witness' house, and asked witness if he knew who was suspected of the murder. Witness told him he did not, and Marion said to him: "Uncle George, if I was arrested you could clear me, for you saw me at the bridge when John Mann passed." The witness Frazier testified that on the night of the murder Marion Schoolcraft came over to his house, and, in conversation on the subject, inquired of witness who was accused. Witness answered he did not know; when Marion said, if he was arrested for it, he could prove himself clear by George Trout and his boys, as he saw them on the bridge that morning.

The evidence tends to show there were two sets of tracks about the body, a large and smaller one; that the larger one corresponded with the measurement of James H. Schoolcraft's boots; that there was a peculiarity in it, in the toe of the right turning a little in; and that James H. walked with that toe a little turned in. The evidence makes it improbable that George Schoolcraft was present at the place of the homicide when it was committed. There was evidence of a hostile feeling of the defendants towards the deceased, of difficulties between them, of an old trouble between George and the deceased, and of numerous threats made by George against the life of the deceased, and of some threats against the deceased made by the other two defendants.

The witness Trout testified that on the night of February 14, 1886, he stayed with George Schoolcraft; that the latter talked about the lawsuit with Mrs. Bullard; said John Mann had talked of having him arrested about the Bullard matter, and he had told him he would be at court, and if he (Mann) wanted anything out of him he could get it; that the next morning George told him he had his shotgun double loaded, with powder and shot in proportion, and he need not be surprised to hear of John Mann being found dead, filled full of shot, with his pockets turned wrong side out; and that on the same morning, as they were walking along the road together, Marion Schoolcraft being with them, George said "that, if Marion did not do something with John Mann before court, he would come near to, if he didn't quite, penitentiary him and Hardman at court, and said Hardman is the boy that is not afraid." The name of James H. Schoolcraft is James Hardman Schoolcraft. Frank Mann, a son of deceased, testified that he was in McLeansborough on the Saturday next before the Friday on which the deceased was shot, and heard a talk between the deceased and George Schoolcraft; that the deceased told George he was coming down Friday to the Bullard place, to measure up McCloud's corn for Lewis Hall. "George told him he wouldn't. Father said he would, and George said to him, 'You won't; there's more ways of killing a dog than choking him to death on butter;' that George told father he would.

show him that he would stay on that place; that he would kill a man before he would be run over; and that John Mann could not bulldoze him." The witness Burnett testified to the same, except the last two statements.

The above are the chief criminating circumstances. We will not stop to comment upon them, or to refer to what exculpatory matter may appear in the case. It is not to be expected that the crime of secret assassination will be proved by direct testimony. It is, from the nature of the case, only the evidence of circumstances tending to show guilt which ordinarily can be adduced. The force of the circumstances, as indicating guilt, was peculiarly for the consideration of the jury. The circumstances which were detailed in evidence appear to have been sufficient to produce in the minds of the jury a conviction that the defendants committed the homicide charged, and we are of opinion that the question of guilt should be left to rest with the decision of the jury; that there is not such a case presented as calls for a court's interference with the verdict as unsustained by the evidence.

There are some legal points made which remain to be noticed.

It is said the court erred in refusing defendant's challenge of a juror who said he could not read English writing. The abstract shows no such challenge. We are not pointed to any place in the record showing such challenge. From an examination of the record made by us we do not discover in it any such challenge. This sufficiently disposes of this ground of error.

The witness Barnet was permitted to testify, for the people, that in the spring of 1885 he heard George Schoolcraft talk about his trouble with John Mann, and George said "he [George] was part Indian, bad medicine, and that something serious would grow out of this trouble." Objection is taken to the reception of this testimony, as calculated to arouse prejudice against the defendants, and that the declaration of one defendant was inadmissible against his co-defendants. The evidence was properly received, it being competent testimony against George Schoolcraft, and was pertinent as tending to show a threat by him.

Defendants made offer of proof by a witness "that the deceased said to him, a few days before he was killed, that he expected that some of those fellows whose wives he had been running after would kill him some day." The exclusion of this offer of proof is assigned for error. The offer was not of the evidence of any fact which was relevant to the issue, but of what was but the statement of mere apprehension on the part of the deceased, and we perceive no error in its exclusion.

The giving of the following instruction on behalf of the people is insisted upon as error:

"That if the jury believe from the evidence, beyond a reasonable doubt, that the defendants deliberately and intentionally shot John Mann in manner and form as charged, and as he was passing along the public highway, and that from the effects of such shooting the said John Mann died as charged in the indictment, it matters not that such evidence is circumstantial, or made up from facts and circumstances, provided the jury believe such facts and circumstances pointing to his guilt to have been proven beyond a reasonable doubt by the evidence."



In the case of *Otmer v. People*, 76 Ill. 149, which is relied on as sustaining this assignment of error, there was a similar instruction, the last clause of which was the same as the last clause of the present instruction, and we there said of it:

"Although the instruction was carefully drawn, yet the latter clause of it was calculated to mislead the jury. The jury may have believed the facts and circumstances pointing to defendant's guilt were proven, and yet they may not have regarded the facts and circumstances so proven sufficient to satisfy their understanding and conscience of the defendant's guilt; but, notwithstanding this, they were told by the instruction it was their duty to convict."

This last feature, as to telling the jury of their duty to convict, is not present in the instruction in this case. The last clause of the instruction in the former case, taken by itself, was calculated to mislead the jury; but whether, when taken in connection with the preceding clause, it was so calculated, may be questioned. It was not indicated in that case that for that instruction alone the judgment should be reversed. There were two other sufficient grounds for reversal there; one being that the verdict was against the evidence. The real purport of the present instruction seems to be no more than that if the jury believed from the evidence, beyond a reasonable doubt, that the defendants committed the crime charged, it was not required that the evidence should be direct, but that it might be circumstantial. The jury were most fully told, by several other instructions in the case, that in order to convict they must believe from the evidence, beyond a reasonable doubt, that the defendants were guilty. We cannot hold that for the giving of this instruction the judgment in this case should be reversed.

Finding no material error in the record, the judgment must be affirmed.

#### NOTE.

On the trial of a prosecution for the murder of the successful suitor of a lady by one who has been rejected, evidence of the lady that the accused had threatened to kill any one else whose company she received, is admissible. *Brown v. State*, (Ind.) 5 N. E. Rep. 900.

While threats against the deceased are admissible in evidence, in a trial for murder, to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. *People v. Bezy*, (Cal.) 7 Pac. Rep. 643.

(117 Ill. 389)

#### SAFFORD and others v. STUBBS and others.

(*Supreme Court of Illinois*. June 12, 1886.)

#### 1. STATUTE OF LIMITATIONS—ADVERSE POSSESSION—GRANTEE OF TENANT PUR AUTRE VIE, WITHOUT NOTICE OF NATURE OF HIS ESTATE, HOLDS ADVERSELY TO REVERSIONER.

The appellee Berkey in this case has had possession and paid taxes for above 20 years, under a quitclaim deed. His grantor had an estate *pur autre vie*, and the appellant and another are the reversioners. The will under which the appellee's grantor acquired his title has never been recorded in Illinois, nor, so far as the proof shows, brought to the notice of appellee. Under these circumstances, his possession has been adverse to the reversioners, and the bar of the statute is complete.<sup>1</sup>

<sup>1</sup> Respecting adverse possession, and when it is sufficient to create a bar under the statute of limitations, see *Todd v. Todd*, (Ill.) *ante*, 583, and *note*, 585.

**2. SAME—DISABILITY OF FEMALE INFANT—BAR COMPLETED AFTER MAJORITY.**

Where the possession of the appellee began as the grantee of a tenant *pur autre vie*, and the right of the reversioner accrued against him while he was in possession during her minority, it was her duty to bring suit within three years after attaining majority, viz., eighteen years of age; failing in which the bar became complete. . 2 Starr & C. c. 83, § 8.

**3. SAME—DISABILITY OF FEME COVERT—MARRIED WOMAN'S ACT.**

Since the passage of the married woman's act of 1861, the saving clause in favor of married women in the statute of limitations has no force, and since that time the statute of limitations applies against a married woman equally as against an unmarried woman.

SHELDON, J., dissents.

Appeal from Madison.

*Happy & Travous*, for appellants.

*Metcalf & Metcalf*, for appellees.

MAGRUDER, J. This is a bill for the partition of 131.04 acres of land in Madison county, filed by appellants against appellees. Appellant Ada A. Safford claims to be the owner of an undivided two-thirds part of the tract, and appellee Eliza V. Stubbs claims to own an undivided one-third part thereof. The appellee Jonathan Berkey is in possession, and claims to have acquired title by possession and payment of taxes for seven successive years, under claim and color of title, made in good faith under the sixth section of the limitation act. The question is whether Berkey has brought himself within the provisions of the statute of limitations, and whether the bar of the statute can be successfully invoked under the circumstances of this case.

By a quitclaim deed dated October 18, 1856, and recorded November 12, 1856, one Joel K. Reiner and his wife conveyed to Jonathan Berkey all their "right, title, interest, claim, and demand in and to" the premises in question. The proof shows that Berkey went into possession of the land under this quitclaim deed as color of title, and continued in such possession, and paid all the taxes assessed upon the premises for a period of more than 20 years before July 14, 1883, the date of the filing of the bill in this cause. He has complied with the requirements of the statute, and is entitled to its benefits unless he is estopped from setting it up upon one or the other of the grounds hereinafter indicated.

It is said that Berkey cannot claim the benefit of the statute, because neither his title nor his possession have ever been adverse to the title of appellants and appellee Stubbs. The facts upon which this contention is based, are as follows: One Mark Darrah, being the owner of the land in question, died testate on August 1, 1850, in Berks county, Pennsylvania, and, by the terms of his will, devised this land to Josiah Weiser for life, and after his death, if he should die leaving lawful issue, gave and devised the same to his heirs as tenants in common in equal shares, and to their respective heirs and assigns, forever. On January 31, 1856, Weiser, being then the owner of a life-estate only, executed a quitclaim deed to Reiner, Berkey's grantor, conveying all of Weiser's "right, title, interest, estate, claim, and demand, both at law and in equity, and as well in possession as in expectancy, of, in, and to" the land in contro-

versy. On July 24, 1863, Weiser died, leaving a widow, Eliza V. Weiser, (now the appellee Eliza V. Stubbs,) and two daughters, Florence Weiser, who died on August 26, 1863, and Ada A. Weiser, (now the appellant Ada A. Safford.) After the death of Josiah Weiser, the said Ada and Eliza became, by the terms of Darrah's will, and by inheritance from Florence Weiser, the owners of the reversionary estate, in the proportions of two-thirds and one-third, as above stated. It is claimed that Berkey entered under a conveyance of an estate for the life of Weiser; that his estate ceased with that life; that he then, being lawfully in possession, became the tenant at sufferance of Mrs. Safford and Mrs. Stubbs, the persons entitled to the reversion, and so could not hold adversely to them. We do not think that this position is well taken under the facts in this case; Berkey having been in possession and paid taxes for more than seven years after the life-estate terminated, and the reversionary estate had attached. Darrah's will, although admitted to probate in Pennsylvania, was never admitted to probate in Illinois; nor was it ever recorded in Madison county, or elsewhere in Illinois. There is no proof that either Reiner or Berkey ever had any notice of its contents. Neither of them had any notice, so far as this record discloses, that the interest of Weiser in the premises was merely that of a life-tenant. The deed from Weiser to Reiner, and the deed from Reiner to Berkey, do not show, or in any way indicate, the nature of the estate owned by Weiser. It may be that Berkey, though he had been in possession and paid taxes for seven years after the tenant for life died, would be debarred from setting up the statute against the owners of the remainder if he had had notice that his grantor's interest was only a tenancy *pur autre vie*. *Dugan v. Follett*, 100 Ill. 581. But, having had no such notice, he did not enter upon the land knowing or believing himself to be the owner of an estate for the life of another, and could not be considered a tenant at sufferance of the reversioners after the estate for life ended. His claim was thereafter adverse to the reversioners, and not in subordination to their title. His quitclaim deed from Reiner was such a deed as would pass the title no less effectually than a warranty deed with full covenants. *Grant v. Bennett*, 96 Ill. 513. It can therefore be relied on as color of title. *Holmway v. Clark*, 27 Ill. 483.

It is said that Berkey cannot plead the statute of limitations because of the infancy of Mrs. Safford, and the coverture of both Mrs. Safford and Mrs. Stubbs. Appellant Ada Alicia Safford was born on March 18, 1860, and was therefore of age on March 18, 1878. She became the owner in fee of two-thirds of the property in question on August 26, 1863. Berkey, being in possession under the quitclaim from Reiner, continued in possession and paid all the taxes, after the estate of the reversioners attached, for a period of 20 years, from 1863 to 1883. The bar of the statute by possession and payment of taxes under color of title was thus complete before Mrs. Safford reached her majority. Under the eighth section of the limitation law (Starr & C. St. c. 83, § 8) she should have brought suit within three years after she became eighteen years of age, (*Davis v. Hall*, 92 Ill. 85,) or on or before March 18, 1881. *Ans ar-*

ready stated, this proceeding was not instituted until July 14, 1883; consequently the fact of her infancy during the running of the statute can avail her nothing.

The interest of Mrs. Stubbs in one-third of the property, as well as that of her daughter in two-thirds of it, accrued on August 26, 1863. We have held that, since the passage of the married woman's act of 1861, the saving clause in favor of married women in this limitation law has no force, and that the statute, since that time, applies against a married woman equally as against an unmarried woman. *Enos v. Buckley*, 94 Ill. 458. Hence the fact of coverture during the running of the statute cuts no figure in this case.

The decree of the circuit court dismissing the bill is affirmed.

SHELDON, J., does not concur.

(117 Ill. 317)

**FREEMAN and others v. EASLEY and others.**

(*Supreme Court of Illinois. June 13, 1886.*)

**1. WILLS—UN SOUNDNESS OF MIND FROM DISEASE.**

Unsoundness of mind arising from disease is not necessarily destructive of the testator's capacity to dispose of his property. He may have been of unsound mind, and yet of sound disposing mind. An instruction which directs the jury that if they believe that, at the execution of the instrument in question, he was so diseased mentally as not to be of sound mind, they must find for the contestant, is inaccurate, and, in a case where the evidence is conflicting, ground for reversal.

**2. TRIAL—INSTRUCTIONS—WHERE EVIDENCE CONFLICTING, EACH CHARGE MUST BE CORRECT.**

It is the settled rule of this court that, where the evidence is conflicting, each of the several charges or instructions given by the court to the jury must be correct in itself.

**3. WILLS—JUSTICE OR INJUSTICE OF THE TESTATOR'S DISPOSITION OF PROPERTY, IMMATERIAL.**

The justice or injustice of the testator's disposition of his property is immaterial to the question of the validity of the will. Within the rules prescribed by the law, the testator's control of his bounty is absolute.

**4. WITNESS—FALSE TESTIMONY—LIBERTY OF JURY TO REJECT ARISES ONLY IN CASE OF WILLFUL FALSITY.**

It is of the utmost importance, in the rule of law giving the jury liberty to reject the uncorroborated testimony of a witness who has sworn falsely upon a material point, that the false testimony be *knowingly* and willfully given. An instruction which omits this qualification is grossly erroneous.

**5. SAME—COMPETENCE OF PARTY—SUIT BY NEXT FRIEND—DISMISSAL AS TO NEXT FRIEND ON ATTAINING MAJORITY.**

Where a suit is brought to contest a will by a minor in the name of his next friend, and on the arrival of the majority of the minor the suit is dismissed as to the next friend, such next friend is no longer a party, and is not incompetent as a witness under section 2 of the evidence act. 1 Starr & C. c. 51, par. 2. Section 7 of the same act, providing that the incompetency of a party cannot be removed by a release of his interest, has no application. The next friend has no interest under the statute.

**6. SAME—SUIT TO CONTEST WILL BY HEIR IS IN CAPACITY OF HEIR—ADVERSE PARTY NOT COMPETENT IN SUCH CASE.**

A suit by heirs to contest a will is brought in their capacity as heirs. In such case, under 1 Starr & C. St. c. 51, par. 2, above cited, as adverse party is not a competent witness, the deposition of such a party is inadmissible.

## 7. COSTS — WILLS — CONTEST — EXECUTION FOR COSTS AGAINST EXECUTOR, IMPROPER.

In a suit to contest a will it is improper to award an execution for costs against an executor.

Appeal from Jackson.

*Hill & Martin*, for appellants.

*W. J. Allen, J. M. Freels, and Smith & Stephens*, for appellees.

SCOTT, C. J. On the twenty-second day of March, 1880, John D. Freeman made and published what purports to be his last will and testament, and afterwards, on the fifth day of April, in the same year, he departed this life. The will was executed with the usual formalities, and was admitted to probate in Jackson county, where the testator had lately resided. On the twenty-eighth of October, 1880, the bill in this case was filed in the circuit court of Jackson county by a part of the heirs of the testator against the executor named in the bill, the widow, and a portion of the other heirs who are named as devisees, to set aside the will on the ground the testator, at the time of making and executing the same, was not of sound and disposing mind, and that he was wholly incapable of making a valid will. An answer filed by defendant, and the replication thereto, put the matters and things alleged in the bill at issue, and thereupon the court directed an issue at law to be made up whether the writing referred to in the pleadings, and purporting to be the last will and testament of John D. Freeman, was his last will and testament or not. Although the bill in this case was exhibited at the December term, 1880, of the circuit court, the cause was continued from term to term, and no trial was had until the March term, 1884, of that court. The cause was then submitted to a jury upon the evidence introduced; but, as they were unable to agree upon a verdict, they were discharged from the further consideration of the matters submitted to them. No other trial was had until on the sixth day of February, 1886, when the case was again submitted to a jury, who, after hearing the evidence, found by their verdict "the instrument in question not to be the last will and testament of John D. Freeman," and thereupon the court ordered, adjudged, and decreed that the instrument in writing purporting to be the last will and testament of John D. Freeman, deceased, and the probate thereof, be set aside and declared null and void. From that decree the defendants bring the case to this court on appeal.

Without expressing any opinion as to the weight of the testimony touching the testamentary capacity of the testator at the time of making the instrument alleged to be his last will and testament, it is thought that, in view of the conflicting character of the evidence, the present decree must be reversed on account of the seventh instruction of the series given by the court on behalf of complainants. It is as follows:

"If you should believe from the evidence that, at the time of the execution of the instrument (the validity of which is in question) by J. D. Freeman, he was so diseased mentally as not to be of sound mind, then your verdict should be for complainants."

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Obviously this charge does not state the law accurately, and, in view of what may be fairly said of the unsatisfactory character of the evidence, it must have been hurtful to the defense. No doubt it is true a party may be so diseased mentally as not to be of sound mind, and yet he might possess what the law terms a "disposing mind;" that is, the mental capacity to know and understand what disposition he may wish to make of his property, and upon whom he will bestow his bounty. It is a rule of law that a person who is capable of transacting ordinary business is also capable of making a valid will. In *Meeker v. Meeker*, 75 Ill. 260, it was held by this court the derangement or imbecility to incapacitate the person from making a valid will must be of that character which renders him incapable of understanding the effects and consequences of his acts. A test usually recognized is, the party must be capable of acting rationally in the ordinary affairs of life, so that he may comprehend what disposition he may wish to make of his property, and be able to select the subjects of his bounty. Nothing more is required, and so the authorities in this state uniformly hold. *Meeker v. Meeker*, *supra*; *Rutherford v. Morris*, 77 Ill. 397, and subsequent cases that follow the doctrine of the cases cited.

Medical testimony in this record is to the effect that, in all cases of diseases of the body, the mind is in some degree affected, and the party might be said to be of "unsound mind," and still be capable of transacting ordinary business such as is done in daily life. In this case the testator suffered greatly from severe bodily disease, and no doubt his mind was affected to a degree it might be, at least in a partial sense, unsound; but the jury should not for that reason alone be told, as a matter of law, that would incapacitate him to make a valid will. That would be to state the rule of law on this subject broader than the authorities in this and other states will warrant.

It is conceded by counsel this instruction may be faulty; but it is insisted, when considered in connection with other charges given upon this branch of the case, which state the law with more accuracy, it was not calculated to mislead the jury. This may or may not be so. It accords with common observation that in contests concerning wills, where the testator has made, or has seemingly made, an unequal or inequitable disposition of his property among those occupying the same relation to him by consanguinity or otherwise, there is a disposition in most minds to seek for a cause for holding the will invalid. The inclination in this direction that is found to exist in the minds of most, if not all, jurors, cannot always be controlled by instructing them there is no law requiring a testator, nor is he bound, to devise his property equitably or in equal proportions among his heirs. Of course, the law is he may make such dispositions of his property as he sees fit, and he may bestow his bounty where he wishes, either upon his heirs or others. While this is undoubtedly the law, the common mind is disinclined to recognize it, and jurors will too frequently seize upon any pretext for finding a verdict in accordance with what they regard as natural justice. In this case it appears the testator did make an unequal disposition of his estate among

his heirs. He may have had the best of reasons for so doing, and it may have been both just and equitable. But, whether he had or not, that is not a matter for inquiry. If he had sufficient testamentary capacity, he might dispose of property in any way not forbidden by law or public policy. As before remarked, it is difficult to get jurors to recognize this abstract principle of law. It may be, the jury in this case seized upon this charge, given them by the court, to enable them to find a verdict in accordance with their own sense of justice, rather than the law as it is. If so, the instruction was most hurtful to the defense, and it was error to give it.

The fifth instruction of the series is also faulty. By it they were told: "If any witness has sworn falsely on any point material to the issue," they might disregard all his testimony, unless corroborated by other unimpeached testimony. It omits the qualification, the witness must have *willfully* or *knowingly* sworn falsely. Even the most candid witness might make a false statement on a point material to the issue, and, unless willfully or corruptly done, it ought not to disparage his other testimony. Such an instruction, even when most accurately formulated, is of doubtful propriety, and certainly it should never be given unless most accurately worded to prevent misapprehension.

It may be well to notice a few objections discussed on the present record that may arise on another trial if one shall be had. At the time the bill was filed, two of complainants were minors, and they commenced the suit in their own behalf, in the name of their father, W. J. Easley, as their next friend. Afterwards, on the eleventh day of January, 1886, proof was made that each of these complainants had attained their majority, and the suit, as to W. J. Easley, the next friend, by order of court, was dismissed. On the next trial of the cause complainants offered W. J. Easley as a witness on their behalf, and it was objected he was incompetent under the statute which forbids any party to the record or in interest to testify of his own motion, where any adverse party sues or defends as executor, heir, legatee, or devisee. The objection is untenable. Since the witness was dismissed from the record, it is as though he had never been a party. He never had any interest in the subject-matter of the litigation; and, if not now a party to the record, there is no reason why he is not a competent witness. Section 7, c. 51, Rev. St. 1874, can have no application, for the reason the witness had no interest to be released.

It is also insisted the trial court erred in excluding the deposition of Harriet A. Freeman, widow of the testator. In this ruling of the court there was no error. She was a party to the record in interest, and therefore, under the statute, was not a competent witness in a case, like the one being considered, where complainants sue as heirs.

It seems the decree rendered inadvertently adjudged costs against the executor, and awarded execution for the collection of the same. It needs no suggestion from this court that such an order was improper. If it shall be made to appear, or if it does now appear, that the other parties interested in the estate are not parties to the suit either as com-

plainants or defendants, it would be well that such persons be made defendants before another trial shall be had.

The decree of the circuit court will be reversed, and the cause remanded.

(117 Ill. 257)

PEOPLE *ex rel.* SHIPLEY *v.* MAYS.

(*Supreme Court of Illinois.* June 12, 1886.)

1. SCHOOLS AND SCHOOL-DISTRICTS — REMOVAL OF COUNTY SUPERINTENDENT — CAUSE FOR REMOVAL NECESSARY.

Under section 18 of the act on schools, (3 Starr & C. St. c. 122, § 18,) the county board has power to remove the county superintendent of schools, not capriciously or without cause, but "for any palpable violation of law or omission of duty."

2. SAME—INTOXICATION WHILE PERFORMING DUTY A SUFFICIENT CAUSE.

The intoxication of the county superintendent when attending, or at the time when he should have been attending, to the duties of his office is a sufficient ground for removing him from office under the statute above cited. It is not essential to the validity of the order for removal in such case that it should specify the particular duty he omitted by reason thereof.

3. SAME — PREFERMENT OF CHARGES AND HEARING PRIOR TO REMOVAL, NOT NECESSARY UNDER STATUTE.

Under the statute above cited it is not necessary that charges should be preferred and lodged with the board against the county superintendent before action is taken against him.

*F. M. Guin* and *B. W. Henry*, for appellant.

*Webb & Cox*, for appellee.

SCOTT, C. J. The information upon which the writ of *quo warranto* was issued in this case sets up that Benjamin F. Shipley was, on the seventh day of November, A. D. 1882, duly elected county superintendent of schools of Fayette county for the term of four years; that he duly qualified, and entered upon the duties of his office, and continued to execute and perform the duties thereof from thence up to the eighth day of March, A. D. 1884, at which time respondent, Jesse Mays, entered into, and from thenceforward to the time of bringing this suit exercised the duties of, such office, to the exclusion of relator, without any warrant of law whatever, and still continues so to do. To this petition respondent answered by way of a plea, asserting his right to hold the office by virtue of certain action of the board of supervisors of Fayette county had at their March meeting in A. D. 1884, which action respondent sets up in his plea substantially as follows: That the board of supervisors of Fayette county, at their March meeting, A. D. 1884, removed relator from the office of county superintendent of schools of Fayette county; that a vacancy in such office was thereby created, and that he, respondent, was duly appointed by the board of supervisors to fill the vacancy; that after receiving such appointment respondent immediately qualified as such officer and entered upon the discharge of the duties therein; and that by virtue of such facts so pleaded respondent was, from and after the tenth day of March, 1884, both *de facto* and *de jure* superintendent of public schools in and for said county. The demurrer interposed to



this plea was by the court overruled, and, the relator having elected to stand by his demurrer, the court dismissed the proceedings, and rendered judgment against relator for costs. The judgment was afterwards affirmed by the appellate court of the Fourth district, and the relator brings the case to this court.

Section 13, c. 122, Rev. St. 1874, provides: "The said superintendent shall be liable to removal by the county board for any palpable violation of law or omission of duty;" and, in case of a vacancy for any reason in the office of superintendent of schools, provision is made that the county board may fill such vacancy by appointment, and the person so appointed shall hold the office until the next election for county officers, when his successor shall be elected. It was under this section of the statute the county board assumed to and did remove relator from the office of superintendent of public schools of the county of Fayette, and appointed respondent to such office. It is undoubtedly true the county board cannot capriciously remove an incumbent from a public office, no matter whether he has been elected or appointed to such office. In case of a superintendent of public schools, he can only be removed for a "palpable violation of law or omission of duty." In this case the plea sets up that the county board found, from the report of a committee of their body, appointed to investigate the matter, that relator had been, at "several different and sundry times, intoxicated when attending, or at the time he should have been attending, to the duties of his office;" and thereupon an order was entered by the board removing relator from the office of superintendent of schools for "omission of duty," and declaring the office vacant. Of course, the demurrer admits every fact well pleaded. That being so, it distinctly appears relator was removed by the county board for "omission of duty." It is true, it is not alleged what particular duty he omitted, but such particularity is not required. It is alleged he was intoxicated when attending, or at the time he should have been attending, to the duties of his office. Conceding that to be true, as must be done, it shows a palpable "omission of duty" as a public officer. The facts admitted by the demurrer bring the case clearly within the meaning of the statute and the previous decisions of this court.

It is made a point against the validity of the removal of relator that the record ought to show that charges were preferred and lodged with the board against relator before any action was taken against him. The practice is otherwise, as settled and determined by the previous decisions of this court. This precise objection was taken in the case of *People v. Higgins*, 15 Ill. 110, and it was then said: "The statute has made none of these formalities necessary, nor does the common law so interpose and attach itself to the statute as to require them." An analogous question arose and was decided in *Wilcox v. People*, 90 Ill. 186, mainly on the authority of *People v. Higgins*, *supra*. The principle of these cases covers the exact point made in the case being considered, and renders any further discussion unnecessary.

It is also insisted it was not competent for the county board to remove

relator from his office without some competent evidence having been heard by the board showing the relator had been guilty of some palpable violation of law or omission of duty. In such matters the board exercise powers in the nature of judicial powers; and, when such a body has jurisdiction of the subject of inquiry, their decision, whether they proceed regularly or irregularly, will be valid in all collateral proceedings. Here the committee appointed by the board to investigate the official conduct of relator reported that they had "examined witnesses" as to relator's neglect of the duties of his office, and found he had, at "several different and sundry times, been intoxicated when attending, or at the time he should have been attending, to the duties of his office;" and the board chose to adopt the report as sufficient evidence upon which to base their action in removing relator from office. Whether that is the best mode of ascertaining the guilt or innocence of the party whose conduct is to be investigated, is a question as to which this court need express no opinion. It is sufficient that the mode of procuring the necessary information adopted is within the discretion of the board, and is not, for that reason, subject to review by this court,—certainly not in a collateral proceeding.

Another objection most confidently insisted upon is that "it was not competent for the board of supervisors to remove relator from office until he had been notified that charges had been preferred against him, and when and where such charges would be investigated." There is much seeming force in the objection taken, and the argument on this branch of the case might with great propriety be addressed to the law-making power. The legislature, in enacting this statute, has not seen fit to require that notice should be given to the superintendent of schools before he could be removed from office for a palpable violation of law or omission of duty, and it is not within the rightful province of courts to add anything to it, in this regard, by judicial construction or otherwise. It is simply the duty of courts to administer the law as it is plainly written; and, if any hardships may result, it is for the legislative department to provide the remedy. In cases where the statute is silent as to notice to the party to be removed from office, this court has had frequent occasion to say no notice will be required. In *People v. Higgins*, *supra*, it was insisted the party removed "should have had formal notice of the time and place of trial" of the charges alleged against him; but it was ruled that, inasmuch as the statute had required no such formality, no notice was necessary. The practice in such cases, in this regard, is so well and definitely settled by the former decisions of the court that the question made is no longer open for discussion.

The attention of this court is directed to the fact that other courts have held that notice in such cases is jurisdictional, and the omission to give such notice would render the removal of the officer invalid. It is seen that in most of the cases decided the statutes of the several states where such decisions were rendered, required that the party to be proceeded against should first have notice. Of course, when the statute requires notice to be given, it is jurisdictional, and may not be omitted. No

matter what other courts may have decided, it is now the settled practice in this state, where the statute is silent upon the subject, no notice will be required to be given to an incumbent before he can be removed from office for a palpable violation of law or omission of duty.

The circuit court decided properly in overruling the demurrer to the plea of the respondent, and the judgment of the appellate court affirming that decision will be affirmed.

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(117 Ill. 379)

OHIO & M. RY. CO. v. COMMISSIONERS OF HIGHWAYS.

(*Supreme Court of Illinois. June 12, 1886.*)

1. TAXATION—ACTION OF DEBT TO RECOVER—VALID TAX MUST BE ESTABLISHED.

In an action of debt *in personam* to recover a tax alleged to be due on forfeited property, (2 Starr & C. St. c. 120, par. 282,) it is necessary for the public authorities to make out a valid tax. The estoppel of a tax deed, under section 224 of the revenue act, (2 Starr & C. St. c. 120, par. 286,) does not extend to such proceedings as this.

2. SAME—DEED CONCLUSIVE THAT TAX WAS DUE ON FORFEITED PROPERTY.

A valid tax being established, the next step would be to prove that it was due on forfeited property, and on this point the tax deed would be conclusive.

Appeal from Clay.

Percy & Werner and G. Pollard, for appellant.

F. G. Cockrell, for appellee.

PER CURIAM. This is an action of debt for certain road taxes alleged to be due on forfeited property. It was stipulated on the trial that the "lists, on the authority of which the county clerk extended these road taxes on the collector's books, were not presented to the board of supervisors of the county, and that said board made no order directing the county clerk to extend said taxes, or to cause the same to be collected, and that the county clerk had no other authority for extending said taxes on the tax-books than the lists of the overseers of roads, as above stated." We have held in *Leachman v. Dougherty*, 81 Ill. 324, and in *Peoria, D. & E. R. Co. v. People*, 6 N. E. Rep. 497, that it was essential to the validity of the tax that the tax should be levied by the commissioners of highways, and that they should give the supervisors of the township a statement of the amount necessary to be raised, and the rate per cent. of taxation, signed by the commissioners, or a majority of them, on or before Tuesday next preceding the annual September meeting of the board of supervisors, who shall cause the same to be submitted to said board for their action at such September meeting of said board, etc., as provided by section 120, c. 121, Rev. St. 1874, p. 932. But the court held that, although the tax was illegally extended, still, inasmuch as the extension was not objected to in the county court, the rendition of the judgment in that court is conclusive against the appellant, and its validity cannot be inquired into in this proceeding. This ruling is predicated upon the seventh clause of section 224 of the amendment to the revenue law, adopted in 1879, (Laws 1879, pp. 253, 254,) whereby it is provided

"that any judgment for the sale of real estate for delinquent taxes, rendered after the passage of this act, \* \* \* shall estop all parties from raising any objections thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment, and could have been presented as a defense to the application for such judgment in the court wherein the same was rendered; and as to all such questions the judgment itself shall be conclusive evidence of its regularity and validity in all collateral proceedings, except in cases where the tax or special assessments have been paid, or the real estate was not liable to the tax or assessment."

But the suit here is on the tax itself. It is for the amount of the tax due on forfeited property. Paragraph 232, Revenue Act, (chapter 120, 2 Starr & C. 2105;) *People v. Winkelman*, 95 Ill. 412; *Biggins v. People*, 96 Ill. 383; *People v. Davis*, 112 Ill. 272; *Bowman v. People*, 114 Ill. 474; S. C. 2 N. E. Rep. 484. Necessarily, therefore, the first thing incumbent on the plaintiff is to establish the levy of a valid tax, which, we have seen, has not been done in the present instance. Had the levy of a valid tax been established, the next step would have been to prove that it was due on forfeited property, and for that purpose the judgment would have been conclusive evidence.

The judgment is reversed, and the cause remanded for further proceedings consistent with this opinion.

(117 Ill. 399)

#### ILLINOIS & ST. L. R. Co. v. SWITZER and others.

(*Supreme Court of Illinois*. June 13, 1886.)

1. RAILROAD COMPANIES—APPROPRIATION OF LAND—DAMAGES—DESTRUCTION OF WATER SUPPLY—AVAILABILITY OF OTHER SUPPLIES ADMISSIBLE AS TO DAMAGES.

Where the property to be taken by a railway in eminent domain proceedings is a strip of property crossing a mill-pond, and the water supply of the mill will be injured, the fact that there are several other water supplies available is a proper fact to be considered by the jury in estimating the damages caused; and it is gross error to reject such evidence, and cause the damages to be estimated on the hypothesis that there is a total destruction of water supply.

2. SAME—FORM AND PLAN OF PROPOSED IMPROVEMENTS, HOW FAR ADMISSIBLE AS AFFECTING DAMAGES.

It is proper for a railway company to show the plan of construction of its road over the premises in question. In such case the plan should be presented, and preserved in the records of the court, so that it might thereafter be known upon what plan of construction the damages were assessed; and if there should be a departure from the plan, to the damage of the parties, they might have their remedy for any such increased damage.

Appeal from St. Clair.

G. & G. A. Koerner, for appellant.

Wilderman & Hamill, for appellees.

SHELDON, J. The petition in this case was filed in vacation in the county court of St. Clair county by the Illinois & St. Louis Railroad & Coal Company for condemnation of a strip of land 100 feet wide, con-

taining one and four one-hundredths acres, for right of way of petitioner. The tract of land of which this strip forms a part contains about 11 acres, on which a flouring-mill is situated. The strip of land is mostly across a pond, from which the water required for steam purposes in the mill is derived. The report of the jury allowed \$400 as the value of the land to be taken, and \$2,185 as damages to the land not taken, upon which finding the court rendered judgment, and the petitioner appealed.

It is the finding and judgment in respect of damages that is complained of. The damage which was sought to be shown by the evidence was in cutting off the water supply for the mill from the pond. It appeared that the railroad company, under license from the former deceased owner, had been in possession and had the use of the property for some 10 or 15 years; that it crossed the pond on trestles, and did not interfere with the pond in supplying water. At the trial witnesses were introduced on the part of the defendants, who gave testimony that if the railroad company should build a solid embankment of earth across the pond, to place its track upon, it would destroy the pond as a source of water supply for the mill; and that if the pond were destroyed, and there was no other means of getting water, the damage to the mill would be great, giving their estimates of the amount based on that hypothesis. In rebuttal of such testimony the petitioner offered to prove that the Belleville Water-works can furnish, and agree to furnish, water regularly to the mill, and all it may require, at a cost which will be less than the cost of pumping the water from this pond; also that Richland creek, which flows nearer to the mill than the pond is, has a capacity to furnish better water, and an abundance, for the use of the mill. The court excluded the testimony. There was, in this, manifest error, for which the judgment must be reversed. There having been an estimate of damages made on the bases that the pond would be destroyed as a source of supply of water for the mill, and that there would be no other means of such supply, it obviously should have been permitted the petitioner to show there would be other sources of water supply, not, as is supposed by appellees' counsel, for the purpose of showing there would be no damage, but for the purpose of affecting the amount of damage; the amount of the estimates of damages by appellees' witnesses having been based upon the supposition that there would be no other means of supplying the mill with water. There was evidence that to cross the pond on trestle-work would cause no, or but little, damage in injuring the pond, and that an embankment of earth across the pond, with a culvert to allow communication between the two sides, would not interfere with the capacity of the pond to supply water to the mill.

The question was asked by the petitioner of a witness to the effect how the company intended to cross the pond, and the court excluded the question. And the court gave this instruction to the jury:

"The court instructs you that the verbal statements of the employees and officers of the railroad company, even when made under oath, that they do not intend to make an embankment of earth or other material across said mill-pond for said railroad tracks, will not legally bind said railroad company, its

successors and assigns, not, to make said embankment. The only way that said railroad company can legally bind itself, and its successors and assigns, not to build an embankment of earth or other material across said pond for its track, is for said company to make in writing, and sign and file with the papers in this case, a stipulation or covenant running with the land that said railroad company, and its successors and assigns, will never make an embankment across said pond, but will perpetually maintain its tracks on trestle-work, or put a bridge or culvert across said pond."

Whether there was error in the rulings in this regard it is unnecessary, for the decision of this case, to determine. It may be proper, in view of another trial, to say it was undoubtedly competent for the railroad company to show the plan of construction of its road over the premises in question; but where, as here, the particular plan of construction would materially affect the question of damages, the plan should be presented, and preserved in the records of the court, so that it might thereafter be known upon what plan of construction the damages were assessed; and if there should be departure from the plan, to the defendant's damage, they might have their remedy for any such increased damage.

The judgment will be reversed, and the cause remanded:

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(117 Ill. 305)

KAUFFMAN and others v. BRECKENRIDGE and others.

(*Supreme Court of Illinois*. June 12, 1886.)

1. **WILLS—GENERAL POWER OF DISPOSAL TO DEVISEE ACCOMPANYING A LIFE-ESTATE.**

Where a power of disposal accompanies a bequest or devise of a life-estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended.<sup>1</sup>

2. **SAME—CIRCUMSTANCES SHOWING INTENT TO GIVE POWER OF ABSOLUTE DISPOSITION.**

Where the life-tenant is given a power of disposition for a certain purpose, which it would be impossible to accomplish by a sale of the life-estate, and which can be accomplished only by a disposal of the fee, the power must be held to be that which is necessary for the accomplishment of the purpose. And where the life-estate is, in the main, in unimproved and unproductive realty, and the purpose is the support of the family, the power will be held to allow an absolute disposition.<sup>1</sup>

3. **SAME—EXTRINSIC EVIDENCE—EVIDENCE OF CONDITION OF PROPERTY ADMISSIBLE TO DETERMINE EXTENT OF POWER.**

In interpreting such a power the court will look at the circumstances under which the deviser makes the will,—as the state of his property, of his family, and the like; and the admission of such evidence is not a violation of the rule forbidding the variation of the will by parol evidence.

Appeal from Madison.

This was a bill filed in the Madison county circuit court, on September 26, 1883, for partition of real estate lying in that county, and in the county of Cook, by the two children and five grandchildren of Stephen H. Long, deceased. The latter was a resident of Alton, Madison county, Illinois, and died September 4, 1864, leaving him surviving his widow,

<sup>1</sup>See note at end of case.

Martha Long, and three children, Henry Long, William D. Long, and Lucy L. Breckenridge, then the wife of Marcus P. Breckenridge. The will of the deceased, made January 12, 1864, and drawn by himself, contains the following provisions:

"Item 1. I give and bequeath to my beloved wife, Martha Long, all my goods, estates, and chattels, real, personal, and mixed, to have, hold, and use the same so long as she may remain my widow; said goods, estates, etc., to be disposed of and used agreeably to her direction and approval, and in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and our beloved children, William D. Long, Henry C. Long, and Lucy L. Breckenridge.

"Item 2. From and after the demise of the said Martha, the surviving children of the said William, Henry, and Lucy, or either of them, shall share equally with the said William, Henry, and Lucy in the division and distribution of said goods, estates," etc.

"Item 4. With regard to my homestead, lately purchased of Alfred Dow and others, and now occupied by my family, no sale, division, or distribution shall be made thereof, except as hereinafter provided for, but the same shall remain in the occupancy and possession of some one or more of my said family so long as the homestead shall be kept by the occupants thereof in good condition and repair in all respects; but in case said occupants should fail to keep said homestead in good condition and repair, then and in that event, the said homestead is hereby donated to the city council of Alton, Illinois, to be occupied exclusively as a seminary for young ladies," etc.; "and in case of failure by the city council to keep it in good repair and condition it was to revert to the heirs."

"Item 6. I hereby constitute, ordain, and appoint Marcus P. Breckenridge, my son-in-law, as principal executor and administrator, and Henry C. Long, my son, as assistant executor and administrator, to carry into effect, on consultation and approval of the said Martha, my wife, and others of my family, all the provisions and bequests contemplated in this, my last will and testament; the said Henry being desired and expected to aid and assist the said Marcus in the arduous and responsible duties devolving on the latter as principal executor and administrator whenever the assistance of the said Henry is needed and required by the said Marcus, who is desired and expected to fix his permanent residence, with his wife and children, in and at the said homestead while the said assistant executor," etc., "is likely to be absent therefrom more or less frequently, and for longer or shorter periods."

Stephen H. Long was a colonel in the engineer corps of the United States army. At the time of the making of his will and of his death his family consisted of himself, wife, and his son William D. Long, who was imbecile from his birth, his son-in-law, M. P. Breckenridge, and wife, and four children, the eldest about 10 years old, residing with him at the time, and also his son Henry C. Long. The evidence shows they were all, except Henry C. Long, dependent upon Stephen H. Long; that Henry C. was, to a considerable extent, dependent on him because of his intemperance. Since her father's death another child has been born to Mrs. Breckenridge. As the witnesses say, Long lived in first-rate style, and in keeping with his position as colonel in the regular army, and after his death the family maintained about the same style of living. The inventory of his estate showed real estate of the value of \$47,880, chattel property of the value of \$991, and notes and accounts

of the value of \$1,940; the testimony being that a large portion of the latter was against relatives, and not collectible.

Mr. Davis, a lawyer residing at Alton, in a deposition given in 1873 in another case, and used in this by consent, says: After the death of Col. S. H. Long "I was consulted by his executors, and became intimately acquainted with the pecuniary condition of his estate, and the nature and condition of his property. His estate consisted of unproductive real estate, with the exception of a small portion of personal property. The real estate could not be rented so as to produce an income, and it could only be made available to support the family by selling it. Unless this could be done his family would be left almost destitute. Under my advice, Mrs. Long has sold some of the real estate to support herself and family. The sales made by her have never been questioned, and the proceeds from such sales have been the only support of herself and family and her grandchildren. These grandchildren should now be receiving an education suitable for their condition in life."

From time to time from April 27, 1865, to January 11, 1867, Martha Long, the widow, and Marcus P. Breckenridge, the executor, sold and conveyed in fee-simple the lands in Madison county, and on June 1, 1872, Mrs. Long (Marcus P. Breckenridge having died in 1870) sold and conveyed by warranty deed the lands in Cook county, the latter, in all 200 acres, for \$40,000. Lucy L. Breckenridge, the daughter, united in this conveyance as grantor. Henry C. Long died about April 11, 1871, intestate and without widow or children. Martha Long, the widow, died September 4, 1873. The bill was filed by Lucy L. Breckenridge and William D. Long, the two surviving children of Stephen D. Long, and by the five children of Lucy L. Breckenridge. It prays that all the said deeds made by Martha Long and by Martha Long and Marcus P. Breckenridge be declared of no effect against the complainants, under the will; that the title to all the said lands be deemed to be vested in the complainants since the death of said Martha Long; and for a partition. Answers were filed and proofs taken, and on final hearing the court decreed in favor of the complainants, finding the title to the lands to be in them; that by the will of Stephen H. Long no power was conferred upon said Martha Long, or Marcus P. Breckenridge, the executor, to convey the lands in fee; that under the will the said Martha Long had power to dispose of the life-estate only, which was thereby devised to her.

*Metcalf & Bradshaw*, for appellants Stanly and others.

*Baker & Baker*, for appellants Stanly, Lohr, and Culp.

*George F. McNulty*, for appellants Long, Spaulding, Graessli, and Stanly.

*Rosenthal & Pence*, for appellant International Bank.

*Wise & Davis* and *John G. Irwin*, for appellees.

**SHELDON, J.** The main question in this case is upon the construction of the will of Stephen H. Long,—whether it conferred the power to dispose of the lands in fee, or only the power to dispose of the life-estate, or estate during widowhood, which was devised to the widow. The will



gives to the widow, Martha Long, all the testator's real and personal property, to have, hold, and use so long as she remains his widow; and reliance is had on the general rule that, where a power of disposal accompanies a bequest or devise of a life-estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless there are other words clearly indicating that a larger power was intended. *Welch v. Belleville Sav. Bank*, 94 Ill. 191; *Henderson v. Blackburn*, 104 Ill. 227. We recognize the rule; and the inquiry before us is whether, taking the whole will together, in view of the state of testator's family and property, it indicates the intention to give a power to dispose of anything more than the widow's estate for life or during widowhood in the property.

The will contemplates that the testator's entire family—his widow; his two sons, one of whom was of weak mind, and unable to take care of himself, and the other who was to some extent a charge upon the testator, from his intemperate habits; his daughter, with her then four small children and her husband—should all remain and live upon the homestead, and that the widow and testator's children should have a comfortable subsistence out of his property. It was a prime object that the testator's homestead should be kept in good condition and repair in all respects; in failure whereof the homestead was to go to the city of Alton for a female seminary. This object would require expenditure of money. The personal property was of inconsiderable amount. The large quantity of real estate was wholly unimproved and unproductive, with the exception of the homestead and some 60 or 70 acres of the Madison county land under cultivation, the rent from which would hardly more than pay the taxes on it. The taxes upon the real estate were considerable. The age of the testator's wife at the time of the making of the will was about 61 years. Under such circumstances is made the devise:

"I give and bequeath to my beloved wife, Martha Long, all my goods, estate, and chattels, real, personal, and mixed, to have, hold, and use the same so long as she may remain my widow; said goods, estates, etc., to be disposed of and used agreeably to her directions and approval, and in such manner as she may deem most conducive to the welfare and comfortable subsistence of herself and our beloved children, William D. Long, Henry C. Long, and Lucy L. Breckenridge."

It is not the mere power of disposal which is given here, nor power of disposal for the widow's own use and benefit, but the power of disposal for the comfortable support of herself and the three children of the testator. Circumstanced as they were, there was given power to dispose of the property for the support of the testator's family. The testimony shows most fully that the widow's life-estate, or estate during widowhood, in the property, was utterly valueless as a resource for the family's support; that it would have been impossible to have made sale of it for any amount which would contribute materially to that end. This must have been known and seen by the testator, at the time he made his will,

from the nature of the property. Where, in such case, there is given to the life-tenant the power to dispose of the property for a certain purpose, which purpose it would be impossible to answer by disposition of the life-estate, and which would be effectuated only by sale of the property absolutely, the power of disposition given must be held to be that which is necessary for the accomplishment of the object for which it is given, —to be the power of absolute disposition. The will was drawn by the testator's own hand, in ignorance, it is to be supposed, of any technical rules of construction; and, when he gave to his wife power to dispose of his goods and estates, real and personal, in such manner as she might deem most conducive to the welfare and comfortable subsistence of herself and their children, it was his intention the family should be supported out of the property; and we can have no doubt that his meaning was to give the power to dispose of the property itself if it was needed for that purpose, and not merely the widow's estate for life in the property. And to hold that, because the testator had given to the widow an estate for life or during widowhood in the property, the power which he gave to dispose of the property was a power only to dispose of her estate for life or during widowhood in the property, would be to make use of a mere artificial rule of construction to frustrate a testator's clear meaning. Goods and chattels and lands are grouped together under the power of disposal which is given. It is the same power of disposal which is given in respect of each. It is unreasonable to suppose that it was only the widow's estate for life or during widowhood in the goods and chattels, and not the goods and chattels themselves, which the testator intended she should sell for the support of the family. Item 4, in providing that no sale should be made of the homestead, affords some implication that power of sale of the whole property had been given, and that it was deemed necessary to make exception of the homestead.

It is objected that all of the extrinsic testimony as to the lands being unimproved, and producing no income, and as to the testator's family, etc., is improper in this case. This objection is not well taken. Rule 10 of the general rules of construction of wills laid down by Jarman in his work on Wills (volume 2, p. 841) is: "The court will look at the circumstances under which the deviser makes his will; as the state of his property, of his family, and the like." This court has often held that there may be created a life-estate with power to sell and convey the fee, and limit a remainder after the termination of the life-estate. *Fairman v. Beal*, 14 Ill. 244; *Funk v. Eggleston*, 92 Ill. 515; *Hamlin v. United States Exp. Co.*, 107 Ill. 443; *Henderson v. Blackburn*, 104 Ill. 227; *Markillie v. Ragland*, 77 Ill. 98. It depends upon the intention, to be gathered from the whole instrument in the light of the circumstances surrounding the testator, whether the power be given. We are of opinion that by this will the widow was clothed with a power of the disposition of the absolute estate in favor of herself and children, and that by the exercise of that power her grantees here took the fee, and not her mere life-estate in the lands.

There is no charge in the bill of collusion or fraud respecting the sale

of the property, or that it did not sell for its full value, or that the proceeds of the sale were not necessary and used for the support of the family.

The view we have taken renders it unnecessary to consider other important questions which are raised in the case.

The decree will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

#### NOTE.

Respecting a devise with a limitation on the fee, see *Van Horne v. Campbell*, (N. Y.) 3 N. E. Rep. 816, and note, 330, 331.

It is said in *Lienau v. Summerfield*, (N. J.) 4 Atl. Rep. 660, that where, in a devise, the quantity of the estate to be taken is expressly defined to be for life, and words adapted to the creation of a power of disposal without restriction as to the mode of execution are added, the superadded words will be construed to be the mere gift of a power of disposition.

In *Brockley's Appeal*, (Pa.) 4 Atl. Rep. 210, a testator devised and bequeathed all his property unto his widow; "giving her full power and authority to sell the whole or any part of my said real estate, and execute deed or deeds therefor; and in case any of my estate be left after the death of my said wife, I order it to be divided as follows," etc., among his children. The court held that the widow took but a life-estate in the realty, and that so much of the proceeds of the real estate sold by the widow as was not used by her was estate of the decedent "left" and that his children were entitled thereto; following *Follweiler's Appeal*, 102 Pa. St. 581.

In *Re Will of Jones v. Jones*, (Wis.) 28 N. W. Rep. 177, the testator left the following will: "After my lawful debts are paid and discharged, I give, bequeath, and dispose of as follows, to-wit: To my beloved wife, Margaret Jones, all that is in my possession at the time of my decease; and also my wife have right to sell the estate, if that will be her choice. And after my wife's decease, the property to be parted to my dear children in equal shares." The court held that Margaret took, under the will, only an estate for life in the property of the testator, with power to sell such life-estate, if she chose to do so, and her children took, in equal shares, a vested remainder in fee in such property.

It was held in *Jones v. Bacon*, 68 Me. 34, that an absolute power of disposal in the first taker of an estate renders a subsequent limitation repugnant and void.

When the will shows a clear purpose of the testator to give an absolute power of disposition to the first taker, the limitation over will be void. *Howard v. Carusi*, 3 Sup. Ct. Rep. 575.

It is said in *McLellan v. Turner*, 15 Me. 436, that where there is an express devise of a life-estate, coupled with a power of disposal, the devisee takes the fee.

Where the first taker has the power of disposal by deed or will, a devise over is void, whether the property be real or personal. *Van Horne v. Campbell*, (N. Y.) 3 N. E. Rep. 816.

Where property is devised in fee-simple to a widow, and words are added directing the disposition of what remains at her death, such words, if precatory, do not affect her title, and, if intended to impose a condition, are void as repugnant thereto. *Alden v. Johnson*, (Iowa,) 18 N. W. Rep. 696. See *Rona v. Meier*, 47 Iowa, 607; *Benkert v. Jacoby*, 36 Iowa, 273; *Williams v. Allison*, 33 Iowa, 278.

In *Ide v. Ide*, 5 Mass. 500, Judge PARSONS says that "whenever, therefore, it is the clear intention of the testator that the devisee shall have an absolute property in the real estate devised, a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee."

In *Gifford v. Choate*, 100 Mass. 343, it is held that a devise of lands, with an absolute power of disposal in the first taker, renders a subsequent limitation repugnant and void. In *Jones v. Bacon*, 68 Me. 34, it is said that an absolute power of disposal in the first taker of an estate renders a subsequent limitation repugnant and void. This was a case in which the testator, after making sundry bequests, proceeds: "And as to the residue of my estate, after payment of my just debts, I give and bequeath the same to my beloved wife. . . . And, lastly, I further direct that if there be any of my said estate left after the decease of my said wife, then the said property left to be equally divided between" two persons designated. The court held that the residue of the estate, after payment of testator's just debts and legacies, vested absolutely in the wife. It is held by the supreme court of the United States, in a recent case, that the rule is well established that although generally an estate may be devised to one in fee-simple or fee-tail, with a limitation over by way of executory devise, yet when the will shows a clear pur-

pose of the testator to give an absolute power of disposition to the first taker, the limitation over is void.

A devise of land to another, generally or indefinitely, with power of disposing of it, amounts to a devise in fee. *Shaw v. Hussey*, 41 Me. 495; *Stuart v. Walker*, 72 Me. 146.

Thus it is held by the court in *Burleigh v. Clough*, 52 N. H. 267, that where lands are devised with words of inheritance, or generally, without words of limitation, it vests an estate in fee in the devisee, and that estate will not be reduced below an estate in fee by added power of disposal; the expression of the added power will be mere surplusage, since every estate in fee involves an absolute power of disposal of the whole.

In *McLellan v. Turner*, 15 Me. 436, it is held that where there is an express devise of a life-estate, coupled with the power of disposal, the devisee takes the fee.

In *Hale v. Marsh*, 100 Mass. 468, where the testator gave all his property to his wife, for life, with power to dispose of the whole or any part thereof, real or personal, at her pleasure, and to manage and improve the same at her discretion, and, if the income was not sufficient for her complete maintenance, gave her power to expend so much of the principal as she might elect, and for such purposes as she might deem expedient, with full power to dispose by will of such portion as might remain unexpended at her decease, but if she should die leaving any unexpended and undisposed of by will, he gave it to a third person, and the court say: "The gift is of a life-estate, with a full power of disposition, both by deed and will, over the entire property, without restriction as to the time, mode, or purposes of the execution of the power. In such case the authorities seem to hold that the life-estate and unlimited power of disposition over the remainder coalesce, and form an estate in fee, and that the devise over of what may remain is void, because inconsistent with the unlimited power of disposition given to the first taker."

It is said by the supreme court of Maine in the case of *Mitchell v. Morse*, 1 Atl. Rep. 141, that a devise of real estate without words of limitation vests in the devisee an estate in fee-simple; and that this result is not defeated by a devise over of the remainder. "If a life-estate only is given, a devise over of the remainder is good. But when by the terms of the devise an estate in fee-simple is given, the addition of a devise over of the remainder is void, because, the whole estate having already been disposed of, there is nothing for it to act upon. The argument usually urged against this conclusion is that the devise over ought to be allowed to cut down or reduce the estate previously given to a life-estate, upon the ground that such must have been the intention of the deviser. And in a few cases this argument has prevailed. But in a large majority of the cases, both in England and in this country, it is held that a mere devise over of a remainder will not cut down the estate given to the first taker." The same doctrine was held in *Turner v. Hallowell Savings Inst.*, 76 Me. 527.

The supreme court of the United States, in the case of *Howard v. Carusi*, 3 Sup. Ct. Rep. 575, held that a devise to a person, "to be held, used, and enjoyed by him, his heirs, executors, administrators, and assigns, forever, with the hope and trust, however, that he will not diminish the same to a greater extent than may be necessary for his comfortable support and maintenance, and that at his death the same, or so much thereof as he shall not have disposed of by devise or sale, shall descend" to certain other parties named in the will in certain proportions fully set out therein, conferred an estate in fee-simple, with an absolute power of disposition in the person to whom the devise is made, and the limitation over is void.

It is held in *Shaw v. Hussey*, 41 Me. 495, that "the general rule is well settled that a devise to one without words of inheritance," but containing the power to dispose of the property without qualification, is treated as equivalent to a devise with words of inheritance. See, also, *Ramsdell v. Ramsdell*, 21 Me. 238; *Hale v. Marsh*, 100 Mass. 468.

But to the general rule there is an exception, and that is where a life-estate only is clearly given to the first taker, with an express power, on the happening of a specified event or for a certain purpose, to dispose of the property, the life-estate is not by such a power enlarged to a fee or absolute right, and the devise over will be good. See *Ramsdell v. Ramsdell*, 21 Me. 238, and *Shaw v. Hussey*, 41 Me. 495.

(117 Ill. 330)

### DONK and others v. ALEXANDER and others.

(Supreme Court of Illinois. June 12, 1886.)

#### 1. ATTACHMENTS—PARTICIPATION—EACH WRIT A LIEN ON ALL PROPERTY ATTACHED.

Where two attachments are sued out of the same court, returnable at the same term, against the same defendant, neither attachment is entitled to priority over the other in respect to any of the property attached. Each writ is a lien upon all of the property attached to the extent of the entire amount of the indebtedness for which it is issued.

**2. SAME—INTERVENING ASSIGNMENT WILL NOT AFFECT RIGHTS OF SUBSEQUENT ATTACHMENT.**

An assignment by the debtor intervening between the two attachments will not abridge or affect the rights of the subsequent attaching creditor to participate in the proceeds of the property attached.

**3. SAME—MERGER—PURCHASE OF JUDGMENT AND OF RIGHTS OF DEBTOR'S ASSIGNEE WORKS MERGER OF CHARACTER OF DEBTOR AND CREDITOR—LIEN EXTINGUISHED THEREBY.**

Where an attachment creditor pursues his remedy to judgment, and then transfers his rights under the judgment to a third person, and, pending these proceedings, the debtor makes an assignment, and a second attachment is sued out, returnable to the same term, the attachments will participate *pro rata* in the proceeds of the property attached. But if, as in this case, the third person who had acquired the first judgment also purchases the rights of the debtor's assignee, he then holds the position of both debtor and creditor. There will be a merger of these two characters, his lien will cease, and he will not participate in the attachment lien.

**4. SAME—PERISHABLE PROPERTY—SALE OF, WILL NOT AFFECT RIGHT OF PARTICIPATION.**

The sale of attached property as perishable, under section 20 of the attachment act, (1 Starr & C. St. c. 11, § 20,) prior to the trial of the attachments, does not affect the right of the subsequent attaching creditors to participate in the proceeds thereof.

This is an appeal from a judgment of the appellate court for the Fourth district. The following is a statement of the case:

"Edmund C. Donk and others filed their affidavit in attachment against Ottomar W. Heyer, November 28, 1881; writ issued the same day, returnable to the February term, 1882, of this court; levy made on real estate of Heyer, and some personal property, as shown by writ; additional levy on other personal property made December 3, 1881, as shown by writ, and sheriff's indorsement thereon; declaration filed February 9, 1882; appearance of Ottomar W. Heyer entered by W. C. Kueffner on the fifth Wednesday of the term; and judgment, by consent of parties, for \$2,600.75, as per stipulation on file, on the fifth Thursday, being the twenty-third of March, 1882. Alexander & Taussig commenced suit in *assumpsit* against Ottomar W. Heyer, December 2, 1881; summons issued same day; writ of attachment in aid sued out and issued same day; both writs returnable to February term, 1882; levy was made on all the property before then attached under writ in favor of Donk and others, and also the additional, viz.: 'The entire stock of bone-black in the buildings on the premises, about fifty barrels of marble dust or whiting, one part barrel grape sugar, two kegs of syrup, and three sets of double harness.' The additional property was found, and directed to be levied on, by Mr. Taussig, one of the plaintiffs; and this additional levy was also on the same day indorsed on the Donk writ; declaration filed February 9, 1882. On November 29, 1881, Ottomar W. Heyer made an assignment to Hugo Muench, assignee, in pursuance of the statute of Missouri relating to assignments. This deed of assignment was recorded in St. Clair county, December 3, 1881, after the above levies. On December 13, 1881, the circuit court of St. Louis, Mo., made an order directing said Hugo Muench, assignee, to sell all the property of O. W. Heyer, subject to all incumbrances, on the fifth day of January, 1882, and subject to the approval of the said court. On January 5, 1882, said assignee sold all of the attached property, real and personal, except that sold by the sheriff as perishable, to John B. Lovington, William D. Marshall, and George W. Lubke, as trustees for a corporation thereafter to be formed, for \$2,000. Said sale purported to be in pursuance of the above order, and the notice of the sale specified that the sale was to be made subject to incumbrances. Deed made by assignee to said vendees, dated January 7, 1882. Report of sale approved by St. Louis circuit court, January 6, 1882.

At said sale personal notice of the levy of the attachment in favor of Alexander & Taussig was given by their attorney.

"On February 27, 1882, the St. Louis Syrup, Glucose & Grape Sugar Co. was incorporated, with John B. Lovingsston, W. D. Marshall, Geo. W. Lubke, L. S. Metcalf, Jr., and others as stockholders. By deed dated February 28, 1882, John B. Lovingsston, W. D. Marshall, and Geo. W. Lubke, as trustees, conveyed to the St. Louis Syrup, Glucose & Grape Sugar Co., in consideration of \$30,000, which was in full-paid shares of the capital stock of said party of the second part, and whereof they retained for themselves as trustees \$12,000, the property acquired by said trustees at the assignee's sale; 'excepting such of said articles as have been heretofore sold by the sheriff of said St. Clair county, under levy of a certain writ of attachment issued in favor of Donk Bros. against said O. W. Heyer.' On January 26, 1882, the sheriff of St. Clair county, Ill., sold the perishable property levied on under the attachment of Donk Bros. for \$1,363.70. On April 11, 1882, the court rendered judgment for \$2,600.75, and awarded special execution therefor against property attached in favor of Donk Bros. On April 25, 1882, the judgment of *Donk Bros. v. Heyer* was duly assigned by Donk Bros. to Lyne S. Metcalf, Jr., and a special execution was issued upon said judgment in favor of Donk Bros. on March 19, 1883, but no sale made under it. On the twenty-fourth of October, 1883, the said Lyne S. Metcalf, Jr., executed to the St. Louis Syrup, Glucose & Grape Sugar Co. the following instrument:

"Whereas, Donk Bros. & Co., on November 28, 1881, in St. Clair county, Illinois, sued out an attachment, and levied upon certain leasehold and other property then belonging to Ottomar W. Heyer, defendant in said cause, and in which cause judgment was on March 23, 1882, rendered in favor of said Donk Bros. & Co. for \$2,600, and costs, and which judgment was subsequently assigned to Lyne Metcalf, Jr.; and whereas, the St. Louis Syrup, Glucose & Grape Sugar Company has purchased all the property so attached and not sold: now, know all men by these presents that I, the said Lyne S. Metcalf, Jr., of St. Louis, Mo., do hereby, in consideration of ten dollars to me paid by said St. Louis Syrup, Glucose & Grape Sugar Company, receipt of which is acknowledged, do hereby remise, release, and forever quitclaim unto said company, their assigns and legal representatives, all and singular any right or lien I may have against the premises and property so attached, of every kind, name, and nature, and do hereby further assign, transfer, and set over unto said corporation the judgment against said O. W. Heyer hereinbefore recited, and assigned to me by said Donk Bros. & Co., to have and to hold said property and premises and said judgment, with all the rights that I may or might be entitled to.

"In witness whereof, I have hereunto set my hand and seal the twenty-fourth day of October, 1883.  
L. S. METCALF, JR.' [L. S.]

"Acknowledged at St. Louis, Mo., recorded in the recorder's office of St. Clair county, Ill., in Book 173, page 456.

"At the February term, 1882, of the circuit court, in the case of *Alexander & Taussig v. Heyer*, the defendant appeared, and filed a plea to the declaration. Hugo Muench, as assignee of Heyer, filed an interpleader claiming the property attached, real and personal, as assignee. Lovingsston, Marshall, and Lubke interpleaded, claiming the property attached as their own as trustees and as purchasers from Muench, and claiming the proceeds of sale of the perishable articles subject to the Donk attachment. The St. Louis Syrup, Glucose & Grape Sugar Company filed their interpleader, claiming the real and personal property attached as their own. Issues were joined, and at a subsequent term all the issues were tried and decided by the court in favor of plaintiff, and judgment rendered in the sum of \$902.56, and general and

special executions awarded. The interpleaders and the defendant sued out a writ of error to the appellate court, where judgment was affirmed; then sued out a writ of error to the supreme court, where judgment was likewise affirmed. Upon the final disposition of the case Alexander & Taussig caused an execution to be issued; and, all the personal property not sold as perishable, and all the buildings and fixtures, having first been before destroyed by fire, the sheriff, under said execution, sold the leasehold estate of said Heyer, then in the possession of the St. Louis Glucose Company, to plaintiffs for \$700, March 5, 1884, and the same was redeemed by said glucose company, March 8, 1884, by payment of \$701.90 to the sheriff. The following is a statement of the net proceeds of said sales under said attachment writs:

Proceeds of sale under Donk Bros' attachment,	-	-	\$1,363 70
Costs of attachment,	-	-	\$178 52
Costs of execution,	-	-	7 45

Net proceeds of Donk attachment,	-	-	\$1,177 73
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Proceeds of sale under attachment of Alexander & Taussig,	-	\$701 90
Costs of attachment,	-	\$ 17 90
Costs of execution,	-	116 65

Net amount left,	-	-	\$567 35
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"And this was all the evidence.

"Then the circuit court found, as a matter of law, that the claim of the judgment of Alexander & Taussig was preferred to the claim of Donk Bros. & Co., and entitled to preference in sharing the proceeds of the said sales, and to this finding Donk Bros. & Co. and the St. Louis Syrup, Glucose & Grape Sugar Company at the time excepted, and then the said Donk Bros. & Co. and the said company moved the court for a new trial or hearing of the motion, because the finding of the court was contrary to law; but the court denied the motion, and the movers thereof excepted. And then the court ordered the sheriff to pay out of the proceeds of said sales the judgment of Alexander & Taussig in full, and the balance to the said company, and to this judgment the said company and the firm of Donk Bros. & Co. excepted, and appealed to appellate court of the Fourth district. The appellate court affirmed the judgment of the circuit court. This appeal is from that judgment."

*Charles W. Thomas*, for appellants.

*Chas. P. Knispel*, for appellees.

SCHOLFIELD, J. We find no reason to disagree with the appellate court in its conclusions as to the law on these facts as announced in its opinion filed on affirming the judgment of the circuit court. *Donk v. St. Louis Glucose & Grape Sugar Co.*, 17 Bradw. 374. But counsel for appellants contend that the fact that appellant did not purchase the perishable property sold under the Donk judgment renders the reasoning in the opinion of the appellate court inapplicable to the case before the court. This seems to assume that the Donk attachment, and the sale of the perishable property under it, are independent of the Alexander & Taussig attachment, and of the levy of both attachments upon other property which appellant did purchase, which is very clearly not admissible. The sale of the perishable property, before judgment was obtained, was merely to prevent loss. Section 20, Attachment Act, (1

Starr & C. St. 318.) So far as any question involved here is concerned, the case may be considered just as if that, and all the other property attached, had remained in the hands of the sheriff until the final sale by him of all the property attached under both attachments; for, since both attachments were returnable at the same term, they would share in the property attached *pro rata*, (section 37, Attachment Act, *supra*;) and this applies as well to the proceeds of the perishable property as to the other property. Neither attachment was entitled to priority over the other in respect to any of the property attached; and each was a lien upon all of the property attached, to the extent of the entire amount of the indebtedness for which it was issued; and hence, when appellant, after it became the owner, subject to these attachments, of all the property attached except that which had been sold as perishable, purchased and became the assignee of the Donk judgment, it occupied, to the extent of the amount of that judgment, the position of both debtor and creditor; and in such cases there is a merger of the qualities of debtor and creditor, extinguishing both. Abbott, in his Law Dictionary, (volume 2, tit. "Merger,") says:

"Merger is the equivalent of confusion in the Roman law, and (when used with reference to demands) indicates that, when the qualities of debtor and creditor become united in the same individual, there arises a confusion of rights which extinguishes both qualities; whence, also, merger is often called extinguishment."

Bouvier in his dictionary, volume 2, tit. "Merger," under the head of 'Rights,' says:

"Rights are said to be merged when the same person who is bound to pay is also entitled to receive. This is more properly called a confusion of rights or extinguishment. When there is a confusion of rights, and the debtor and creditor become the same person, there can be no right to put in execution."

The same rule is recognized in Pomeroy's Equity, volume 2, §§ 789, 790. The extinguishment is complete at law, though in equity, under certain circumstances, a merger or extinguishment will be prevented. *Id.*

The assignments of the judgment invested the assignees, in the order of the assignments successively, with the right to receive the amount to which the plaintiff in the judgment was before entitled, and a court of law recognizes and enforces the rights of such assignees. *Chapman v. Shattuck*, 3 Gilman, 49; *Carr v. Waugh*, 28 Ill. 418; *Morris' Adm'r v. Cheney*, 51 Ill. 451; *Hodson v. McConnel*, 12 Ill. 170. No right, therefore, recognized by a court of law remained in Donk Bros. after the assignment, and there was nothing to prevent the legal merger or extinguishment.

The judgment of the appellate court is affirmed.



(117 Ill. 265)

## HENDERSON v. PEOPLE.

(Supreme Court of Illinois. June 12, 1886.)

## 1. PERJURY—TIME, PLACE, AND DETAILS TESTIFIED TO IN ALLEGED PERJURY NOT IMMATERIAL ISSUES.

On an indictment for perjury, the alleged perjury consisting of false testimony that at a certain time and place the defendant was offered \$250 by the deceased if he would kill the slayer of the deceased, which was given in evidence on the trial of the slayer for murder, the time, place, and details so testified to are not immaterial issues of which perjury could not be predicated.

## 2. SAME—CONCLUSION OF INDICTMENT—FORMAL CONCLUSION.

An indictment for perjury, concluding, "against the peace and dignity of the state of Illinois," is sufficiently formal. The ancient conclusion, "and so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit willful and corrupt perjury," etc., while appropriate, is not material. 1 Starr & C. St. c. 88, § 227, par. 283.

## 3. SAME—EVIDENCE HELD TO SUSTAIN CONVICTION.

The evidence in this case is reviewed, and *held* to sustain the conviction of the defendant.

Error to Jackson.

W. J. Allen and W. W. Baer, for plaintiff in error.

R. J. McElvain, State's Atty., and W. A. Schwartz, for the People.

CRAIG, J. This was an indictment in the circuit court of Jackson county against John Henderson for perjury. The indictment contains averments of the pendency of a certain cause of *People v. Lightfoot*, for the murder of one Benjamin W. Moore, the jurisdiction of the court, etc. It was therein then alleged that "it became a material inquiry and issue in said trial whether the said Moore tried to hire the said John Henderson to kill the said Lightfoot; and the said John Henderson, being so sworn as aforesaid, wickedly contriving and intending to cause the said Lightfoot to be acquitted of said felony, did then and there feloniously, willfully, corruptly, and falsely, in said," etc., "material to said issue and trial, depose and swear that the said Moore offered him, the said John Henderson, at the town of Makanda, in said county, on the eighteenth day of November, A. D. 1885, the sum of two hundred and fifty dollars if he, the said John Henderson, would kill the said Lightfoot; whereas in truth and in fact, as the said John Henderson then and there well knew, the said Moore did not offer him, the said John Henderson, at the town of Makanda aforesaid, on said eighteenth day of November, the sum of two hundred and fifty dollars if the said John Henderson would kill the said Lightfoot." The indictment then concludes, "contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same, people of the state of Illinois." The defendant entered a motion to quash the indictment, and, after conviction, a motion in arrest of judgment, both of which were overruled, and the decision of the court on the motions is the first error relied upon to reverse the judgment.

Two objections are made to the indictment:

First, it is contended that the averment wherein it is alleged that the defendant testified that Moore tried to hire him to kill Lightfoot on the

eighteenth day of November, at Makanda, for \$250, presented an immaterial issue. It is no doubt true that the gist of the offense consisted in giving evidence that Moore offered the defendant money to induce him to kill Lightfoot, but, at the same time, the place, amount, and the time were also material matters. As said in the argument, the naming of the time, place, and amount added strength to the testimony of the defendant on the issue before the jury, and thus became a material part of his evidence. It is a mistake to suppose that, by the averment in the indictment, the defendant, in making his defense, was confined to the place, time, and amount alleged. As said before, the material element of the crime charged against the defendant was that he testified that Moore offered him money to kill a certain person. In his defense it might have been proper for the defendant to prove that Moore offered him money to do the act at a different time and place from that named in the indictment. Such evidence would have been a complete answer to the charge in the indictment, and, had it been offered, it no doubt would have been admitted.

The second objection is that the indictment is bad for the reason that it fails to conclude as required by law. The form in the old precedents requires a formal conclusion, substantially as follows: "And so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit willful and corrupt perjury," etc. While it might be well in an indictment of this character to conform to the formal conclusion used in the precedents, it is not material. 2 Chit. Crim. Law, 312; *The King v. Smith*, 2 Leach, 856. Our statute does not name the formal conclusion as an essential element in an indictment for perjury. It declares:

"In every indictment for perjury \* \* \* It shall be sufficient to set forth the substance of the offense charged upon the defendant \* \* \* together with the proper averments, to falsify the matter wherein the perjury is assigned. \* \* \* Rev. St. c. 38, § 227.

The indictment conformed substantially to the statute, and we regard it sufficient.

It is next contended that there was not sufficient evidence introduced to warrant the conviction. There is no dispute in regard to the fact that on the trial of Lightfoot for the murder of Moore, in the circuit court of Jackson county, the defendant testified, as charged in the indictment, that Moore offered him \$250 to kill Lightfoot; that the offer was made in a conversation between the defendant and Moore while they were sitting on some apple barrels at the south end of the passenger depot platform in Makanda, on Wednesday, the eighteenth day of November, 1885. It is also clear from the evidence that Moore was in Makanda on the eighteenth day of November, and that was the only time in the month that he was there. It is also clear from the evidence that Moore arrived at Makanda on the train about noon of the day, and returned on the north-bound train between 2 and 3 o'clock. But whether the defendant was in Makanda and saw Moore on the eighteenth day of November the evidence is somewhat conflicting. Several reliable witnesses

who were at the depot with Moore testify that the defendant was not there, and no conversation occurred between Moore and the defendant. It appears from the evidence that Moore went to Makanda to see a justice of the peace in reference to some case on his docket; that upon arriving at the depot he went immediately to the office of the justice. He remained there, as the justice testified, an hour or an hour and a half. Then the justice went with Moore to the depot; remained there a short time; ate some apples out of a barrel on the platform; then the two walked across to Hartman's store, and remained there 15 or 20 minutes; and then returned to the depot, where they remained together until Moore took the train for home. The justice testified that Henderson was not there, and no conversation occurred between him and the defendant at the apple barrels on the depot platform. The testimony of the justice is corroborated by other witnesses who were there at the time. It is true that the defendant introduced some witnesses who testified that he was there, and one testified that he saw Moore and the defendant in conversation together at the depot. This witness, who was a lawyer without a license, had assisted in the defense of Lightfoot, and was then under indictment for perjury. On his cross-examination he testified that Henderson was on a drunk the day before he testified; that he took him home and brought him back the next day to the trial. Whether the witness testified to the truth was a question for the jury. Doubtless his connection with Henderson, and his seeming control and management of him before Henderson testified in the *Lightfoot Case*, did not inspire the jury with much confidence in the integrity of his evidence. We do not, however, deem it necessary to enter upon a critical review of the evidence upon this question. We have carefully examined all the evidence, and, in our judgment, it was entirely sufficient to authorize the jury to arrive at the conclusion that the defendant had no conversation at Makanda with Moore, and that Moore made no such offer as he testified, on the trial of Lightfoot, was made to him. The story is incredible in itself. It is unreasonable to believe that any person of ordinary intelligence would, at a public depot, in the presence of a number of people, enter into negotiations with another to induce him to commit murder for a stipulated sum of money. Such contracts are not made at a public place, in broad daylight, in the presence of witnesses; but it is more reasonable to believe that an assassin who sought to engage one to aid him in the commission of such a crime would seek a dark, secluded spot, where no living witness could see or hear the foul bargain.

We think the verdict of the jury warranted by the evidence, and the judgment will be affirmed.

(118 Ill. 374)

BARTH v. LINES and others.<sup>1</sup>

(*Supreme Court of Illinois. June 12, 1896.*)

DOWER—ANTENUPTIAL AGREEMENT—RELEASING PROSPECTIVE CLAIMS.

An antenuptial agreement reciting that each of the parties is possessed of a separate estate, and providing that each, in consideration of the agreements

<sup>1</sup>A petition for rehearing is pending in this case.

of the other, waives all claim which he or she may acquire by the marriage in the estate of the other, is valid, and bars the claim of the widow of such marriage to dower in her deceased husband's estate, although it may lack some of the formalities of a jointure agreement.

Appeal from St. Clair.

*W. C. Kueffmer and James M. Dill*, for appellant.

*Turner & Holden, R. A. Holbert, and A. S. Wilderman*, for appellees.

MAGRUDER, J. In June, 1875, John Barth, a resident of St. Clair county, a widower, 47 years old, with nine children, the owner of about 1,000 acres of land, worth from \$80,000 to \$100,000, and of personal property worth from \$1,500 to \$2,000, married a widow named Maria K. Lines, now Maria K. Barth, the appellant in the cause. The marriage took place in St. Louis, Missouri, on the twenty-ninth day of June, A. D. 1875. Previous to the marriage an antenuptial contract was made between Barth and Mrs. Lines, which was signed by them on June 18, 1875, the day of its date, and acknowledged on June 21, 1875, before a justice of the peace in St. Clair county. It was recorded in that county on June 8, 1876, and is as follows:

"This agreement, made this eighteenth day of June, A. D. 1875, between Mary K. Lines, of Mascoutah, in the county of St. Clair and state of Illinois, of the first part, and John Barth, the second, of the county and state aforesaid, of the second part, witnesseth, that whereas, a marriage is about to be had and solemnized between said parties; and whereas, said Mary K. Lines is possessed of real and personal estate, to-wit, certain houses and lots in the platted town of Mascoutah, a stock of store goods, negotiable securities, etc., and the said John Barth, the second, is also possessed of real and personal estate, to-wit, farming and timber lands in the county and state aforesaid, farm-stock, and negotiable securities; and whereas, it is mutually desired by the said parties that the estate of each shall remain separate, and be subject only to the sole control of its respective owner, as well after as previous to the solemnization of the marriage: they hereby mutually agree and covenant, *first*, that the estate of the said Mary K. Lines shall remain her separate property, subject entirely to her individual control and management as if she were unmarried; the said John Barth, the second, not acquiring, by force of said marriage, for himself, his heirs, assigns, or creditors, any interest therein, or in the use or control thereof, or in the income, rents, profits, or dividends arising thereout. And whereas, it is also agreed that all estate, real or personal, which said Mary K. Lines may hereafter acquire or become entitled to in any manner shall be held by her to her separate use as aforesaid, and be thereby placed beyond the control and management of John Barth, the second; now, therefore, it is agreed by said John Barth, the second, in consideration of the marriage, and of a further consideration hereinafter mentioned, that he will waive, release, and relinquish unto the said Mary K. Lines all the dower interest in the real estate which she now possesses, or hereafter may acquire, or in any manner become entitled to, of which he may become vested by force of the contemplated marriage, and all, at all times during the coverture of said Mary K. Lines permit her to control and manage said estate, and such estate as may hereafter come to her as hereinbefore is named, and to receive, expend, or reinvest the income, rents, and profits and dividends thereof, at her own separate discretion, free from his interference or control, to her own separate use; and the said John Barth, the second, hereby cove-

nants and agrees to and with said Mary K. Lines, her heirs and assigns, that he will warrant and defend said estate and property, and all such estate and property as she may hereafter become in any manner entitled to, to the said Mary K. Lines, against himself and his heirs, to her separate use; that he will permit her to dispose of the same by will as she may bequeath the same; and that he will not in any manner interfere with her absolute control thereof. *Second*, that the estate of the said John Barth, the second, shall remain his separate property, subject entirely to his individual control and management, as if he were unmarried, the said Mary K. Lines not acquiring, by force of said marriage, for herself, her heirs, assigns, or creditors, any interest therein, or in the use or control thereof, or in the income, rents, profits, or dividends arising thereout. And whereas, it is also agreed that all estate, real or personal, which said John Barth, the second, may hereafter acquire or become entitled to in any manner shall be held by him, to his own separate use, as aforesaid, and be thereby placed beyond the control and management of said Mary K. Lines, now, therefore, it is agreed by said Mary K. Lines, in consideration of said marriage, and of the foregoing covenants on the part of said Barth, the second, that she hereby expressly waives, releases, and relinquishes unto said John Barth, the second, all dower interest in the real estate which he now possesses, or hereafter may acquire, or in any manner become entitled to, of which she may become vested by the contemplated marriage, and will at all times during the coverture of said John Barth, the second, permit him to control and manage said estate, and such estate as may hereafter come to him, as hereinbefore is named, and to receive, expend, or reinvest the income, rents, profits, and dividends thereof, at his own separate discretion, free from her interference or control, at his own separate use; and the said Mary K. Lines hereby covenants and agrees to and with said John Barth, the second, his heirs and assigns, that she will warrant and defend said estate and property, and all such estate and property as he may hereafter become in any manner entitled, to said John Barth, the second, against herself and her heirs, to his separate use; that she will permit him to dispose of the same by will as he may bequeath the same; and that she will not in any manner interfere with his absolute control thereof.

"Witness our hands and seals the day and year above written.

"JOHN BARTH, THE SECOND. [Seal.]  
"M. K. LINES." [Seal.]

On July 7, 1884, John Barth died intestate, leaving the appellant, his widow, and eleven children,—nine of them the children of a former wife, as above stated, and two of them the fruit of his marriage with appellant,—all of whom are the appellees in this cause. The appellant filed her bill on September 5, 1884, in the circuit court of St. Clair county, for assignment of dower and homestead; and the contract above recited is set up by appellees as a bar to her claim for dower. The circuit court found it to be a bar, and so decreed. This is an appeal from that decree, and the question which it brings before us is whether the agreement in question is a bar to appellant's right of dower in her deceased husband's lands.

The case of *McGee v. McGee*, 91 Ill. 548, seems to be decisive of the question. We there held that an agreement substantially the same as that in the case at bar was in equity a bar to the dower of the demandant, although it was wanting in the requisites of a legal or statutory jointure. In that case the agreement recited that each party owned real and personal property, and provided that each should retain the control

and possession of his or her own property free from all claim on the part of the other, and each thereby renounced all claims of dower or otherwise in the lands or personalty of the other.

It is said, however, that the contract passed upon in *McGee v. McGee* was made in 1857, and that, "as the law then was, the husband, on the consummation of the marriage, succeeded to the absolute ownership of the personal property of the wife, and was entitled to curtesy in her real estate, as well as the usufruct thereof;" whereas, under the law as it stood in June, 1875, the husband had no estate as tenant by the curtesy in his wife's land, and a married woman was as much entitled to the separate ownership and control of her personal property as though she was a *feme sole*. It is therefore argued that by the agreement now under consideration Barth surrendered nothing to the appellant as a consideration for the release of her dower interest in his lands which the law did not already secure to her independently of any contract. It is to be noted, however, that when appellant made the agreement in question she was a woman of mature years, and a merchant engaged in business for herself. She owned real estate worth from \$1,500 to \$2,000; consisting of two lots in Mascoutah, upon one of which was a house in which she kept a store. She also owned a stock of "store goods" worth some \$4,000 or \$5,000. If she should die before her husband, he would have dower in her real estate, and become the absolute owner of one-third of her personalty. By the agreement he released all claim to the interests which the law would thus have given him in her estate, and empowered her to dispose of it by will, free of any dower rights therein on his part. She made the same relinquishment to him of whatever interest the law would give her in any of his property. He was a farmer, and she kept a store. Each was to control and manage his or her own property free from any interference by the other. The marriage seems to have been a sort of business arrangement.

The statutes of most of the states now make the wife as free and independent, in the control of her property, as the husband is in the control of his property. As a result of this legislation, the tendency of the modern decisions is to uphold antenuptial contracts made fairly and without fraud by adult single women.

A woman "may bar her dower in any lawful manner, since by the statutes she can make any lawful contract." *Wentworth v. Wentworth*, 69 Me. 247.

"There is, perhaps, no principle better settled than that any provision which an adult, before marriage, agrees to accept in lieu of dower, will amount to a good equitable jointure." *Andrews v. Andrews*, 8 Conn. 79.

"Where the parties agree beforehand that, after marriage, each shall hold his or her antenuptial property to his or her separate use, and on the death of one of them neither shall have any marital claim on the estate of the other, this is, at least in a court of equity, generally esteemed to be a good bar to dower." Bish. Marr. Wom. § 423.

The provision of our statute that when a conveyance is made to or in trust for an intended wife, for the purpose of creating a jointure in her

favor, with her assent, to be taken in lieu of dower, such jointure shall bar any claim for dower by her in the lands of her husband, (Hurd. Rev. St. 1885, c. 41, § 7,) "cannot be said to deprive her of the power to bar her right to dower by any other form of antenuptial contract. \* \* \* This, however, is not the case of a settlement or jointure, but of a contract." *Naill v. Maurer*, 25 Md. 532.

Scribner, in his work on Dower, (volume 2, pp. 409, 413,) says:

"With respect to the legal requisite that the estate limited in jointure be such an estate of freehold as should continue during the wife's life, no such circumstance will be necessary in equity in order to make the jointure an absolute bar to dower if the intended wife be of age and a party to the deed, because, as she is able to settle and dispose of all her rights, she is competent to extinguish her title to dower upon any terms to which she may think proper to agree. \* \* \* The cases are not entirely agreed upon the question as to whether an antenuptial contract, which merely secures to the wife her separate property, and makes no provision for her out of the husband's estate, is a good equitable jointure; but in a majority of the cases it is held that, if it be a part of such agreement that the wife shall relinquish her dower, it will be good in equity."

For the reasons here stated we think that the agreement made by appellant with her deceased husband operates as a bar to her claim of dower in his lands. The proof shows that she intended it, with a full understanding of its meaning and effect. It rests upon the consideration of her husband's release of all his legal rights in her separate estate.

The decree of the circuit court is therefore affirmed.

(117 Ill. 63)

*In re* Petition of SMITH for Writ of *Habeas Corpus*.

(*Supreme Court of Illinois*. May 24, 1886.)

1. CONTEMPT—FINE—ORDER OF IMPRISONMENT FOR NON-PAYMENT.

Where a witness is properly brought before the court, and, for failure to answer questions propounded, he is fined for contempt, and an order is entered that he stand committed until the same and all costs are paid, such order is in the nature of a final process or means of enforcing the judgment, and not a judgment in itself.<sup>1</sup>

2. SAME—SUCH ORDER NOT REVIEWABLE BY HABEAS CORPUS.

A *habeas corpus* will not lie in such case, as it does not come within any of the statutory grounds for a *habeas corpus* for a prisoner under process. 1 Starr & C. St. c. 66, par. 22. A writ of error with an order for a *superseas* is the proper remedy.<sup>1</sup>

Original petition for *habeas corpus*.

MULKEY, J. This is an application by John S. Smith for a writ of *habeas corpus*. The petition shows that, in obedience to a subpoena, he appeared before the grand jury of Franklin county, then legally convened for the transaction of business; that upon such appearance a number of questions were propounded to him, the object of which was to elicit anything he might know about others than himself having played

<sup>1</sup> See note at end of case.

at any game or games with cards for money within 18 months next before the time of such inquiry. The petitioner answered, in substance that he knew of no person or persons having so played whose names he could give to the grand jury without furnishing such information as would lead to his own conviction, and on this ground declined to answer the questions. The matter having been referred to the court, it ruled, in substance, that, while the witness could not be required to state anything affecting himself personally in respect to such game or games, he was bound to tell what he might know of others being engaged in such unlawful gaming. The witness, nevertheless, still standing upon what he regarded his constitutional rights, declined to answer the questions, and the court thereupon imposed upon him a fine of \$25, and order that he stand committed until the same, together with all costs, was paid. Declining to pay the fine and costs as required by the order and judgment of the court, he was taken into custody by the sheriff of the county for the purpose of being committed to jail, whereupon the witness presented his petition to this court, setting up the foregoing facts, and asking to be discharged on *habeas corpus*.

It will be observed that the imprisonment complained of is by virtue of an order in the nature of final process to enforce a judgment at law for a specific sum of money. Such being the case, the petitioner can only be discharged for one of the causes set forth in the twenty-second section of the *habeas corpus* act, which are as follows:

"*First*, where the court has exceeded the limit of its jurisdiction, either as to matter, place, sum, or person; *second*, where, though the original imprisonment was lawful, yet, by some act, omission, or event which has subsequently taken place, the party has become entitled to his discharge; *third*, where the process is defective in some substantial form required by law; *fourth*, when the process, though in proper form, has been issued in a case or under circumstances where the law does not allow process or orders for imprisonment or arrest to issue; *fifth*, where, although in proper form, the process has been issued or executed by a person either unauthorized to issue or execute the same, or where the person having the custody of the prisoner under such process is not the person empowered by law to detain him; *sixth*, where the process appears to have been obtained through false pretense or bribery; *seventh*, where there is no general law, or any judgment order or decree of a court, to authorize the process if in a civil suit, or any conviction if in a criminal proceeding."

In the light of the previous decisions of this court, it is quite clear the petition fails to make out such a case as will authorize this court to grant the relief sought. Such being the case, it would be altogether useless to award the writ. We regard the petition in this case as a mere attempt to review and set aside a judgment at law for an alleged error in the proceeding, where the court clearly had jurisdiction both of the person and subject-matter of the suit. This cannot be done. The petition shows that the petitioner was regularly brought before the grand jury as a witness; that he refused to answer questions propounded to him; and that the court thereupon imposed a fine upon him. Whether the court was authorized, under the circumstances, to impose the fine, was a mat-



ter which the law authorized and empowered the court to determine just as in any other case of alleged contempt. While, for the purposes of the argument, it may be conceded the court erred in reaching the conclusion it did, nevertheless its right and duty to pass upon the question was clear beyond all question. If the judgment was erroneous, as is claimed, the remedy was the same as in the case of any other erroneous judgment, where the right of appeal or writ of error is given.

We regard the order directing the defendant to stand committed till the fine and costs were paid in the nature of final process,—a mere means of enforcing the payment of the judgment, which would have been suspended by any order staying the judgment itself. If, as claimed, the judgment is erroneous, a writ of error was the appropriate remedy, and upon that hypothesis we must assume the reviewing tribunal would, if asked, have made the writ a *supersedeas*, which would have suspended the order of commitment till the case could be disposed of on the merits. The following authorities fully sustain the view here taken: *People v. Foster*, 104 Ill. 156; *Same v. Pirfenbrink*, 96 Ill. 68; *Same v. Whitson*, 74 Ill. 20; *Hammond v. People*, 32 Ill. 446.

Had the circuit court simply entered an order in this case committing the petitioner to jail till he answered the questions propounded to him, quite a different question would be presented for determination. But that is not the case presented by this record; hence the constitutional question argued by counsel in their briefs<sup>1</sup> is not clearly presented, and the court has no disposition to go out of its way to express its views upon the subject. It is clear the imprisonment here complained of is no part of the punishment inflicted by the judgment, but is a mere subsidiary order in aid of the judgment, and which would have been discharged by payment of the judgment. As a writ of error may be prosecuted as well after as before payment in such a case, it is not perceived how the petitioner will be subjected to any particular hardship or inconvenience in holding his remedy, if he has any, is by writ of error, and not by this proceeding. Writ denied.

## NOTE.

An appeal will not lie from judgment for contempt, and no stay of proceedings will be granted; but, if the power of the court to fine or commit is exercised tyrannically, the case may generally be remedied by *habeas corpus* or *certiorari*. *Tyler v. Connolly*, (Cal.) 2 Pac. Rep. 414.

A witness who, without sufficient excuse, refuses to answer a question propounded to her by the grand jury, and refuses to obey the order of the court directing her to answer the same, is guilty of a contempt of court, for which she may be punished by fine and imprisonment. *Ex parte Harris*, (Utah,) 5 Pac. Rep. 129.

<sup>1</sup>The clerk informs us that the briefs in this case were not filed.—Ed.

**BELLEVILLE SAV. BANK v. BORNMAN and others, Ex'ts, etc.<sup>1</sup>**

(*Supreme Court of Illinois.* May 12, 1886.)

1. **GUARANTY—CONDITION THAT CO-GUARANTY BE SECURED.**  
Where the president of a corporation, as a guarantor of a draft by the corporation upon a bank, directed the treasurer of the corporation to inform the cashier of the bank that the draft was not to be taken unless A. placed his name on the back of it, which the treasurer communicated to the bank cashier, and A. did not place his name on the back of the draft, but gave a subsidiary separate writing of guaranty, whereupon the bank took the draft, there was no performance of the condition, and no guaranty by the president.
2. **SAME—LEAVING OF INSTRUMENT BY OBLIGOR WITH HIS AGENT, WITH CONDITION FOR DELIVERY, NOT AN ESCROW.**  
The leaving of the draft in the hands of the drawer's own treasurer, as above stated, by the company, and its president as guarantor, do not constitute a delivery in escrow by such guarantor.
3. **EVIDENCE—PAROL EVIDENCE AS TO WRITTEN CONTRACT—PAROL DIRECTIONS AS TO DELIVERY OF DOCUMENT ADMISSIBLE.**  
Directions to an agent as to the delivery of a written contract may be shown by parol in an action on the contract.
4. **EXECUTORS AND ADMINISTRATORS—INVALID WRITTEN CLAIM PRESENTED—RECOVERY ON FORMER CLAIM, OF WHICH THIS WAS RENEWAL, NOT ALLOWED.**  
Where a written obligation is presented as a claim against an estate, and such instrument proves to be invalid, but was given in renewal of a former obligation, a recovery upon the former obligation cannot be allowed in that proceeding.

Error to appellate court, Fourth district.

*Charles W. Thomas*, for plaintiff in error.

*Wilderman & Hamill*, for defendant in error.

**SHELDON, J.** This is an appeal from a judgment of the appellate court for the Fourth district, affirming a judgment of disallowance by the circuit court of St. Clair county of a claim against the estate of Conrad Bornman, deceased, presented by the Belleville Savings Bank for allowance in the county court; and, under the statute, certified to the circuit court for hearing. The claim presented for allowance was the following:

"\$10,000.

OFFICE OF BELLEVILLE NAIL MILL CO.,

"BELLEVILLE, ILL., July 17, 1874.

"Four months after date, pay to the order of Belleville Savings Bank, ten thousand dollars, value received, and charge same to account of Belleville Nail Mill Co.

CONRAD BORNMAN, Prest.

"JAS. C. WAUGH, Sec'y.

"To *F. H. Pieper, Treas., Belleville, Illinois.*"

Written across the face of this instrument appear the words: "Accepted. *F. H. PIEPER, Treas.*" On the back are the signatures of Conrad Bornman and James Waugh.

The trial in the circuit court was by the court without a jury. There was evidence that, when the draft was given, Bornman, after it was executed by the Belleville Nail Mill Company, put his name on the back, and gave it to the witness Pieper, directing him to tell the cashier of the

<sup>1</sup> A petition for rehearing is pending in this case.

Belleville Savings Bank that it was not to be taken by the bank unless Mr. Abend placed his name on the back of it, and that Pieper did so tell the cashier. This was evidence tending to show that Bornman imposed the condition that the draft should not be delivered to the bank unless Mr. Abend placed his name on the back of it, and that the bank, at the time of receiving the draft, knew of the condition; and, in support of the judgment of the circuit court, we must presume that court did find as facts the existence of such condition, and such knowledge of it. If there had been performance of this condition, Bornman's name on the back of the draft would have amounted to a guaranty by him of its payment. But without such performance Bornman's name on the draft was of no avail, and he incurred no obligation whatever in respect of the instrument. Abend never did place his name on the back of the draft. He signed a separate writing, guarantying the payment of the draft if the same was not paid by the Belleville Nail Mill Company or Conrad Bornman. This was not at all a compliance with the condition. It did not make Abend a co-guarantor with Bornman, or liable to share with him in any degree the responsibility of his guaranty.

Exception was taken to the admission of the testimony of Pieper, as above, as being parol evidence to show that the contract of guaranty of Bornman was other than as it was written. It was not evidence to contradict or vary a contract in writing, but to show that no contract was made; that there was never a delivery of Bornman's supposed writing of guaranty,—a delivery in violation of the condition for delivery being no delivery, and a delivery of the writing being essential to its binding force. And so as to the writing being in escrow, and the objection that a paper must be delivered to a third person if in escrow. There was no delivery whatever here, in escrow or otherwise. *Knight v. Hurlbut*, 74 Ill. 133; *Benton v. Martin*, 52 N. Y. 570; *Bronson v. Noyes*, 7 Wend. 191; *Jordan v. Davis*, 108 Ill. 336.

It appeared in evidence that this draft was given in renewal of a like one in every respect, except date made on March 14, 1874, and accepted in like manner, on the back of which were the signatures of Conrad Bornman, James Waugh, and Edward Abend, co-guarantors of the paper. Authorities are cited to the effect that, where a note is paid off by renewal, the debt is the same; the debt remains unpaid; the credit is extended; that, as a general rule, the surrender of the pre-existing note does not discharge it, but, in order to have such effect, there must be an express agreement to that end. It is insisted, under this rule, that even if the draft in this case, and Bornman's alleged guaranty of it, be invalid, there may then be recovery on the old draft and guaranty, in renewal of which the one in suit was given. How that might be had the old draft and guaranty been presented and filed as a claim against the estate, we need not now decide. The only claim presented in writing, and filed against the estate as the cause of action, was the last draft and alleged guaranty of July 17, 1874; and to show that there is no liability thereon defeats the claim which is here presented for allowance. It is true that, in the adjudication of claims against a decedent in the county court,

there are no formal pleadings,—no declaration is required. The statute, however, does require that the “claimant shall produce his claim in writing;” and when one presents, as his claim against an estate, an instrument in writing simply, and that instrument is shown by the proof upon trial to be invalid, we do not think it admissible to allow a recovery upon a different instrument in writing, although the former may have been given in renewal of the latter. To warrant that, there should at least have been notice given, before the trial, that the former instrument would be relied on as a cause of action, in order to have given opportunity to prepare for the making of any defense there might be against it. The record discloses nothing of any such notice here.

It is said the court had power, in this case, to adjust equities, and give judgment according to the right of the cause; that Bowman was willing to be co-guarantor with Abend, and guaranty half of the debt; and that it would be just that he should at least be held liable for what he was willing and expected to guaranty,—one-half of the debt. The question is one of legal liability. If Bornman made no contract of guaranty, there was no liability on his part. We find that he made no contract. He was willing to guaranty the payment of the draft upon the condition that Abend would be a co-guarantor with him. Abend declined to become such co-guarantor, and so Bornman did not enter into any contract of guaranty. There is no principle of law or equity for holding him bound as upon a contract of guaranty made with Abend for the payment of one-half of the debt merely because he was willing to but did not enter into such a contract, and come under such a liability.

The judgment of the appellate court must be affirmed.

CRAIG, J. On the evidence introduced in the county court, I think the plaintiff was entitled to recover. The fact that the last draft was filed as a claim ought not to defeat a recovery in a court where no pleadings are required, when the evidence introduced shows a right of recovery, as is the case here.

(119 Ill. 51)

**CHICAGO & A. R. Co. v. BRAGONIER.**

(*Supreme Court of Illinois. May 16, 1886.*)

**1. APPEAL—APPELLATE COURT'S FINDING OF FACTS FINAL.**

The finding of facts by the appellate court is final and conclusive on the supreme court. 2 Starr & C. St. c. 110, par. 89.

**2. MASTER AND SERVANT—RAILWAY EMPLOYEES—MACHINERY—NOTICE OF CONDITION OF MACHINERY.**

While it is the duty of a railway company to provide fit machinery and appliances, it is the duty of employes to observe and report defects in the machinery used in the especial field of his employment; and the company will not be chargeable for injuries to employes resulting from their neglect of such duty. This duty of employes is none the less where the company employs local inspectors, unless such inspection is given exclusively to them.<sup>1</sup>

**3. TRIAL—INSTRUCTIONS MUST BE BASED ON EVIDENCE.**

An instruction which states the legal effect of certain facts, of whose existence there is no evidence, is grossly erroneous.

<sup>1</sup>See note at end of case.

4. MASTER AND SERVANT—RAILWAY EMPLOYEES—DUTIES OF COMPANY AND EMPLOYEE IN INSPECTING MACHINERY—HABITUAL NEGLECT OF DUTY BY OTHERS NO EXCUSE.

The fact that the duty of employees in inspecting cars and machinery is habitually disregarded by some of the employees of the company will not excuse another for the non-performance of his duty in that behalf.<sup>1</sup>

5. SAME—LEGAL DUTY OF EMPLOYEES TO USE CARE CANNOT BE RELAXED BY PERMISSION OF COMPANY.

The law exacts of every employee the observance of reasonable care and diligence in the work assigned to him, and that duty he cannot be relieved from by his employer.

MULKEY, C. J., and SHOFF, J., dissent.

Appeal from appellate court, Third district.

*Williams & Capin* and *Fiffer & Phillips*, for appellant.

*William E. Hughes*, for appellee.

SCOTT, J. This suit was brought by Elsie Bragonier, administratrix of the estate of William Bragonier, deceased, against the Chicago & Alton Railroad Company, to recover damages resulting to the next of kin on account of the death of the intestate, which it is alleged was caused by the negligent conduct of defendant. There have been three trials of the cause in the circuit court, in each of which plaintiff succeeded in obtaining a judgment against defendant. The first and second judgments were reversed by the appellate court of the Second district on the appeal of defendant, but the last one was affirmed, and defendant brings the cause to this court on its further appeal.

Of course, there can be no controversy in this court as to the facts of the case. It will be understood the trial court and the appellate court have found every fact the evidence tends to establish in favor of plaintiff, and the finding of such facts by the latter court, under the statute, is conclusive in this court. The intestate had been, and was at the time of the receiving of the injury which caused his death, a brakeman on defendant's railroad, and was so employed at the time. On the morning of the eighth of August, 1879, the intestate was one of the number that were designated by the proper officers to go upon what is called a "wild" freight train from Roodhouse to St. Louis. The usual number of men were assigned to the train, and they were directed to leave a few minutes after 2 o'clock on that morning, which they did. After leaving Roodhouse, going south, the first stopping place was the Chicago, Burlington & Quincy Railroad crossing, about one-half of a mile from Whitehall. The train then went on to the yards at Whitehall, where it was intended some cars should be left. In doing that work the train was separated, and the car that injured the intestate was set back on the main line. At that point there was a slight down grade, and, to prevent this car from moving forward of its own weight, one of the brakemen "chucked" it. After the cars had been set off the engineer moved back on the main line, that he might hitch to this particular car. It was the duty of the intestate to make the coupling, which he undertook to do. When the

<sup>1</sup> See note at end of case.

engine moved back to this car, the coupling link failed to enter the bumper, and so the coupling was not made. The striking of the engine, however, knocked the car back some distance, perhaps 20 or 30 feet. It seems the link did not enter the draw-head because it had not been adjusted to the proper height. Perceiving the difficulty, the intestate undertook to change the link into another pocket, so that the coupling could be made. While engaged in that work, the car, that had been pushed back by the concussion, moved forward again of its own weight, and struck him, inflicting the fatal injury.

It is averred in one count of the declaration the car that caused the injury was unfit for use, in that the brake-ratchet was broken and lost, in consequence of which the car could not be controlled; that intestate did not know of such defect; and that defendant knew, or by the exercise of a high degree of care might have known, of the existence of such defect in time to have had the same repaired. In another count it is averred the ratchet-wheel was so imperfectly fitted and constructed the dog would not fall in place. The original and amended declaration contains quite a number of counts, in all of which some defect in the ratchet-wheel or dog, or perhaps both of them, is averred, but no other defect in the car is stated. In most, if not all, of the counts it is averred, by reason of the defect in the ratchet-wheel, the brake could not be set, and consequently the car was not subject to control.

At the trial two questions "arose in the case as made by the declaration: (1) Was plaintiff himself guilty of negligence, or, what is the same thing, did he observe ordinary care for his personal safety? And (2) was defendant guilty of negligence in regard to that which caused the injury?"

It is conceded the facts are within the province of the jury to find, and the law applicable to the facts is to be declared by the court. It is for this reason, if the court misdirects the jury as to the law applicable to the facts, it is error. Applying these obvious and well-understood principles, there is manifest error in this record. Before coming to consider some of the propositions of law which the court stated to the jury as fixing the liability of defendant for the death of plaintiff's intestate, it will be necessary to recur to some of the principal facts which the evidence tends to establish, and which must therefore be regarded as having been so found. The car that was the cause of the accident did not belong to defendant. It was a "Blue Line" car, and belonged to the West Wisconsin Railroad Company. It came on defendant's road at Joliet, on the night of the second of August, and reached Bloomington at 3:25 o'clock the next morning, left Bloomington at 8:40 o'clock the same day, and went to Jacksonville. It lay there until the afternoon of August the 7th, when it was taken to Roodhouse, and from there it was taken to Jerseyville on the 8th. It left Roodhouse, after having remained there about nine hours, at 2:18 A. M., on the morning of the 8th, for Jerseyville, and in less than an hour thereafter the intestate received the injury from which he died. It appears the company had car inspectors on its line of road over which the car passed, at Joliet, Dwight, Bloom-

ington, and Roodhouse, but not at any other stations. The duties of car inspectors are not prescribed by any written rules, but the duties they are expected to perform were sufficiently proved both by plaintiff and defendant. While it is their duty to make reasonably thorough examination of all cars that come to the stations where they are located, their examination in the first instance is most generally confined to the running and hauling gear of the cars, and unless their attention is called to a defect in the car by the train-men they seldom go on top of a car to make examination. Of course, any defects that can be discovered must be reported. It is expected that all defects that can only be discovered by going on top of the cars will be reported to them by the train-men. Where the principal shops are located, the most thorough examination of cars is made by car inspectors. It is not practicable to make a close examination of the ratchet-wheel and dog on freight cars without going upon the top of the car.

Rule 58, given in evidence, is in relation to the duties of conductors and train-men. A copy of it is placed in the hands of all employees that have anything to do with the running of trains. It provides: "Conductors and train-men must be in attendance at the trains one hour before leaving time, and personally know that everything connected with their trains is in perfect order." Another rule makes it the duty of every employee to exercise the utmost caution to avoid injury to himself or his fellows, especially in the switching or other movements of cars or trains. While these rules, enacted by the company, exact a high degree of vigilance and watchful care of all train-men, still they impose no higher duties than the law itself would impose upon them in the absence of all written or printed rules. Such written rules are important, as they make known definitely to all such employees their specific duties. It is the special duty of a brakeman to assist in the control and management of trains. The stopping of heavy freight trains is done largely by the use of the brakes. It is known to every brakeman that it is his duty to manage the brakes, and in that way to assist in stopping and otherwise control the running of these heavy freight trains. His duty in that respect can only be performed by means of efficient brakes. On freight trains brakes are and can be put on and let off only by train-men employed for that purpose. While they have other duties to perform, managing of the brakes on freight trains are among the most important. As brakemen are expected, on such trains, to constantly use the brakes, it becomes their reasonable duty to see that they are always in order for working; otherwise there would be no safety for the service. It is as much the duty of a brakeman to observe that the brakes which he is expected to handle are in working order as it is that of the engine driver to see that his engine is in order for use. All employees, in these respects, must be held to a high degree of care to insure any safety at all in railroad service. This is not declaring any new doctrine. It is simply the application of well-settled principles, and nothing more.

In *Illinois Cent. R. Co. v. Jewell*, 146 Ill. 99, it was held it was the duty of a brakeman to see that the brake was in a fit condition for use, and

the company was not to suffer for the neglect of such duty. It was said the condition of the brake was a matter under the special care of the brakeman, and it was his business, at all times, to see that it was in a fit condition for use, and report defects to the company. The same reasonable rule was declared in *Toledo, W. & W. Ry. Co. v. Eddy*, 72 Ill. 138. The defect insisted upon in this latter case was in the ladder attached to the car for the use of employes. It was said the evidence showed plaintiff had been in the constant use of the ladder, and it was therefore his duty to know that it was in repair, and, if not, to have reported it to the proper person for repair. It was for that reason held that an instruction that stated it is an implied contract by the company with their servants that they will keep their road and apparatus in safe repair, and in such condition that all of their machinery in operating the road can be used with safety to their employes, was not accurate under the evidence.

The rule of law undoubtedly is that it is primarily the duty of the company to provide good, safe, and proper machinery, so far as reasonable skill and diligence can construct it; but, when that duty has been once performed, it is a duty devolving upon the servants operating it to observe that it is in repair, or report it to the company. There is no reason why employes should be relieved from duties the law has heretofore imposed upon them, nor should their obligation to be watchful be relaxed. There are many cogent reasons why both the company and employe should be held to a strict performance of their respective duties and obligations to each other and to the public.

In view of these well-understood principles, and in view of the evidence, some of the instructions asked by plaintiff ought not to have been given. Many of them were highly calculated to mislead the jury as to the law applicable to the facts. The seventeenth instruction of the series is radically wrong. It not only does not state the law accurately, but it was calculated to mislead the jury in their investigation of the case. It is as follows:

"That if the jury believe from the evidence that the printed rules of the company requiring train-men to examine their trains were habitually disregarded by the company itself,—that is, if the officers of the company having charge of the freight trains habitually caused such trains to be made up, and sent out on the company's business after being made up, without affording brakemen an opportunity to examine the train,—such fact, if proven, would cause the rule to lose its authority over the brakemen; in other words, the rule must be obeyed by the master as well as by the servant, or it ceases to be operative as to both."

This instruction on its face is so obviously erroneous and vicious in the propositions it states it would seem to be wholly unnecessary to remark upon it. It assumes there is evidence that the officers of the company having charge of the freight trains habitually caused such trains to be made up, and sent out after being so made up, without affording brakemen an opportunity to examine them. This is not the fact. There is not a particle of evidence in this record that shows, or even tends to



show, the officers "habitually caused" freight trains to be made up and sent out without affording brakemen an opportunity to examine them. But the conclusion stated does not follow from the alleged misconduct of the officers; that is, the "rule must be obeyed by the master as well as by the servant, or it ceases to be operative as to both." Exactly what is meant by this proposition is not readily understood. The rule was never intended to have any application to the management of the company. It relates exclusively to conductors and train-men. If it means negligent conduct on the part of officers whose duty it is to make up and send out freight trains would relieve the company from the obvious duty to cause its cars to be inspected, nothing could be more erroneous, or hurtful to railroad service. As before stated, the rule imposes no higher duty upon brakemen than the law itself imposes in regard to the inspection of that part of the machinery of cars which they are required to use in performing their customary work; and it would be a most dangerous doctrine to hold that the omission of duty by other employes would relieve them from the duties and obligations the law exacts of them. The public exigency requires of all railroad employes a high degree of care in the running and management of trains, and the omission of duty by one servant cannot excuse another from his obligation to observe care. Otherwise railroad service would be most dangerous both to freight and passenger traffic.

In this connection it is proper to remark the objection taken by defendant to the evidence permitted to go to the jury, that some, and perhaps a good many, brakemen, omitted to observe rule 58, should have been sustained. That testimony was clearly inadmissible. It cannot be that the omission by one servant to perform his duty would afford the slightest excuse for the same negligent conduct in another employe. No matter how many other brakemen may have neglected to observe the rule, it was the duty of the intestate to conform to it as near as practicable, and any instruction that advised the jury he might be excused from the performance of his duty in that respect was positively erroneous.

It may also be further remarked, in this same connection, that, while plaintiff's counsel disclaimed any purpose to prove what were the customary or usual duties of brakeman on defendant's road, he was permitted to and did prove what was termed the "work" of brakemen. The word "work," in the sense used, could mean nothing else than "duty." As used, the words are convertible terms, and obviously mean the same thing. Either party had the right to prove what were the customary and usual duties of brakemen as to the inspection of the brakes, but that privilege was denied, by the rulings of the court, to defendant. In this there was error.

The second instruction of the series given for plaintiff is also objectionable, both as to the phraseology and as to the propositions of law it assumes to state. It is as follows:

"That where a railroad company undertakes the work of inspecting its cars, and is shown by the evidence to have intrusted that work to other serv-

ants than its brakemen, a brakeman employed by that railroad company, who goes upon one of the company's trains to work, has a right to expect that the cars with which he is to work are safe and suitable cars wherewith to work, and that the company employing him has exercised a reasonable degree of care to ascertain and remedy any defects arising from want of repairs which would be discovered by a reasonably careful inspection, if such defects, for want of repair, will make the car unsafe to the life and limbs of the brakeman while he is doing his work in a reasonably prudent manner, and using ordinary care for his own personal safety, and to ascertain any defects in the cars caused by want of repairs, if any."

This instruction assumes it is shown from the evidence defendant had intrusted the work of inspecting its cars to "other servants than its brakemen." Whatever defendant may have done in that regard was a question of fact for the jury, and not a fact to be stated by the court. It makes the impression on the mind that it is shown by the evidence in this case that defendant *had* intrusted the work of inspecting its cars to other servants than its brakemen, and in that respect it was erroneous and misleading.

But a worse feature of this instruction is, it implies by its terms that, when a railroad company employs local inspectors of its cars at particular stations, it thereby relieves all brakemen from the duty to observe whether the brakes on the cars they may be using are in repair, and fit for present use. If this is not its meaning, it can have no possible application to the facts of the case. That this is its evident meaning is clear from what follows, when it is said such brakeman "has a right to expect that the cars with which he is to work are safe and suitable wherewith to work," and that the inspection has been done with such care that he may enter upon the work of braking without making any examination for himself. The principle sought to be stated could not be regarded as law in any event, unless it had been added, "when the company had intrusted the *exclusive* work of inspecting its cars to other servants than brakemen." That, however, is not this case. The fact defendant may have and did employ car inspectors at certain stations did not relieve brakemen from the duty to observe the rule in regard to inspecting that part of the machinery they are expected to handle. The duty, in that respect, is as imperative as if they were the sole inspectors. It is simply laying the same duty upon other servants, as an additional guaranty the work may be faithfully and certainly done. Aside from this view, these car inspectors are local, at stations wide apart, and it is therefore impracticable for them to inspect brakes and other machinery at every station, as the safety of the service requires shall be done. But it is apprehended it is not in the power of the company to relieve brakemen from the obligation to observe care in doing the work particularly allotted to them, by rule or otherwise. The law exacts of every employe the observance of reasonable care and diligence in the work assigned to him, and that duty he cannot be relieved from by his employer or otherwise. That would be to permit the employer to allow negligence to the servant, which the law will not tolerate under any circumstances. Any instruction that holds that a servant in the employ of a

railroad company may be relieved from the observance of that care the law exacts of him is pernicious in the extreme.

The third instruction assumes, in direct terms, "such inspection is taken by the master,"—that is, the inspection of its cars in this case,—and for that and other obvious reasons is faulty, and should not have been given.

In many of the instructions the jury were told it is an undertaking of a railroad company with its brakemen to exercise reasonable care to furnish safe and suitable cars to work with. That is undoubtedly the law; but the doctrine stated has nothing whatever to do with the present case, and, under the evidence, was calculated to mislead the jury. It is not pretended the car that caused the death of the intestate was faulty in its original construction. The only ground of liability, as stated in the declaration, is that the ratchet-wheel and the dog—one or both of them—were out of order. No other defect is alleged to exist in the car, nor does the proof show it was otherwise imperfect in its construction, or that it was in any way out of repair. The attention of the jury should have been directed to the defects stated in the declaration, and not generally to the condition of the car, about which no controversy existed. This manner of instructing the jury was condemned by this court in *Toledo, W. & W. Ry. Co. v. Eddy, supra*.

The giving of the seventh of plaintiff's instructions makes some further discussion necessary, and will warrant an allusion to some facts in the case not previously stated. By it the jury were told, in substance, if they believe from the evidence it was no part of the duty of brakemen to inspect freight cars, and to ascertain defects making the same unsafe, then it was the duty of defendant to provide some method of inspecting such cars whereby such defects could, by the exercise of ordinary care, be ascertained and remedied, and the omission to do so would render the company liable for an injury to a brakeman using the same with ordinary care. If this charge simply means the jury may find it is no part of the duty of a brakeman to inspect cars generally as to their construction, the strength of the wheels, or axles or timbers used in constructing them, undoubtedly the jury might so find, for no one pretends it was any part of the duty of a brakeman to make any such general inspection of cars. But whether it was the duty of brakemen to make a general inspection of freight cars is not now and was not a question on the trial, and it was error to introduce it into this case by instruction or by argument. Neither rule 58 nor the law requires any such duties of brakemen. What the rule and what the law do require of them is that they shall observe whether the machinery they are to handle is in order, and reasonably fit for use; and, if this instruction means the jury might believe from the evidence brakemen were not bound to observe their duty in that respect, it was faulty, and should not have been given.

The concluding sentence of the instruction is also calculated to, and no doubt did, mislead the jury. It says: "If he [intestate] had no notice, or by the exercise of reasonable care could have had no notice, of that dangerous and defective condition of the car." Here, again, a vice com-

mon to many of the instructions given for plaintiff is apparent. What reason was there for directing the attention of the jury to "that dangerous and defective condition of the car?" No complaint has been made as to the car itself. So far as this evidence discloses, it was well constructed and in repair. Why was not the attention of the jury directed alone to the ratchet-wheel and the dog that rendered the brake inefficient? No other ground of liability was stated in the declaration, or even claimed by the proof. It is simply absurd to direct the jury to inquire whether the intestate could, by the exercise of ordinary care, have discovered the condition of the ratchet-wheel and dog if they were in the condition the witnesses say they were. The slightest examination would have disclosed their exact condition, and the law imposed upon him the duty to make examination with reasonable care. The brakeman employed on the train with the intestate discovered its condition as soon as he touched the brake. Had the intestate tried the brake at any time, he would have learned, as his fellow-brakeman did, it was out of repair. Surely, by the exercise of ordinary care he would have discovered its condition; and charging the jury to inquire whether he could have ascertained its condition by the use of ordinary care is simply to afford them a pretext to find the intestate did not know the condition of the brake, that they might find a verdict for plaintiff.

The great number of instructions given on behalf of both plaintiff and defendant renders it impracticable to comment on all of them without extending this opinion to a most unreasonable length. Enough has been said to indicate to the trial court the views entertained by this court as to the law applicable to the facts, and on another trial the instructions should be made to conform as near as practicable to the law as stated in this opinion.

The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court.

MULKEY, C. J., and SHOPE, J. We do not concur in the opinion in this case.

#### NOTE.

1. DUTY OF RAILWAY COMPANY TO INSPECT CARE. It is a general rule, applicable to all kinds of service, that a master who negligently fails to furnish his servants with safe machinery, means, and appliances for the work required to be done, is liable for injuries to the servant caused by such negligence. *Thompson v. Hermann*, (Wis.) 3 N. W. Rep. 579.

It is the duty of a master to use due care in supplying and maintaining suitable instrumentalities for the performance of the work required of his servants. This duty is imposed upon him as master. It is an absolute and personal duty; that is to say, it is one from responsibility for the proper discharge of which the master cannot escape by intrusting its performance to a servant or agent. If the master does so intrust it, the servant or agent is charged with the master's duty, and, in the case of a corporation, such servant or agent occupies the place of the corporation, and the latter is deemed present, and consequently liable for the manner in which such servant or agent acts. The negligence of the agent or servant in such cases is the negligence of the master. *Thompson v. Drymala*, (Minn.) 1 N. W. Rep. 255.

It is said in *Ransier v. Minneapolis & St. L. Ry. Co.*, (Minn.) 20 N. W. Rep. 332, that the use by a servant of defective and unsafe machinery delivered to him for use by the master, although the servant may have been guilty of negligence in using it, does not relieve the master from responsibility to a fellow-servant injured thereby on account of the unsafe condition of the machinery furnished; that there is no legal presumption

that it is the duty of the conductor of a railway freight train to inspect the cars and machinery of his train; or that he is chargeable with negligence for using cars if the defect was such that it might have been discovered by inspection.

An employe charged with the duty of inspecting cars, and a brakeman using such cars, are not co-employees in such sense that the latter cannot recover from the corporation for an injury received through the negligence of the former in failing to properly perform his duties. *Brann v. Chicago, R. I. & P. R. Co.*, (Iowa,) 6 N. W. Rep. 5.

As respects the duty of a railroad corporation to have its cars inspected so that they may be maintained in a safe condition for use by its servants, the master is not exonerated from liability to a servant for the neglect of this duty, upon the ground that its car inspector, and the servant injured by reason of his neglect, were fellow-servants; following *Tierney v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 311, S. C. 23 N.W. Rep. 223, and *Fay v. Same*, 30 Minn. 231, S. C. 15 N.W. Rep. 241. *Macy v. St. Paul & D. Ry. Co.*, (Minn.) 28 N. W. Rep. 249.

The master is liable as for his own neglect, in failing to furnish proper and safe machinery or implements, and in failing to keep them in a safe and suitable condition for such use. These duties belong to the master, and he cannot rid himself of the responsibility for not performing them by showing that he delegated the performance to another servant, who neglected to follow his instructions. *Herbert v. Northern Pac. R. Co.*, (Dak.) 13 N. W. Rep. 349.

A servant to whom a master intrusts the duty of furnishing safe and suitable machinery or appliances for other servants to work with is not their fellow-servant so as to prevent liability of master to them for injuries caused by his negligence in performing that duty. *Kelly v. Erie Telegraph & Telephone Co.*, (Minn.) 25 N. W. Rep. 703.

Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition; and when an employe, in the proper discharge of his duty, is injured from a failure on the part of the company to perform this personal duty, it is liable. *King v. Ohio, etc., R. Co.*, 14 Fed. Rep. 277.

It seems well established that a master is responsible to his servant for an injury sustained by him, without his fault, in consequence of the negligence of a fellow-servant, where the master has charged the latter with the duty of providing proper appliances for carrying on the work. *Gilmore v. Northern Pac. Ry. Co.*, 13 Fed. Rep. 836.

A railway brakeman can maintain an action against the corporation for an injury sustained through its negligence to have its cars inspected. *Braun v. Chicago, R. I. & P. Ry. Co.*, (Iowa,) 6 N. W. Rep. 5.

A corporation is liable for negligence, or want of proper care, in respect to such acts and duties as it is required to perform and discharge as master or principal, without regard to the rank or title of the agent intrusted with their performance. As to such acts the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed. *Filke v. Boston & A. R. Co.*, 53 N. Y. 549.

When the servant by whose acts of negligence other servants of the common employer have received injury is the *alter ego* of the master, to whom he has left everything, then the middle-man's negligence is the negligence of the employer, for which the latter is liable. *Malone v. Hathaway*, 84 N. Y. 5.

Where a general servant occupies the place of the master, the latter cannot, by thus delegating his authority, and absenting himself, escape from liability for the non-performance of the duties he owed to his employes. This rule applies as well to individuals as to corporations. *Corcoran v. Holbrook*, 59 N. Y. 517.

**2. DEFECTIVE MACHINERY.** Respecting the duty of the master to provide reasonably suitable and safe machinery and appliances, and to keep them in repair, see *McGee v. Boston Cordage Co.*, (Mass.) 1 N. E. Rep. 745, and note; *Stringham v. Stewart*, (N. Y.) 3 N. E. Rep. 575, and note, 578, 579; *Marsh v. Chickering*, (N. Y.) 5 N. E. Rep. 56, and note, 58, 59; *Pittsburgh, C. & St. L. Ry. Co. v. Adams*, (Ind.) Id. 187, and note, 197; *Sweeney v. Berlin & Jones Envelope Co.*, (N. Y.) Id. 358; *Benzing v. Steinway*, (N. Y.) Id. 449, and note, 451; *Chicago, R. I. & P. Ry. Co. v. Londergan*, (Ill.) 7 N. E. Rep. 55.

To render the master liable for an injury to his employe, caused by defective machinery furnished by the former for the latter's use, it must appear that the master knew, or by the exercise of proper diligence ought to have known, of its unfitness; and that the employe did not know, or could not reasonably be held to have known, of the defect. *Hull v. Hall*, (Me.) 3 Atl. Rep. 38.

In an action for injuries resulting from defects in machinery and appliances used, it must be shown that the master had knowledge, or by the exercise of reasonable care and diligence should have known, of the defect, before a recovery can be had. *Ballou v. Chicago & N. W. Ry. Co.*, (Wis.) 11 N. W. Rep. 559.

It was said in *Hayden v. Smithville Manufg Co.*, 29 Conn. 548, that "an employe cannot recover for an injury suffered in the course of his employment, from a defect in the machinery used by his employer, unless the employer knew or ought to have known of the defect, and the employe did not know of it, or had not equal means of knowledge." See, also, *Chicago & N. W. Ry. Co. v. Jackson*, 55 Ill. 492.

In *Atchison, T. & S. F. R. Co. v. Ledbetter*, (Kan.) 8 Pac. Rep. 411, which was an action by a yard switchman against a railroad company in whose employ he had been, for injuries alleged to have resulted in consequence of a defect in the draw-bar of a car, or in some of its accompanying appliances, it was held that no recovery could be had against the railroad company except by proof of negligence on its part, and that where it is not shown that the railroad company had any knowledge of the defect existing in the draw-bar, or in some of its accompanying appliances, prior to or at the time of the injury, or that such defect had existed for any considerable length of time, or that by the exercise of due care the company would or should have known of the defect, there can be no recovery.

An employe of a railroad company cannot recover for an injury sustained by reason of an alleged defective brake, unless it is shown that the company was negligent, either in providing the machinery which caused the injury, or in selecting the mechanics whose duty it is to keep it in good order. *Wonder v. Baltimore & O. R. Co.*, 32 Md. 411.

The legal implication is that the employer will adopt suitable instruments and means with which to carry on his business, and when injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of the work, the employer is liable, provided he knew, or might have known by the exercise of reasonable care, that the apparatus was unsafe. *Gibson v. Pacific R. Co.*, 46 Mo. 163.

To recover for an injury to a servant caused by defective machinery, it must be shown that the master knew or ought to have known of such defects. *Columbus, C. & I. C. Ry. Co. v. Troesch*, 88 Ill. 545.

3. NEGLIGENCE OF FELLOW-SERVANTS. For a full discussion of the question of the liability of the common master for an injury resulting to an employe by reason of the negligence of a fellow-employe or co-servant, see *Neubauer v. New York, L. E. & W. R. Co.*, (N. Y.) 4 N. E. Rep. 125, and note, 128, 127; *Benzing v. Steinway*, (N. Y.) 5 N. E. Rep. 449; and *Clifford v. Old Colony R. Co.*, (Mass.) 6 N. E. Rep. 751, and note, 752.

(117 Ill. 203)

ILLINOIS CENT. R. CO. v. WILLENBORG and another.

(*Supreme Court of Illinois*. May 12, 1886.)

1. EQUITY—JURISDICTION—BREACH OF COVENANT NOT ALONE GROUND FOR.

The breach of a covenant, entered into for a valuable consideration, to maintain a farm crossing, is not in itself a ground for equitable relief. The remedy is complete at law.

2. CONSTITUTIONAL LAW—POLICE POWER—CHARTERS NOT CONTRACTS EXEMPTING HOLDERS FROM CONTROL BY—REGULATION BY, APPLIES TO PREVIOUSLY CHARTERED COMPANIES.

Charters of companies are not contracts exempting them from any subsequent regulation or control by the state. All charters are subject to regulation and control by the police power of the state; *a. g.*, statute exercising the police power by regulating railroads applies to companies previously chartered.

3. SAME—POLICE POWER EXERCISED TO PREVENT PRIVATE INJURY—THIS NOT A TAKING FOR PRIVATE USE.

The law has always required the citizen so to use his property as not unnecessarily to injure another; and to compel the observance of that rule even private property may be brought within legislative control.

4. SAME—PUBLIC CHARACTER OF PROPERTY OR BUSINESS SUBJECTS IT TO POLICE REGULATION—CONSTRUCTION OF FARM CROSSING BY RAILWAY COMPANY COMPELLABLE.

Where property, whether belonging to a natural person or a corporation, becomes affected with a public interest, it ceases to be *jura privati* only. Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. In the exercise of this power the construction of a farm crossing by a railway company is compellable, and the statute imposing that duty is a valid exercise of the police power. 2 Starr & C. St. c. 114.

Error to Effingham.

*Green & Gilbert*, for plaintiff in error.

*John C. White*, for defendants in error.

SCOTT, J. The original bill in this case is for an injunction and relief, and was brought by the Illinois Central Railroad Company against Henry Willenborg and Frank Deckerman. It appears from the allegations of the pleadings the right of way on which the road of complainant is constructed divides lands owned by defendant Willenborg, and that a farm crossing over the land of complainant's road is necessary for the convenient use of the land by the owner and his tenants. Defendant Deckerman is a tenant of his co-defendant Willenborg, and has no other interest in the litigation. As early as 1852 the railroad company acquired the right of way over the premises by deed from Henrick Fisher, and soon after constructed its road over the same, and since then has operated its trains thereon. On the twenty-fifth day of May, 1882, defendants notified the railroad company to build or construct, for the use of the farm, a private crossing over its track at a certain point indicated, and that, if it did not build such crossing, defendants would proceed, under the statute, to construct it. The railroad company refused or neglected to build a crossing at the point indicated, or elsewhere on the farm; and, defendants having entered upon the work of constructing such crossing, the bill in this case was brought to perpetually enjoin the further prosecution of the proposed work. It is alleged as a ground of relief that, at the point where the notice to defendant required the crossing to be constructed, there is a deep cut, where it is alleged it would have been manifestly unsafe to make a farm crossing; that, when complainant purchased the right of way, it realized the danger of building a farm crossing at the point in question, and had voluntarily made a crossing, for the use of the owner of the land, at a point 300 feet north of the point now insisted upon, which for more than 20 years had been satisfactory.

The bill makes the point, sections 51 and 52, c. 114, Rev. St., under which it is alleged defendants had entered upon the right of way, and were constructing the crossing, are not obligatory on the railroad company, for the reason they were enacted many years since complainant received its charter from the state, under which it had constructed and operated its road, and, if enforced, the result would be the taking of the private property of the company for the private use and benefit of the adjoining land-owners, which, it is charged, cannot be done, under the constitution, without first making compensation. In their answers defendants insist that sections 51 and 52, cited, are applicable and binding on the railroad company, and, if enforced, will violate no provision of the constitution. They also insist upon the duty resting upon the company arising out of the clause of the deed from Fisher to the corporation, which obligated the company to erect and maintain for him, and to whose rights defendants have succeeded, convenient crossing, which is as follows: "It is understood that said company shall erect and maintain such crossings as may be necessary to the accommodation of persons whose lands are divided by said tract." They also deny that such cross-

ing, when constructed, would be dangerous, either to the parties using it or to the railroad company. After filing their answer, defendants filed their cross-bill, alleging the duty of the company to construct the crossing both under the statute, and also under the covenants contained in the right-of-way deed. On hearing the evidence the circuit court dismissed the original bill for want of equity, and dissolved the injunction, with damages, and granted relief on the cross-bill. To reverse that decision complainant brings the case to this court on error.

There would seem to be no equitable consideration in support of the original bill, since complainant, by accepting the deed of the right of way, had covenanted to erect and maintain such crossing as may be necessary for the accommodation of persons whose lands are divided by the track of its road. Under that covenant it is and was the clear duty of the railroad company to erect and maintain a suitable farm crossing for the owners of the land divided by its track, and equity will hardly listen with much favor to the complaint of a party who seeks relief against obvious duty arising out of a covenant entered into upon a valuable consideration.

But the decision dismissing the original bill, as was done, may be sustained on the broad ground it was the duty of the company, under the statute, to construct suitable farm crossings for the use of the parties through whose lands its road-bed is constructed. Section 1 of the act of 1874 in relation to fencing and operating a railroad makes it the duty of every railroad corporation, within six months after its line is open for use, to construct farm crossings "when and where the same may be found necessary for the use of the proprietor of the land adjoining such railroad." Section 3 of the same act provides, whenever a railroad corporation shall neglect or refuse to build or repair such farm crossings as provided in that act, the owner or occupant of the lands adjoining such railroad, through which the railroad track is or may be laid, may give notice in writing to such corporation to build such crossing 10 days after service of notice. Section 4 provides, in case the corporation refuses to build such crossing after notice as provided in section 3, the owner or occupant of such land may build it, and may recover double the value thereof from the defaulting corporation, with damages.

Had similar provisions with these sections of the statute been incorporated in the charter of the corporation, or existed in some law that entered into its charter, it would hardly have been insisted the company would not be bound to observe them, or that their enforcement would violate any provisions of the constitution. The point is made, however, that these provisions are not obligatory on this corporation because they were enacted many years since it received its charter from the state. This is a misapprehension of the law. The regulation in regard to fencing railroad tracks, and the construction of farm crossings, for the use of adjoining land-owners, are police regulations, in the strict sense of those terms, and apply with equal force to corporations whose tracks are already built, as well as those to be thereafter constructed. They have reference to the public security, both as to persons and to property. All



property devoted to public uses takes on a nature or qualification *quasi* public, and is for that reason held to be subject to legislative control in a greater or less degree, and to which the mere private property of the citizen is not subjected. Rights purely and exclusively private, in nowise affecting others, and in no way affecting public morals, are not regarded as being within the control of the police power; nor can mere private property be taken for public uses without making to the owner just compensation; yet the law has always required the citizen to so use his property as not unnecessarily to injure another; and to compel the observance of that rule even private property may be brought within legislative control to that extent. But where property, whether belonging to a natural person or to a corporation, becomes affected with a public interest, it ceases to be *juris privati* only. Where a party devotes his property to a public use, the community at large acquire such a qualified interest as will subject it to legislative control for the common welfare. Accordingly, the property of railroads and other similar corporations transacting business for and with the public has been subjected to burdens not imposed on the owners of mere private property used purely and exclusively for private interest. The distinctions in this regard have been uniformly observed. It is for this reason it has been frequently held railroad corporations, notwithstanding no such right had been reserved in their charter, may be required to fence their track, to put in cattle-guards, to place upon their engines a bell, and to do many other things for the protection of life and property. No public exigency has ever made it necessary to impose such burdens on the citizen exercising no functions or occupations in their nature public or *quasi* public. Railroad companies are public corporations in a limited sense, although the right of way, the road-bed, and the track thereon, are for the exclusive use of the owners, over which only their own conveyances are propelled. All others are excluded. The traffic, however, on railways, bears no analogy to our notions of travel on an ordinary street or highway. The uses are totally different, and even inconsistent. The one is exclusive in favor of the owner, and the other is open and free to all. The common use of railroads by the public could not be otherwise than dangerous. It is for that reason their use is restricted to the owner. The fact railroad corporations are granted exclusive franchises to conduct a business in its nature public must subject them to all reasonable control to secure the public safety and welfare. It is now the settled law that railroad corporations are within the operation of all reasonable police regulations. Otherwise there would be no security for the life or property of the citizen residing in the vicinity.

No reason is perceived why, upon the same principle on which a railroad corporation may be required to fence its track and construct cattle-guards it may not be required also to construct farm crossings. The one is as much required as the other for the convenience and safety of adjoining land-owners. Such corporations are permitted, in order to secure the best and most useful road-bed, to make deep cuts, and throw up embankments on their right of way through farms. On account of

the peculiar construction of all railways it is obvious it is impracticable for the owner whose lands are divided by the track to pass from one part to another unless crossings are provided. Indeed, it would be most dangerous if persons should attempt to cross a railroad track at a point where no provision is made for that purpose; and persons are not permitted to do so. It certainly cannot be inferred the legislature would irrevocably grant to a railroad corporation a franchise to construct a railway through farm lands in such manner as to cut off all right of passage to and from the portion separated by the road-bed. The proposition that a corporation can construct a railroad from Galena to Cairo, and cannot, under the police power of the state, be compelled to construct "farm crossings" over its track for the use of the owners of lands over which it passes, is too absurd to be considered seriously. That would occasion irreparable injury to the adjoining proprietor, and would be in violation of the maxim of the law, *sic utere tuo ut alienum non lædas*. The conclusion seems inevitable, the statute that requires a railroad corporation to construct farm crossings "when and where the same may become necessary for the use of the proprietors of the land adjoining such railroad," as well as to fence its track and construct cattle-guards, is a reasonable police regulation, and the enforcement of the duty enjoined by the statute violates no provision of the constitution.

The case of *Illinois Cent. R. Co. v. Bloomington*, 76 Ill. 447, is not analogous, in its facts or otherwise, with the case being considered, and is therefore no authority in support of the position taken by counsel in this case. In that case a new street was opened by the corporate authorities of the city across the track of the railroad, and it was thought to impose the whole burden upon the company to construct the approach of such new street to and over the track, and this, it was held, could not be done under any power conferred by the city charter. Constructing approaches to and crossings over the track for any number of streets that may be laid out by a municipal corporation is a very different thing from constructing an ordinary farm crossing, that is made indispensable by the construction of the track itself. The latter could reasonably be anticipated when the railroad was constructed, but it could hardly be expected the company could anticipate the municipal corporation would open new streets where none had existed when the track was located. Inasmuch as there was no law that made it the duty of the company to conform to a new state of facts that might transpire, it was held the general assembly had no rightful authority, under the constitution, to impose such burden upon the company by a subsequent law. Nor is the case of *Chalcraft v. Louisville, E. & St. L. R. R.*, 113 Ill. 86, sufficiently analogous in its facts to be an authority against the views expressed in this opinion.

The objection that the construction of a crossing at the point indicated would be dangerous, cannot be allowed to prevail. It is not shown there is any other place on the premises where the crossing would be less dangerous. That defendants are entitled to a crossing somewhere on their own land, either under the contract in the deed, or under the

statute, not the slightest doubt is entertained. But would a farm crossing at the point in question be dangerous? It is not proved it would be. It is shown the cut at the point in question is not much more, if any, than six feet below the line of the natural surface. Some dirt has been thrown from the cut upon the adjacent bank, and that makes the cut seem deeper than it really is. It is quite apparent a farm crossing, properly constructed, at the point indicated, would not be dangerous for all the use that would be made of it for an ordinary farm crossing. Such crossings are only intended for the use and benefit of the farm, and the persons using it would be expected to observe more care than is ordinarily observed by the public on an ordinary highway. It may be that, if there were another point on the farm of defendant where a crossing would be less dangerous, the company, when notified to build it, would have had the privilege to select it, but no such proof is made; nor did the company elect to build a crossing elsewhere on the land of defendant; nor were defendants under any obligation to accept the crossing on other lands, that had been provided many years before. To make any use of that crossing they had to follow the track on the right of way for a considerable distance before reaching it, and then return on the right of way, on the other side of the track, to their own land. Such a mode of crossing the track is most dangerous, and the law will not require defendants to expose themselves to such hazard as its use would involve. In any view that can be taken, the decree dismissing the original bill is correct.

Coming now to the branch of the case made by the cross-bill of defendants, it is thought the decree rendered in their favor cannot be sustained. Whether they are entitled to have a crossing constructed by the company for their use, either under the covenant in the right-of-way deed, or under the statute, or both, their remedy is clearly in a court of law, and they will be remitted to that forum, where such matters are properly cognizable. The remedy for the complaint made against the railroad company for the omission of duty, whether it arises out of a contract or under the statute, is full, complete, and adequate at law, and no reason appears why a court of equity should assume jurisdiction.

The decree of the circuit court dismissing the original bill will be affirmed, and the decree granting relief to defendants on their cross-bill will be reversed, and the cross-bill dismissed. Each party will be required to pay its own costs in this court.

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(142 Mass. 110)

STANCHFIELD v. CITY OF NEWTON.

(*Supreme Judicial Court of Massachusetts. Middlesex. June 29, 1886.*)

1. MUNICIPAL CORPORATIONS—DRAINS—SURFACE WATER—HIGHWAYS—DRAINAGE BY CITIES—DAMAGES—RIPARIAN PROPRIETOR—OVERFLOW.

The plaintiff was the owner of land, the rear of which extended back to a brook or drain or ditch. The city of N., in which the premises were situate, for the purpose of draining the surface of certain of its highways, built a

drain, with catch-basins for collecting the water, and turning it into the same, and this drain connected with another drain, which terminated in a catch-basin, from which water passed into the rear of plaintiff's premises; the intention being to empty the water coming through the drain-pipe into the brook or drain before named, and so carry the same to the river. Instead of connecting directly with said brook, the drain-pipe was stopped at the catch-basin, where there was a discontinued blind drain made of rubble-stone and dirt, through which only the water could pass to the brook, so that water rose to the surface, and spread over the land of plaintiff; and the sand and gravel carried into the brook choked up the culvert at its outlet, so that the water was turned back upon plaintiff's premises. By the construction of these drains water which would not otherwise have flowed towards plaintiff's premises was conveyed there. *Held*, that the city had a right to drain the surface of its highways, even if water was thereby turned upon the land of plaintiff, provided the methods adopted were proper, and that the plaintiff could make no complaint of the city for the construction of the catch-basins and drain, and that, in the absence of evidence that the defendant had improperly constructed its drain, and in the absence of evidence that the plaintiff was a riparian owner of land bounding on a natural water-course, the plaintiff could not maintain an action against the city for interfering with the water-course so that water which flowed into it could not flow out of it.<sup>1</sup>

2. SAME—PRIVATE WAY—DRAIN—CONSENT OF OWNERS—RIPARIAN PROPRIETOR.

Where a city constructed a drain for the purpose of draining the surface of its highways, and, with the consent of the owners, connected it with a drain which it constructed through a private way, and water was thus conveyed to a catch-basin, whence it flowed upon the premises of the plaintiff, and was also conducted to a brook in the rear of the land of the latter, which brook overflowed in consequence of the additional volume of water turned into it, and damaged the premises of plaintiff, *held*, that the city rightfully constructed the drain through the private way, and that the plaintiff could not rightfully complain of the flooding of the brook unless he was a riparian proprietor of the brook.

This was an action of tort to recover damages arising from the alleged flooding of plaintiff's premises situated in Church street, in Newton. At the trial in the superior court, before BRIGHAM, C. J., there was evidence, on the part of the plaintiff, tending to prove the following facts:

That the plaintiff was the owner of certain premises on Church street, extending back from said street about 180 feet on the southerly side, to a brook or drain, also described by some of the witnesses as a "ditch," by a gradual descent; that there was a brook or drain commencing at Maple place, westerly of his premises, and adjacent thereto, with a small channel, gradually deepening until it reached Center street, where it was about two and a half feet deep, having a regular channel and banks, but that there is little water therein except at the wet seasons of the year, and much of the time none at all; that it passed under Center street, a public highway, through a culvert, which it appeared by the evidence had been there for upwards of 40 years, and thence down to the Charles river; that southerly of the plaintiff's premises was a long range of hills, the natural drainage of which was in part in the rear of the said premises, and in part to the east and west of the same; that the natural drainage of Church street, and other streets northerly of said premises, was for the most part westerly and northerly and away from said premises,—the descent from Church street southerly being towards said brook; that in 1875 the city laid a large cement drain-pipe along Church street, with catch-basins for collecting the water, and turning it into the same, and said drain extended about 700 feet easterly along Church street, and then, turning down Maple place, extended about 180 feet, terminating in a catch-basin, from which the water passed into the rear of the plaintiff's premises,—the

<sup>1</sup> See note at end of case.

intention being to empty the water coming through the drain-pipe into the brook or drain before named, and so carry the same to the Charles river; that, instead of connecting directly with said brook, the drain-pipe was stopped at the catch-basin, where was a discontinued blind drain made of loose rubble-stone and dirt, through which only the water could pass to the brook, so that the water rose to the surface, and spread over the land during the springs of 1876, 1877, and 1878; that the flowage through the drain-pipe was very great after rains and in wet seasons; that Center street crossed Church street about 700 feet east of Maple place, at right angles, coming down the hill in a southerly direction, and leading into the street on the east and west were a number of other streets, along which there were, within the limits of the street, constructed side drains for surface water, which brought a large amount of water down said Center street into said culvert, let into it by grated openings made for that purpose; that naturally large portions of said water could not come to said culvert, or to the plaintiff's premises; that this water brought to said culvert large quantities of sand, gravel, etc., so that in 1876 it became more or less filled up, and this water also, not finding an outlet to the Charles river through the culvert, was turned back into the rear of and upon the plaintiff's premises; that this water, with that brought there from the west end of Church street by the said drain-pipe, flooded the plaintiff's premises, his cellar, kitchen, and out-houses, doing the damage complained of in this action; that this state of things continued from March, 1876, to 1879, when the superintendent of streets took up the blind drain, and connected the drain-pipe or catch-basin directly with the brook, and cleared out and deepened the channel of the brook from Maple place, and the culvert under Center street, it taking from 15 to 20 men about 30 days to do the work, and thereupon the flooding ceased.

The verdict was for defendant, and the plaintiff alleged exceptions.

*E. W. Cate*, for plaintiff.

*W. S. Slocum*, for defendant.

DEVENS, J. The plaintiff sought to recover upon two distinct grounds: *First*, that being a riparian proprietor upon the brook, water-course, ditch, or drain (for it is called by all these names) which flowed in the rear of his premises, he was entitled to the natural flow of water therein, and that such flow had been greatly increased in volume and rendered foul by the acts of the defendant; and, *second*, that, even if not a riparian proprietor, he was injured by the imperfect construction of the drain through Maple street, by which the water from Church street was intended to be conducted to the brook, and also, by the defective preparation of the line of the brook, considered with reference to its channel, the means of discharge from it by a culvert, and the drainage brought to it, the land of the plaintiff in the vicinity having been overflowed, and injury to him thus occasioned.

There was evidence on behalf of the plaintiff that a drain-pipe had been constructed along Church street, in the city of Newton, for some 700 feet, whose only object was the collection of surface water; that the natural drainage of a portion of the territory was in a different direction from plaintiff's premises; and that in the rear of the plaintiff's premises was a small brook or ditch,—whether it was a natural water-course or not was in dispute, and also whether it was entirely outside of and beyond the plaintiff's premises. There was further evidence that the drain

in Church street was connected with another drain-pipe, through which its waters passed, 180 feet in length, that extended through Maple place, a private way, by leave of the proprietors thereof, and terminated in a catch-basin, from which water passed, by overflow, to the plaintiff's premises; that this drain-pipe, at the time of the injuries of which plaintiff complained, did not extend to the brook or ditch; and that, the only connection being by a discontinued blind drain of rubble-stone and dirt, the water, by reason of the flowage in rains or wet seasons, rose to the surface, and thus spread over the plaintiff's land. There was further evidence that the land of the plaintiff had been overflowed by the overflow of the brook or ditch, and that there was no sufficient outlet from the same; that the only outlet provided was by a culvert under Center street, which was insufficient, and had also been permitted to be choked up; that, further, there was a drainage of surface water not naturally coming there, near Center street, and that this back-water had been thrown upon the plaintiff's land. The evidence on behalf of defendant was more or less contradictory as to the said facts and causes of damage as alleged by the plaintiff.

The second, third, and fourth instructions requested were, in substance, that the defendant could not lawfully collect, from a great extent of country, water not naturally coming near the plaintiff's land; and, conducting it by an artificial channel, through a private way, precipitate it upon the rear of his lot, with force and volume increased by the mode in which it was conducted, and the extent of country from which it was drawn. The seventh, eighth, and ninth instructions requested were, in substance, that if there was a natural water-course or ditch running in the rear of plaintiff's premises, which passed across Center street, defendant was bound to make there a suitable culvert for the passage of the water through the same, which might naturally come there, or which might be brought there by its acts and doings, as by the construction of a drain through Maple street; and further provide that it should not be obstructed; that if there was a culvert maintained by private persons for more than 20 years, that it was the duty of defendant to see that it was not obstructed, even if the waters were not those of a natural water-course; and, further, that if, by neglect in these respects, the water overflowed, or was thrown back upon plaintiff's premises, the defendant was responsible.

These latter requests are apparently intended to prevent the inquiry as to the rights of the plaintiff, even if it be assumed that he was not a riparian proprietor. The requests do not clearly distinguish between the two grounds upon which the plaintiff was entitled, upon the evidence, to present his case, and it would have been impossible to give them precisely as asked. In the instructions as given this distinction was carefully made by the presiding judge, and it is to be considered whether, as given, they accurately and sufficiently cover the case as presented.

The first portion of them is devoted to considering the rights of the plaintiff as a riparian proprietor upon the brook. They hold that the city has no right to go beyond the limits of its highways, without the per-

mission of the adjoining proprietors, for the disposal of its surface water; that, with the assent of the owners of Maple place, it might conduct the surface water by a drain therein, and, with the permission of the owners of the land through which the water-course or ditch ran, might lawfully conduct each drain into the ditch, and so on to the culvert; that of all these acts the plaintiff would have no right to complain unless he was a riparian owner, and thus had a right to the regular flow of the waters of the brook. They conclude by saying that "if you find that the plaintiff had no right in the brook, as the owner of one of its banks, or because it was the boundary of his estate, and the city of Newton made a drain to carry off its surface water upon Church street, continued it into Maple place by the permission of the owners of Maple place, and continued it then to Center street by permission of the owners of the land through which the brook passed, then, if you find these facts, the plaintiff cannot complain, and make it a cause of inquiry that the brook or water-course was so interfered with that the water which flowed into it could not flow out of it." These instructions relate only to the claim of the plaintiff as a riparian proprietor, and show that, if not so, he is not entitled to complain of mere interference with the water of the brook, or increase in their volume. They are irrespective of the rights which the plaintiff had as a land-owner whose lands were remote, or not immediately bordering on the brook, which are dealt with in the subsequent sentence. While they are negatively expressed, and state in what cases a party cannot recover, unless a riparian proprietor, for mere interference with the waters of the brook, that he may do so for this, if a riparian proprietor, is clearly shown, especially where they are taken in connection with the earlier portion of the charge, which states that, if the plaintiff was a riparian proprietor, "he had rights in that water-course which gave him a cause of action against any person who prevented the flow in that water-course, or the flow of water from his land by that water-course, or befouled the water of that water-course." These instructions give the plaintiff all that he was entitled to upon this part of the case. Even if we assume the contention of the plaintiff, that the defendant had not a right to collect the water from a larger area than was naturally drained by Church street, of which there was some evidence, or then to conduct it, beyond and through the lands immediately adjoining the highway, into the brook, these acts of themselves afford no ground of complaint to any one except the owners of the land, or riparian owners of the brook. If, in doing these acts, injury is done to others than riparian proprietors, by the defective constructions adopted, or defective preparations made, so that their lands are overflowed, or nuisances to them are created, a different ground of action is presented, which is dealt with in the subsequent part of the instructions.

These were:

"If—and this is entirely irrespective of any question of his rights in the brook—the city so improperly constructed this drain through Maple place, or the line of the water-course, and negligently kept and maintained it, either considered as a thing by itself, or considered in its connection with Center

street, the culvert under it, and the drainage of land in that direction towards it, and did these things to the injury of the plaintiff, he might recover, not because he has any right in the brook, but because the city, in disposing of their water lawfully, so long as it was properly done, had acted unlawfully and wrongfully in the construction and maintenance of their drain, and in the repair and maintenance of it."

These instructions certainly entitled the plaintiff to recover if the drain through Maple place was not properly constructed by being directly connected with the brook, but emptied in a cess-pool which did not permit the waters to percolate through with sufficient rapidity; or was insufficient to contain them, so that they spread over the plaintiff's land in the vicinity, to his injury; or was so negligently kept in repair and maintained that the same result followed. They permitted him also to recover if the line of the water-course was thus improperly constructed or negligently maintained.

The plaintiff claimed that the culvert was insufficient to carry off the water naturally coming to the brook, or which might be brought there by the defendant, and that, whether this ditch was or was not a natural water-course, the defendant must maintain it of sufficient size to carry off the water, and if insufficient, or permitted to be obstructed so that the water was flowed back upon the plaintiff's premises, to his injury, he was entitled to recover therefor. The instructions do not in terms state that the culvert should be sufficient to carry off the water there naturally flowing, and that brought into the brook; but the expression the "line of the water-course" must have been understood by the jury as meaning the whole of the line by which the water was to be carried off, including the culvert. The jury were told that this must be considered "in its connection with Center street, the culvert under it, and the drainage of land towards it." The plaintiff having offered evidence that there was a drainage of water near Center street not naturally coming there, which might of course swell the volume of water to be there disposed of, in determining whether it was a proper construction, this fact was to be regarded. The jury were further told that, while the city might dispose of its surface water so long as it was properly done, any improper construction occasioning injury to plaintiff would be a wrongful act for which he could maintain an action. That the line of the water-course would be improperly constructed if not provided with proper means of discharge needs no argument, and this is contemplated by the instruction which requires it to be considered in connection with the culvert, etc.

The whole of the instructions are not given in detail. They do not take up, except in a general way, the various facts upon which the plaintiff claimed that the defendant was guilty of negligence in regard to its arrangement for disposing of the water brought into the brook. It is quite probable that at the trial the remarks of the judge were amplified and applied to each of them. But, as stated, they fully cover these facts in a manner which must have been comprehended. The exceptions we have considered should therefore be overruled. Those that remain may be more rapidly disposed of.



The first request singles out the testimony of a single witness, whose evidence was contradicted, and requests an instruction to the jury as to its effect. This might properly be refused. *Bailey v. Bailey*, 97 Mass. 373; *McDonough v. Miller*, 114 Mass. 94.

The fifth request was given in substance, and the plaintiff was permitted to recover if, as he alleged, by reason that the drain through Maple place did not connect with the brook, the water conducted by it to the cess-pool spread over his land, to his injury.

In answer to the sixth request the presiding judge correctly defined a water-course. *Dickinson v. Worcester*, 7 Allen, 19; *Parks v. Newburyport*, 10 Gray, 28.

The tenth request was fully considered with the seventh, eighth, and ninth requests.

The question whether the plaintiff could be permitted to prove flowage or drainage in 1876, or whether his claim therefor was barred by the statute of limitations, is not important in the view we have taken of the other exceptions, as the evidence relied on was of a similar character; but this evidence was properly excluded. Exceptions overruled.

#### NOTE.

The resident owner of a lot fronting on a public street in a city cannot be permitted to restrain such city from constructing drains along the side, or culverts across, such street, or other streets in the vicinity, or from grading or otherwise improving the same, merely because such acts, when completed, would greatly increase the flow of surface water upon his land. *Heth v. City of Fond du Lac*, (Wis.) 23 N. W. Rep. 466.

The commissioners of sewage of Brooklyn constructed a main sewer in 1898, of insufficient capacity, so that heavy rains forced the sewage through the man-holes, and injured plaintiff's property. They continued to add lateral sewers to it, though knowing that they were increasing the damage of plaintiff. It was held that the city was liable for their action. *Siefert v. City of Brooklyn*, (N. Y.) 4 N. E. Rep. 321.

A city has no right to detain and force the natural flow of waters onto the lot of a private individual; and such an act is a trespass amounting to a taking of his land, and constitutes a nuisance. *Conniff v. City and County of San Francisco*, (Cal.) 7 Pac. Rep. 41.

A city bringing its streets to grade, and omitting to construct gutters, is not liable, in the absence of negligence, for the overflow of surface water from the street on adjacent lots below grade. *Freberg v. City of Davenport*, (Iowa.) 18 N. W. Rep. 705.

A city for unskillfully constructing a gutter, or negligently suffering it to be out of repair, or obstructed, by reason of which surface water floods an adjacent lot, is liable to the owner, although the lot is below grade. *Gilluly v. City of Madison*, (Wis.) 24 N. W. Rep. 137.

A municipal corporation cannot so adjust the grade of its streets as to turn the surface water upon the lots of adjacent owners. *City of Aurora v. Reed*, 57 Ill. 29.

In *City of Dixon v. Baker*, 65 Ill. 518, by the elevation of the grade of a street of the city, surface water flowed into the basement of the plaintiff's building, and thereby the building was injured and the walls cracked. It was held that the city was liable for the damage. See, to same effect, *Inman v. Tripp*, 11 R. I. 520.

Municipal corporations are not liable for damages for so altering the grade of streets as to turn the surface water upon adjacent lots, thereby injuring them. *Imler v. Springfield*, 55 Mo. 119.

Where a municipal corporation, in filling up or changing a street, turns water which formerly flowed in gutters onto an adjacent lot owner's land, it will be liable in damages. *Smith v. City Council of Alexandria*, 33 Grat. 208. See, also, *City of Shawnee-town v. Mason*, 82 Ill. 337.

A municipal corporation has no right to confine a small natural stream within a box-drain, allow the same to become obstructed, and so turn surface water into it that the stream is swelled beyond its natural capacity, and overflows and injures the land of an adjacent proprietor. *Noonan v. City of Albany*, 79 N. Y. 470.

If a municipal corporation, in improving its streets, accumulates surface water, and

turns it, in new and destructive currents, upon the lands of adjoining owners, it is liable. *O'Brien v. City of St. Paul*, 25 Minn. 333.

Where a city, in grading streets, collects surface water, and casts it in a new body on the land of an adjoining proprietor, it is liable for the injury. *Gillison v. City of Charleston*, 18 W. Va. 282.

A municipal corporation is not liable for allowing ordinary surface water to escape from a highway onto adjacent land, nor for the result of such ordinary changes of grade as must be presumed to have been contemplated and paid from laying out the highway. *Wakefield v. Newell*, 12 R. I. 75.

In grading streets, and constructing gutters for surface water, a city is not bound to provide for extraordinary storms, such as prudent persons do not think of guarding against. *Allen v. City of Chippewa Falls*, (Wis.) 9 N. W. Rep. 284.

In the construction of water-ways a city is bound to take into consideration the liability to occasional freshets. *German Theological School v. City of Dubuque*, (Iowa,) 17 N. W. Rep. 153.

(143 Mass. 33)

### FREEMAN v. FREEMAN.

(*Supreme Judicial Court of Massachusetts*. Bristol. June 29, 1896.)

#### 1. PARTNERSHIP—LETTERS PATENT—USE—NET PROFITS—PROOF—EVIDENCE.

A. & B., copartners, were the patentees named in certain letters patent, and made and sold the goods embodying the patented invention until the death of A. The business of the firm was then carried on by B., under an agreement with C., as administratrix, until 1879, when copartnership relations ceased, and C. sold to B. all the business and property of the firm except the letters patent. C. then requested B. to sell the letters patent or purchase them, which B. declined to do. C. then brought a bill in equity to compel the sale of the letters; a sale was ordered by the court; and the matter referred to a master to determine the amount of net income and profits arising from the manufacture and sale of said goods, and the use of said letters patent, and to ascertain the amount due C. as administratrix. *Held*, that the amount due the plaintiff, C., was one-half the net income from the sale of the goods which remained after deducting all expenses necessary in the manufacture and sale of the goods, including interest at 6 per cent. on the capital invested by B., less 20 per cent., which was found to be the average, usual, and customary profit made by manufacturers of unpatented articles of the same kind as those manufactured under the patent; interest to be added from 1879. *Held, also*, that proof that the article manufactured under the patent was not really more valuable than the competing articles made by other manufacturers had no bearing upon the inquiry as to the profits made by the defendant, B., by the use of the patent, and was inadmissible.

#### 2. PATENT-RIGHTS—VALUE—EVIDENCE—SALE OF.

In a suit to determine the value of the use of a patent for the manufacture of an article of jewelry, evidence of what the patent brought when sold by order of court is inadmissible as tending to show that the patent had been of little or no value.

The firm of Freeman & Co. were patentees in letters patent for a chain link, and made and sold chain links embodying the invention until its dissolution in October, 1878, by the death of Joseph J. Freeman. The partners were Joseph J. Freeman and the defendant; and plaintiff is administratrix of the estate of Joseph J. Freeman. The facts appear in the opinion.

*J. E. Maynadier*, for defendant.

*H. J. Fuller*, for plaintiff.

DEVENS, J. When this case was last before the court, it was held that a bill in equity might be maintained against the surviving partner by the administrator of a deceased partner to obtain a sale of the letters patent belonging to the partnership, and for an account of the profits re-

ceived by the surviving partner from the use thereof since the dissolution of the partnership. *Freeman v. Freeman*, 136 Mass. 260. The contract of partnership implies an agreement that all the assets of the firm, including letters patent, as well as other kinds of property, shall be used for the common benefit of all the partners, and supersedes the relation which the parties would otherwise sustain to each other as owners together thereof. By the decree of this court the letters patent have now been sold under the authority of a master, who has also made his report under the order recommitting the matter to him with a direction "to inquire and report the amount of net income and profits from the manufacture and sale of said goods, and the use of said letters patent;" and, in taking said account, to make to the defendant "all just allowances for money and labor expended in carrying on the manufacture and sale of said goods." The master has reported in two forms, so as to show—*First*, the net income and profits from the manufacture and sale of the goods embracing both the manufacturer's and patentee's profits; and, *second*, the net income and profits derived from the use of the letters patent, or what he terms patentee's profits,—one-half of which entire profits, or of such patentee's profits, according to the rule which may be adopted, he deems the plaintiff entitled to recover. To each of these findings the defendant excepts, deeming the rule in either case to result in an exaggerated charge against him.

Upon the first theory, the master, having found the price at which the different varieties of ornamental chain (which was the patented article) were sold, has deducted the cost thereof; including in this, in addition to the actual cost of labor and material, "all other expenses of labor, use of capital, salesmen, traveling expenses, office rent, insurance,—in fact every expense necessary in carrying on the manufacture and sale of goods in the jewelry business." In addition to what is embraced in the cost of the chains as thus stated, he has added 6 per cent. on the sales as a reasonable compensation to the defendant for his personal services in conducting the business. The cost of all the goods manufactured and sold, as thus ascertained, being deducted from the price at which they were sold, he has allowed to the plaintiff one-half thereof as her share of "the net income and profits of the manufacture and sale of the goods, and the use of the letters patent," from January 1, 1879, to date of the sale of the letters patent, which was the time to be covered by the account. This sum is found to be \$19,676.85. This finding does not appear to do entire justice to the defendant. Although interest upon his capital, and a reasonable sum for his personal services, are included in the expenditures, yet his capital was at risk, his business energy and skill were taxed alike in the manufacture of the goods, and the enterprise with which their sale was pushed; and he was entitled to a fair and reasonable profit in that business which he thus controlled and carried on. Certainly no one would embark in a business without an expectation of this; and, when successfully conducted, he should be entitled to it as against others, who, even if they had a valuable interest, took no active part therein. Nor should he be deprived of this even if

those who had such valuable interest by reason of their ownership in or control over a patent used in the business objected thereto, provided that they were properly compensated for the use of their patent, and the profits made thereby.

It is found by the master that 20 per cent. is "the average, usual, and customary profit made by manufacturers of unpatented articles of jewelry." This profit might reasonably have been expected by the manufacturer in any business of jewelry manufacture if carefully conducted, and it is in evidence that this was so conducted, irrespective and independent of the advantage derived from the right to use patents. It may be claimed that this profit should be deducted in favor of the manufacturer, and as his proper profit as such, in determining what are the profits derived from the use of the patent. In this view of the case, the master has caused a deduction of 20 per cent. to be made from the sum of \$19,676.85; leaving the sum of \$16,405.91 as the amount to which the plaintiff is entitled as the share belonging to her, it being one-half of the income or profits derived from the use of the patent. To the amount as thus found due from him the defendant objects as being a much larger sum than that which he should be compelled to pay for the use made by him of the patent, and contends that the master has not adopted any proper basis on which the liability of the defendant should be computed.

According to the report of the master, the defendant claimed that "the amount of the net income and profits from the manufacture and sale of said goods, and the use of said letters patent," were to be distinguished each from the other, and the master was therefore to inquire—*First*, "the net income and profits from the manufacture and sale of said goods, embracing both the manufacturer's and patentee's profits;" *second*, "the net income and profits from the use of the letters patent, or what are termed patentee's profits;" the latter being the excess of profits "over the average, usual, and customary profit obtained by the manufacturer of unpatented articles." The defendant contends, by his sixth exception, that this is not a fair statement of his position, but no evidence is offered of this. The master's report finds the contrary, and this is final. When, in the same exception, the defendant restates his contention, it is as follows:

"That the whole net income and profits included both manufacturer's profits and the net income and profits from the use of the patent; and that the latter obviously could not be more than the difference between the usual and customary manufacturer's profits and the whole net income and profits."

The defendant then claims that, in view of certain evidence stated, the net income and profits were merely nominal.

It is much insisted on throughout the defendant's argument that he had not succeeded in impressing on the mind of the master that the plaintiff was only to recover for the amount of profits derived from the use of the patent, as distinguished and separated from any which might have been made in any other mode from the manufacture and sale of the patented article; but the report of the master shows that he fully

understood this, and has properly dealt with it. Nor does the position appear so abstruse or ingenious that it is not readily to be comprehended by any intelligent person upon being stated. The complaint that the master has not found what profits were derived from the use of the patent is not justified. Whether he has arrived at his result by the true rule, or whether by that claimed by the defendant, which he declined to adopt as correct, is to be considered; but that by his second finding he has determined the amount due solely for profit derived from the use of the patent is clear. The real difficulty which the defendant has with the report is that the master, in determining the amount of profit derived from the use of the patent, did not adopt the claim made in the fourth exception, as well as in the argumentative portion of the sixth, which was that the evidence should be examined as to the manufacture of certain competing chains, the prices at which they were made and sold, the profits made thereby, and also evidence that the patented chain was not essentially superior, and ascertain and determine thereby that no more than a nominal profit had been derived from the patent. This evidence, as offered, afforded no adequate means of comparison, and was properly disregarded. The article manufactured by others was, even if similar, still different from that manufactured by defendant. Even if there was no actual advantage in the article made by the defendant, the value of such an article, purely ornamental, deriving a large part of its value from its mere fashion, for the purposes of sale may have been much greater. In the case at bar the quantity of the patented chain made and sold by defendant, the price at which it was sold, and the cost of its manufacture, were determined by an agreement of parties. Whether it was better or worse than competing chains, or what effect they had in regard to the sale, or what profits the manufacturers thereof made, were not important inquiries.

The recovery of profits, or rather the mode of ascertaining them, in patent suits, appears to have been found one of considerable difficulty in suits against infringers. When the patent is for a process in making an established article, and a definite saving is thus made in the process of manufacture, the saving may properly be the guide as to the profits. *Mowry v. Whitney*, 14 Wall. 620. But the patent in the case at bar was for a product, and not for a process or machine for making a product. It was an improved chain link, made in a way and form described, which could be readily connected with other links so as to form an "ornamental chain for jewelry." That it was of a different structure and fashion from the Nevins chain, which it most nearly resembled, the defendant himself testified, although he states that the difference is but little in style and appearance, and that at a little distance they could not be distinguished. Proof that the Freeman chain was not really more valuable than the competing chain made by other manufacturers has no bearing upon the inquiry as to the profits made by the defendant by the use of the patent.

If this were a suit against an infringer of a patent by the owner thereof, the rule appears to be well established that the profits from the use of

the patent would be fairly ascertained by finding the difference between the cost of the articles produced and the amount received from the sale thereof. In estimating the cost, all the elements which go to make up the expenditures in the manufacture and sale are to be taken into account. "Profit," says Mr. Justice SWAYNE, "is the gain made upon business or investment when both the receipts and payments are taken into account." *Rubber Co. v. Goodyear*, 9 Wall. 788. In the same case any and all claims for manufacturer's profits were rejected. In *Elizabeth v. Pavement Co.*, 97 U. S. 126, the defendants, who were infringers of a patent for the manufacture of a wood pavement, in the computation of profits with which they were to be charged, claimed a profit of 20 per cent. in addition to the actual cost of the lumber and other materials and labor. "It is only necessary to state the claim," says Mr. Justice BRADLY, "to show its preposterousness."

Were the rule as against infringers adopted in the case at bar, it is obvious that the first computation made by the master was correct, as in the cost of the chains, which he finds to be 32 cents a foot, he has included every necessary expenditure of their manufacture and sale, and has awarded to the defendant, as compensation for his personal services, 6 per cent. on the sale. It is in the power of the United States court, in suits against an infringer, to award damages in addition to profits, as well as to give the patentee a remedy in damages if he has been caused injury by the infringement of his patent, even if the infringer has derived no profit from the use of the invention. *Elizabeth v. Pavement Co.*, *ubi supra*. The rule as against infringers has been held very strongly, in order that neither directly nor indirectly should any advantage be gained by them, and it has been deemed that to allow even the profits ordinarily made by a manufacturer would be a premium on dishonesty, and an invitation to aggression. *Rubber Co. v. Goodyear*, *ubi supra*.

We do not think the circumstances of this case such as to require an allowance of them to be here excluded. The defendant was the owner of all the assets of the partnership which formerly existed between himself and the plaintiff's intestate, except this patent. They had carried on the business of making ornamental chains under it, and it remained a partnership asset after the sale by which the defendant became possessed of the other assets. He was requested to sell and dispose of it. His right to use it was denied, but he continued to manufacture under it. He can certainly obtain no personal advantage by the use of a partnership asset which he was bound to manage or dispose of for the best advantage of the partnership estate, which, as surviving partner, he was to administer. *Freeman v. Freeman*, 136 Mass. 263. The plaintiff, by her bill, claims to be "entitled to one undivided half part of all the net profits derived from the use of said letters patent," and demands that they be paid over to her. To the profits derived from the use of all the other assets of the firm the defendant was fairly entitled. The use of this partnership asset was certainly not justified, yet the case is distinguishable from one in which the defendant is found to have embarked in an enterprise necessarily involving an injury to the rights of patentees.

He continued to conduct a business already in existence, using therein an asset which had theretofore been used and which belonged to the partnership. Although conducted for his own benefit, if the advantage he derived from such use is fairly ascertainable in a suit brought for the plaintiff's half of the net profits thereof, he should not be deprived of the profits attributable to the manufacture of the article in which no assets but his own were embarked. While a trustee or *quasi* trustee, such as a surviving partner, is to make no profits out of the trust-estate, it cannot be said that the whole profits found by the master were those of the asset which the defendant held in trust, when, if he had made an unpatented article of the same general description, there would have been a profit thereon of 20 per cent.

The defendant contends that actual profits can only be recovered, and that these must be definitely shown by the plaintiff. But this is to be shown, as in ordinary cases, by the exhibition of facts from which they can fairly be inferred; such as the difference between the cost of the articles and the price for which they are sold. Indeed, when these show a large apparent profit in the manufacture and sale of an article under a patent wrongfully used, it would seem that the natural order of proof would require that the defendant should show that it was made in other modes or from other causes than the use of the patent. We are, for the reasons above stated, of opinion that the mode of computation adopted by the master in his second finding correctly states the damages which plaintiff is entitled to recover.

The defendant contends that the moderate sum for which the patent, at the sale, under direction of the master, was sold, shows that the amount charged against him as profits was grossly exaggerated. No such inference can fairly be drawn. The patent had but a few years to run, and it is more than probable that the profitable use of it was well exhausted. It was for an article of fashion in jewelry, and the examination of the accounts show, as might be expected, that after a few years the sales rapidly diminished.

It is to be considered whether the plaintiff is entitled to interest as computed by the master, or only from the date of this proceeding. The master has, at the conclusion of each year, given to the plaintiff simple interest on the profits of that year to the date of his report, as appears by table 3 annexed thereto. If defendant had used an article of a definite and permanent value in his business, it would appear that the plaintiff might either demand the fair interest on such value, or the profits which had been made by its use; but she could not expect both. If he had possessed himself of funds belonging to the firm, to his proportion of which the representative of his partner was entitled, and, against the remonstrances of the latter, had mingled them with the funds properly his own, the party injured might demand compensation for the use thus wrongfully made of the funds misappropriated, by charging him with full interest thereon. He might do so also where the party thus in possession of funds unreasonably neglected and refused to settle his accounts. *Dunlap v. Watson*, 124 Mass. 305. Where, in a similar case, the party

injured demands to share the profits which have been made by the use of his funds, he ought not, in addition thereto, to recover interest thereon. In the case at bar no settlement was ever made at the end of the year, nor any sum then found due which should thereafter stand to the credit of either partner. Whether the apparent balance was used, or to what extent it was used, in the subsequent operations cannot be determined. It may well have been of benefit in their subsequent operations, and thus have increased the profits subsequently made. If the plaintiff receives, without interest, except from the date of the writ, her full share of the profits made by the use of the patent as found by the master, irrespective of "manufacturer's profits" and the costs and expenses as allowed defendant, she will receive, in a bill brought for profits, all to which she is entitled.

The general rule, as applied both to trustees and to a surviving partner whose relation is fiduciary, and who have wrongfully used funds in the prosecution of a business, is that the party injured may have either the profits actually made, or interest on the funds so used. *McDonald v. Richardson*, 1 Giff. 81; *Brown v. De Tastet*, Jac. Ch. 284; *Wedderburn v. Wedderburn*, 22 Beav. 84; *Crawshaw v. Collins*, 2 Russ. 348; *Washburn v. Goodman*, 17 Pick. 519-523. The patent used in the case at bar had not a definite money value. The plaintiff seeks only to be compensated by the share of the profits made from its use belonging to the estate of her intestate. To calculate the profits annually, and to add interest thereon, in the absence of evidence that such profit was or could be annually set aside and invested elsewhere, would not be just to the defendant.

The result therefore is that the plaintiff is entitled to recover the smaller sum found due by the master as one-half of patentee's net income and profits, viz., \$16,405.91, with interest thereon from the date of this proceeding. This, in addition to the half of the amounts collected, and to the half of the property taken, at an appraisal by defendant to the finding of the master, in regard to which there was no exception. The plaintiff will be further entitled to an order upon the master to pay over to her one-half of the net proceeds of the sale of the letters patent. Decree accordingly.

(142 Mass. 146)

#### COMMONWEALTH v. BOSTON & A. R. Co.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 30, 1886.*)

CORPORATIONS—STOCK DIVIDENDS—ST. 1882, CH. 121—PUB. ST. CH. 112, § 61.

Under St. 1882, c. 121, the Boston & Albany Railroad Company was authorized to distribute among its stockholders the shares of stock purchased by it from the commonwealth under the provisions of said act; and such distribution is not a violation of Pub. St. c. 112, § 61, forbidding a railroad company from declaring a stock dividend without authority of the general court.

This was an information praying for an injunction to restrain the Boston & Albany Railroad Company, its agents and attorneys, from distributing among the stockholders of the corporation certain shares of stock purchased by the corporation of the commonwealth, and that the



stock distributed be declared void. Hearing in the supreme court, before FIELD, J., who dismissed the information, and, the plaintiff appealing, reserved the case for the consideration of the full court. The material facts appear in the opinion.

*E. J. Sherman*, Atty. Gen., and *H. N. Shepard*, Asst. Atty. Gen., for the Commonwealth.

*A. L. Soule*, for defendant.

C. ALLEN, J. Pub. St. c. 112, § 61, forbids a railroad corporation without authority of the general court, to increase its capital stock beyond the fixed maximum, to declare stock dividends, to divide the proceeds of the sale of stock among its stockholders, or to issue certificates of stock when the par value of the shares so issued is not first paid in cash to its treasurer. It is contended, on the part of the commonwealth, that the actual and intended distribution of shares by the defendant are in violation of this section; such distributions being stock dividends. Literally they are so; but it is certainly open to grave doubt whether a division of shares which have once been fully paid for to a corporation, and have since been purchased by such corporation with its surplus earnings, would fall within the mischief intended to be guarded against by the statutes, and properly be termed "stock dividends" within its meaning. We give no further consideration to this question, because the surplus earnings do not appear to be sufficient fully to cover the distribution which the second information alleges is intended, and because we are of opinion that the information must be dismissed upon another ground; namely, that by a fair construction of St. 1882, c. 121, the authority of the general court was given for the division of the shares in question.

The commonwealth sustained towards the defendant a double relation, as sovereign and as shareholder. Wishing, as shareholder, to negotiate an exchange of its shares for bonds of the corporation on certain terms, it exacts, as sovereign, that upon such assignment to the corporation of the shares the corporation shall hold and dispose of the same as its absolute property. It was known that the corporation had undivided surplus earnings to a large amount, which entered into and increased the market value of the shares. At the end of the first fiscal year after the passage of the statute of 1882 these surplus earnings amounted to \$2,632,921. It is implied in the information, and conceded in the argument, that these surplus earnings might have been divided among the stockholders. The price of the shares transferred by the commonwealth was \$3,858,400. The statute of 1882 in express terms authorized the corporation to dispose of the shares assigned to it by the commonwealth; but on the literal construction of Pub. St. c. 112, § 61, now insisted on, the corporation would not be at liberty to divide the proceeds of such sale among its stockholders even to an amount equivalent to its surplus earnings. The fact that the payment for the shares was made wholly in bonds, instead of being made partly in bonds and partly by the direct application of surplus earnings in the form of cash or cash assets, can-

not be of such significance as to change the rights and obligations of the corporation. Its financial condition would in effect remain the same. Upon the construction contended for by the commonwealth, if surplus earnings had been used directly in payment for these shares, the corporation would thereby have lost the power, in any form, to divide such earnings, or their equivalent, among its stockholders; and the authority to purchase, hold, and dispose of the shares so assigned to it as its absolute property, would be a restriction instead of a privilege. But the legislature plainly were intending to confer a privilege,—to add something to the powers which the corporation would otherwise have possessed. It is argued that the intention was to free the shares from certain trusts theretofore existing, and enable the corporation to own and hold its own shares, since otherwise they would have been canceled *ipso facto*. We are not aware of any such trusts that would not be extinguished by the mere transfer of the shares; and it has not been considered in this commonwealth that shares in a corporation are necessarily extinguished by being transferred to the corporation, so that they cannot be reissued, or that the amount of capital stock is thereby reduced, (*Crease v. Babcock*, 10 Metc. 556, 557; *American Ry. Frog Co. v. Haven*, 101 Mass. 402; *Dupee v. Boston Water-power Co.*, 114 Mass. 37, 43;) nor has such a rule prevailed in this country generally, (*City Bank v. Bruce*, 17 N. Y. 507; *Coleman v. Columbia Oil Co.*, 51 Pa. St. 74; *State v. Smith*, 48 Vt. 266, 285; *Williams v. Savage Manuf'g Co.*, 3 Md. Ch. 418, 452; *Taylor v. Miami Exp. Co.*, 6 Ohio, 176, 219; *Robison v. Beall*, 26 Ga. 17, 28; *Hartridge v. Rockwell*, R. M. Charl. 260.) See, also, *Currier v. Slate Co.*, 56 N. H. 262, 268.

There was therefore no occasion to add the clause in question for the purpose suggested in the argument for the commonwealth. These purposes failing as an explanation, no other purpose is suggested to account for the language of the statute. We are left to put such a construction upon it as it naturally bears, in view of the circumstances under which the statute was passed, having regard to the financial condition of the corporation, and to the position of the state as a contracting party, certainly intending to offer to the corporation some inducement to make the purchase. The natural meaning of the words used imports an authority to dispose absolutely of all the purchased shares free from all conditions and restrictions. They are classed together as a whole. Whatever authority is given in respect to any of them is given in respect to all. It can hardly be supposed, under any circumstances, that the legislature would intend to restrict the distribution of purchased shares equal in value to the amount on hand of surplus earnings which might be distributed at the pleasure of the corporation. Looking at the whole statute, we are brought to the conclusion that the past and contemplated action of the corporation is within its authority. Information dismissed.

(142 Mass. 141)

## SHERBURNE v. SHEPARD.

(Supreme Judicial Court of Massachusetts. Middlesex. June 30, 1886.)

COSTS—SCIRE FACIAS—INDORSER OF WRIT—FRAUD—ORIGINAL JUDGMENT CONCLUSIVE.

Upon *scire facias* against the indorser of a writ, evidence that the defendant in the original suit fraudulently procured the allowance of certain sums to which he was not lawfully entitled, is inadmissible, so long as the judgment in the original suit remains unreversed.

This was an action of *scire facias* against the indorser of the original writ in the action of Engstrom against said John G. Sherburne and others, in which action judgment was rendered for defendant Sherburne therein for his costs. At the trial in the superior court, before KNOWLTON, J., without a jury, the defendant offered evidence tending to show that, upon the first and fifth counts in the declaration in the original action, the verdict and judgment for the plaintiff, as he was defendant therein, were concocted and procured by the plaintiff by gross frauds upon said Engstrom and by perjury. Other evidence, the nature of which appears in the opinion, was offered by defendant, but was excluded by the court, who ruled that the defendant could not avail himself, in the defense of this action, of the evidence offered. The court found for the plaintiff, and the defendant alleged exceptions.

Chas. Owley, for defendant.

C. H. Conant and J. H. Carmichael, for plaintiff.

MORTON, C. J. This is a *scire facias* against the indorser of a writ. The only defense now relied upon is that the plaintiff in this suit, in taxing his costs in the original action, in which he was the defendant, fraudulently procured the allowance by the clerk of various sums to which he was not lawfully entitled. We are of opinion that this defense is open to the defendant, but that the judgment in the original action, so long as it is unreversed, is conclusive upon him. The statute provides that "every indorser, in case of avoidance or inability of the plaintiff, shall be liable to pay all costs awarded against the plaintiff." Pub. St. c. 161, § 24. The liability of an indorser is analogous to that of bail; the indorsee being a surety for the plaintiff, as bail is for the defendant. Either is so far a privy to the judgment as to be bound by it, unless it is obtained by collusion between the parties to it in order to create or enlarge the liability of the indorser or bail.

The grounds of defense set up in this suit might and should have been tried in the original suit. The objection now made to the taxation of the costs could have been raised in that suit, before the clerk, and by appeal before the court, by the plaintiff therein, and by the indorser, who is a party to the record, and so far interested in and privy to the former suit that he would have had a right to be heard upon the taxation of costs. As neither raised the question at the proper time, the judgment duly rendered is conclusive upon both, and the defendant in this suit cannot collaterally impeach it. *Webster v. Lowell*, 2 Allen, 123;

*Tracy v. Maloney*, 105 Mass. 90; *Tracy v. Goodwin*, 5 Allen, 409; *Springfield Card Manuf'g Co. v. West*, 1 Cush. 388; *Wood v. Mann*, 125 Mass. 319. The question is not whether the indorser could impeach the former judgment by proof that the parties thereto obtained it by collusion in order to charge him. No such collusion was alleged, or offered to be proved. Exceptions overruled.

(142 Mass. 242)

NUTT and others v. NORTON.

(*Supreme Judicial Court of Massachusetts. Middlesex. July 8, 1886.*)

1. WILL—REVOKED BY MARRIAGE OF TESTATRIX—PAROL EVIDENCE.

The will of a woman is revoked by her subsequent marriage; and where, after the execution of a will by a woman, she married, and had a child born, who survived her, a revocation of the will is implied, and this implication cannot be rebutted by parol evidence that the parties did not know the rule of law, or that they did not intend that the subsequent marriage and birth of a child should operate as a revocation.<sup>1</sup>

2. SAME—HUSBAND AS A WITNESS.

The fact that the husband of a married woman witnessed a will made by her before her marriage, and parol evidence that he knew its contents, are immaterial, and have no effect on the will, which is revoked by the marriage.

This was an appeal from the decision of the judge of probate. Hearing in the supreme court before Judge FIELD, upon facts which appear in the opinion, who affirmed the decree of the probate court, and the plaintiffs appealed.

*E. F. Dewing*, for plaintiff.

*C. Robinson*, for defendant.

MORTON, C. J. It was decided in *Swan v. Hammond*, 138 Mass. 45, that a will of a woman was revoked by her subsequent marriage. In the case before us, after the will offered for probate was executed, the testatrix married, and had a child born of the marriage, who survived her. Upon these facts a revocation of the will is implied by law, and this implication cannot be rebutted by parol evidence that the parties did not know the rule of law, or that they did not intend that the subsequent marriage, and birth of a child, should operate as a revocation. *Marston v. Roe*, 8 Adol. & E. 14. The will did not make any provision for the husband or after-born children. The fact that the man the testatrix was about to marry witnessed the will, and the parol evidence that he knew its contents, are immaterial. Whether the act of the husband in witnessing the will could, by way of estoppel, prevent him from contesting the will if he were the only party interested, as claimed by the appellant, we need not discuss. It certainly cannot operate to give validity to the will as against the after-born child. Upon the facts of this case, therefore, we are of opinion that the will offered for probate was revoked by implication of law. Decree affirmed.

<sup>1</sup> Respecting the revocation of a will by the subsequent marriage of the testatrix, see *Biolgett v. Moore*, (Mass.) 5 N. E. Rep. 470, and note, 471.

(142 Mass. 156)

## McGIVNEY v. McGIVNEY.

*(Supreme Judicial Court of Massachusetts. Suffolk. June 30, 1886.)***TRUST—RESULTING TRUST—PURCHASE WITH MONEY OF THIRD PARTY—PROMISE TO DEVISE—LACHES.**

Where funds of A. were used by M. in the purchase of real estate, with the implied consent of A., M. promising that at her death the property should be A.'s, and M. died leaving a will in which the property was left to B., to whom she was indebted, on condition that he should pay to A. a certain sum, and A. was notified of the provisions of the will, but took no steps in the premises for 23 years, A. is to be presumed to have acquiesced in the provisions of the will, and cannot maintain a bill in equity to compel B. to convey to him the estate purchased by him.

This was a bill in equity by the plaintiff, Edward McGivney, praying that the defendant be compelled to convey the legal title of certain real estate to the plaintiff. Hearing in the supreme court before GARDNER, J., who reported the case for the consideration of the full court. The facts appear in the opinion.

*Crowley & Maxwell*, for plaintiff.

*W. H. Harrington*, for defendant.

GARDNER, J. The plaintiff claims that he has an equitable interest in the house and land on Billerica street, in Boston, which he can reach through his bill in equity, and apply in payment of his debt. If his money had been used in the purchase of the estate without his knowledge or consent, he might have been entitled to relief. *Bremihan v. Sheehan*, 125 Mass. 11. The case finds, however, that his sister, Mary O'Riley, purchased the house in September, 1857; and in December of that year she wrote to the plaintiff, then in California, informing him that she had used part of his money in its purchase, "and at her death all should be his." In case the plaintiff did not approve of this she asks him to let it remain for two or three years, and that then she will repay him. The plaintiff received this letter, and made no answer to it. It is fair to presume that the plaintiff was willing to let the sum of \$400 remain in the house for the benefit of his sister, according to her request.

The plaintiff claims that the letter of Mary O'Riley to him contains a good declaration of trust, in the following language:

"After a hard struggle, Thomas let me have a little of your money, which he gave me on the terms that the deed should be made out in my name; that at my death all should be yours. All Thomas wants is a living out of it while he lives; and, if you don't approve of this letter, all the favor I ask of you is to give me one or two years, and I will pay you up your money, with thanks; for so doing you will be the means of making me a home in Boston while myself and husband are alive, and after that it is your property forever."

This letter contains a statement of the misappropriation of the \$400 of the plaintiff's money by Thomas O'Riley, and an offer on the part of Mary to repay it in one of two ways. The plaintiff made no election. He did not notify Mary of any intention to elect. He never answered the letter. Mary lived in possession of the estate until July 21, 1865,

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when she died testate. The plaintiff was soon after notified of the contents of her will, which provided that Thomas O'Riley was to have a life-estate in the house; that upon his death the defendant, Peter, should take the estate upon condition that he paid the expenses of the last sickness and funeral expenses of Mary, and also paid \$500 to the plaintiff.

The defendant claims that if the plaintiff intended to rely upon an equitable interest in the house, or upon the alleged declaration of trust, that, immediately upon the receipt of the information concerning the will and its provisions, he should have notified the defendant of his intention; that it was his duty then to have enforced his claim upon the estate. Mary died in 1865. During 20 years the plaintiff has been silent. In the mean time, the defendant knew of the original wrongdoing of the \$400, and that the plaintiff had been informed of it, and that he had full knowledge of the contents of the will, and of the further fact that the defendant, Peter, had lent \$200 to his sister Mary upon the purchase of the house. The defendant, through the silence of the plaintiff, was led to believe that he acquiesced in the disposition of the estate by the will of Mary. He was induced to believe that it was not necessary for him to press his claim as a creditor against the estate of Mary. He relied upon the will, and according to its terms, soon after the death of Mary, paid the expenses of her last sickness and funeral. We think that the silence of the plaintiff after he had knowledge of the provision of the will of Mary O'Riley is decisive. *Plymouth v. Mills*, 7 Allen, 438, 444. By his own laches the plaintiff has deprived himself of any right or benefit which he might have had if he had exercised proper diligence. His silence in relation to the will, after he had been informed of its provisions regarding himself and the defendant, induced the defendant to believe that the plaintiff fully acquiesced in its provisions. It is now too late to set up any claim he may have had to the estate, if in season he had insisted upon it. The plaintiff is entitled to \$500 under the will of Mary O'Riley, with interest from the time of the death of Thomas O'Riley. Upon payment of this sum by the defendant into the clerk's office the bill will be dismissed. Decree accordingly.

(142 Mass. 200)

ATTORNEY GENERAL, by Information, *v.* CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts.* Suffolk. July 1, 1886.)

1. MUNICIPAL CORPORATIONS — CITY OF BOSTON — SIDEWALKS — REMOVAL OF — CONSTRUCTION.

Under the existing statutes, the city of Boston is not obliged to construct or maintain sidewalks upon any of its highways, and may remove sidewalks already constructed.

2. SAME — ST. 1872, CH. 808 — SCOPE — ACCEPTANCE OF, BY CITIES.

There is nothing in St. 1872, c. 808, which provides for the construction of sidewalks by cities, which renders it obligatory upon any city accepting the same to construct sidewalks upon any of its highways, or to continue those already constructed.

**3. SAME—CITY OF BOSTON—POWERS OF BOARD OF ALDERMEN.**

The power to determine whether public convenience requires the construction or removal of a sidewalk in the city of Boston, is located in the board of aldermen, who may impose upon the proper city official the duty of accomplishing the work decided upon by the legislative branch of the city council.

**4. SAME—BOARD OF ALDERMEN—POWERS OF—APPROPRIATIONS.**

The board of aldermen may pass an order for the construction or removal of a sidewalk after the general appropriation for paving has been made, without a more specific appropriation, although the order directs the expenditure to be charged to the general appropriation for paving.

Information for an injunction to restrain the removal of the sidewalk on Boylston street, in the city of Boston, adjoining the Common, as ordered by the board of aldermen. Hearing in the supreme court, before C. ALLEN, J., who reserved the case for the full court upon facts appearing in the opinion.

*Hale & Walcott*, for plaintiff.

*A. J. Bailey*, for defendant.

DEVENS, J. St. 1799, c. 31, § 1, (2 Mass. Sp. Laws, p. 338,) provided that all streets in the city of Boston shall be paved "agreeable to the following regulations, viz., that the foot path or walk on each side of every street shall be of the breadth of one-sixth part of the width of the whole street, and shall be laid or paved with bricks or flat stone, and secured with a beam or cut stone along the outside thereof, and the middle, or remaining four-sixths, of every street shall remain as a passage-way for carriages of burden or pleasure." In certain cases it was provided that "the breadth of the foot-walk, and the ascent and descent and the curving of every pavement, shall be regulated by the surveyors of highways." This statute the informant claims to be still in force, and contends that there exists no power in the city government, or any of its branches, to cause the entire and permanent removal of a sidewalk on any paved street in the city of Boston.

The act of 1799 does not in terms provide that every paved street shall have a sidewalk or foot-path on each side thereof, but it does assume by these regulations that it will; and the second section of the act provides that, when the cart-way in any street is ordered to be paved, the owner of any abutting lot "shall, without delay and at his own cost, cause the foot-way in front of his ground to be paved with brick or flat stones, and supported by timber or hewn stones, and kept in repair; the same to be done under direction of and to the approbation of the surveyors of highways." In case such owner neglects to pave his foot-way, the surveyors are authorized to do it, and to recover of him the amount thus expended.

St. 1831, c. 17, treats the statute of 1799 as in force, and recognizes the second section thereof as its principal object, by imposing upon the abutters, upon macadamized streets in the city of Boston, the same liabilities as would be created under the act of 1799, and the acts in addition thereto, by the paving of the street.

St. 1833, c. 128, provides that the city council of Boston "may, by

any ordinance or ordinances, empower the surveyors of highways so to regulate the width and height of sidewalks \* \* \* as shall, in the judgment of said surveyors, be most conducive to the convenience and interest of said city, any law of the commonwealth to the contrary notwithstanding." It further provides that the city council may "empower said surveyors to accept said sidewalks after the same shall be put in good and perfect repair, \* \* \* and \* \* \* relinquished to said city, \* \* \* and \* \* \* order that after such relinquishment such sidewalks may be maintained at the expense of said city." The power of regulating the width and height of the sidewalks is given as a part of the power of accepting the same for the city when put by the abutter in good and perfect repair, and, when also relinquished to the city, thenceforth they may be maintained at its expense. The act does not make it the duty of the city through the surveyors to accept the sidewalk prepared by the abutter on his relinquishment of it, nor does it compel the relinquishment of the abutter. Its object was to place within the control of the city the whole subject, and, under it, if it was not deemed necessary that any sidewalk should be constructed, it was not obliged to accept one, and impose the burden upon the city. While the word "regulate," as applied to the sidewalks, may often imply the existence of the thing to be regulated, the use of the streets of a city implies the power to prohibit the use of them under certain circumstances. *Com. v. Stodder*, 2 Cush. 562, 571; *Union Ry. Co. v. Cambridge*, 11 Allen, 287, 294.

If the validity of the order here in question depended alone on these three statutes cited, it may be doubted whether it could be held that they rendered it obligatory on the city, whenever a way was paved or macadamized, to provide it with sidewalks or footways if, in the judgment of the authorities, these were not required.

These statutes, which related only to the city of Boston, were repealed by the statute of 1872 (re-enacted Pub. St. c. 50, § 22) so far as they are inconsistent therewith. The statute of 1872 was a general statute, applicable to all cities of the commonwealth who should accept the same; was accepted by the city of Boston May 21, 1872; and was consequently in force when the order in the case at bar was passed. The previous statutes, which we have referred to as a part of the history of legislation on this subject, had contemplated the grading and construction of sidewalks by the abutters. This provided for the construction of sidewalks by the city "as public convenience might require," in such form and with such materials as it might deem proper, or for the completion of any partially constructed sidewalk to be thereafter maintained by the city, and for the assessment of the expenditure upon the abutter; deduction being made for previous assessments paid by him. There is nothing in this act which renders it obligatory upon any city accepting it to construct sidewalks upon any of its ways. Whether this shall be done is left to the discretion of its lawful authorities. If any statute previously existed compelling the construction of a sidewalk in every paved street, the provision would be clearly inconsistent with the discretionary



power given by this act, so far, certainly, as streets are concerned which up to that time had not been provided with sidewalks.

It is urged that the power to construct sidewalks, even if it be discretionary, cannot be treated as giving authority to remove or dispense with them where they already exist. To hold thus would be to give too limited an interpretation to the statute. The general power to construct sidewalks or not in all streets, whether macadamized or paved, must be construed as one which deals with the whole subject, and places it within the control of the local authorities. It authorizes them, not merely to construct them or not in their discretion where they do not now exist, but to remove or dispense with them where they do exist if, in their judgment, it is desirable.

It is to be considered, if this is so, whether the order to remove the sidewalks here in question has been passed by the proper authority. That the aldermen had formerly the powers of surveyors of highways appears by St. 1856, c. 448, § 41, (city charter.) Under St. 1885, c. 266, § 6, the executive power of the city government was vested in the mayor, to be exercised through the several officers and boards of the city in their respective departments under his general supervision and control; and the contention of the informant is that the power to dispense with or remove the sidewalk was "executive" or "administrative" strictly; both these words being used in the statute. But the power to determine whether public convenience requires the construction of a sidewalk, and equally so its removal, involves the exercise of judgment not administrative only, and the exercise of the power is judicial in its character, although expressed in a legislative form. The power to so repair a highway that it shall be fit for travel within the lines marked out for travel as established, is executive, but that of determining what shall be the lines of travel is legislative. The board of aldermen may not be able to control executive action of the mayor by prescribing the time within which the renewal shall take place, but this portion of the order may fairly be interpreted as imposing upon the proper officer, the superintendent of streets, acting under his official superior, the mayor, the duty of doing it within the time named if it could be so done with proper regard to other executive duties of a similar character.

The remaining question is whether the board of aldermen might pass such an order without a more specific appropriation than the general appropriation for paving, made at the beginning of the year, before action had been had or taken as to this sidewalk, to which appropriation the order directed the expenditure to be charged. The statute provides that "no expenditure shall be made nor liability incurred for any purpose beyond the appropriation for the paving department of \$800,000, for the objects and purposes explained in the recommendations of the committee on pavings. These included new work on streets already laid out, as on those which might be petitioned for, and for repairs and maintenance of streets and roads. If the removal of the sidewalk, and also the repavement of that portion of the street, were necessary, they were acts in the nature of a repair of the way. The appropriation as passed con-

templated contingencies the exact nature and character of which could not be foreseen, and when such a contingency occurred the expenditure which became necessary might properly be assigned to it. It is not suggested that the appropriation did not afford ample means to meet the expenditure, but only that there was no more than sufficient money on hand "to do the customary and necessary work, in other respects, of the department of paving." If it shall be found hereafter that the appropriation is exhausted before the work in question can properly be done, the statutory provision forbidding expenditure beyond the appropriation must be observed, but the order for this work is not on that account invalid. Petition dismissed.

(142 Mass. 107)

MORGAN v. CURLEY.

(*Supreme Judicial Court of Massachusetts. Middlesex. June 29, 1886.*)

POOR DEBTORS—EXAMINATION—RECOGNIZANCE—ARREST, WHEN ILLEGAL.

Where the plaintiff was under a recognizance to appear before a master in chancery, and made an application to take the oath for the relief of poor debtors, upon which application an examination had taken place, but no decision given by the magistrate in the presence of the plaintiff, but a decision had been given in his absence, an arrest of the plaintiff at a place other than the office of the magistrate where the decision was given, and on an occasion subsequent to that at which the proceedings before the magistrate ended, is illegal, and the plaintiff may recover compensation for loss of time and for any indignity he may have suffered.

This was an action for trespass to the person. Trial in the superior court before KNOWLTON, J., where, upon facts which appear in the opinion, the presiding judge ruled that, the arrest having been made at a place other than the office of the magistrate where the decision was given, and on an occasion subsequent to that at which proceedings before the magistrate ended, was illegal, and upon the question of damages instructed the jury that they might give a sum sufficient to compensate plaintiff for the loss of his time and the indignity he had suffered, if any. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

*J. D. Thompson*, for defendant.

*S. W. Trowbridge*, for plaintiff.

GARDNER, J. The plaintiff was under recognizance "to appear at the time fixed for his examination; and from time to time until the same is concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon." Pub. St. c. 162, § 28. Before the examination was concluded, and before the magistrate had formally decided that the plaintiff was not entitled to take the oath, and before he had made his certificate to that effect, and annexed it to the execution, the plaintiff made default. His departure before the examination was concluded, and before the magistrate had made his certificate, was premature, and was a breach of his recognizance. *Lothrop v. Bailey*, 14 Al-

len, 514; *Peck v. Emery*, 1 Allen, 463; *Fuller v. Meehan*, 118 Mass. 135. After the plaintiff had departed, and the condition of the recognizance was broken, the magistrate made the certificate, which was annexed to the execution. By virtue thereof the officers arrested the plaintiff, after a lapse of two days, at a place remote from that of the examination.

Upon entering into the recognizance the plaintiff was relieved from arrest under the execution. The arrest could not be renewed while the proceedings in relation to the examination were still pending, nor until they were brought to a close. *Jacot v. Wyatt*, 10 Gray, 236; *Lothrop v. Bailey*, *ubi supra*. The place of the examination was the place where he was to attend, and abide the final order of the magistrate, and where the officer was to be in attendance to arrest the debtor, if the oath was refused. The debtor by the terms of his recognizance was to deliver himself up at the time and place of his examination, and not elsewhere, *Lothrop v. Bailey*, *ubi supra*.

The question arises whether the magistrate had power to act in any respect during the absence of the debtor, and after he had made default upon his recognizance. By the common law a commitment of a debtor on execution is a discharge of the judgment. The statutes of the commonwealth have materially changed the common law in this respect. *Cheney v. Whitley*, 9 Cush. 289. By these statutes the creditor preserves all his rights and remedies on the judgment, except that of arresting and imprisoning the debtor. But, as Mr. Justice METCALF said in *Coburn v. Palmer*, 10 Cush. 273, the common law remains in force in all the cases in which the statutes have not altered it. This was an action of debt on a judgment upon which execution had issued. The defendant was arrested, and gave bond for the prison limits under Rev. St. c. 97, §§ 63, 65, made default, and the bond was forfeited. Upon suit on the bond the surety successfully defended upon the ground of infancy. The court say:

"The fact that the surety in the bond was not answerable thereon does not give the plaintiff any further remedy against the defendant than if the plaintiff had voluntarily released him from prison on his giving insufficient security to pay the judgment. \* \* \* The judgment is discharged, and the plaintiff's only remedy is on the bond."

In *Whitton v. Bicknell*, 3 Allen, 472, the plaintiff argued that the recognizance was a satisfaction of the execution and judgment. The opinion of the court went no further than to say that the recognizance was a bar to any further proceeding to enforce the collection of the execution, and that the remedy of the execution creditor was upon the recognizance only; citing *Coburn v. Palmer*, *ubi supra*, and *Kennedy v. Dunklee*, 1 Gray, 65.

When the debtor enters into a recognizance in compliance with the statutes, the recognizance takes the place of the execution and the arrest, and remains as security to the creditor. The power of the execution is suspended until the debtor submits himself to examination, and the magistrate refuses the oath, and annexes to the execution his certificate to that effect. Then, if the officer is present at the place of the examina-

tion, and the debtor is there, abiding the final order of the magistrate, the officer is empowered to take him. The recognizance is then of no effect, and the execution resumes its former power. In this way, and in no other, does the execution displace the recognizance. The officer cannot act until he is warranted so to do by the certificate of the magistrate annexed to the execution. After breach of the recognizance the magistrate has no power to act further in the premises. The execution is *functus officio*. The recognizance stands in its place as the security to the creditor, and his only remedy is by suit thereon.

The instructions to the jury were substantially in accordance with the views we have expressed as to the law. The examination before the magistrate was not concluded when he attempted to make his certificate, and annex it to the execution, in the absence of the debtor, and after breach of the recognizance. There was no escape by the debtor, and the officer was not authorized to arrest him at a place other than that of the examination, and at no place after breach of the recognizance.

As the defendant had no authority to arrest the plaintiff, he was entitled to recover compensation for the loss of his time, and for the indignity he had suffered thereby. *Smith v. Holcomb*, 99 Mass. 552.

Exceptions overruled.

(142 Mass. 124)

KELLOGG v. KIMBALL and another.

(*Supreme Judicial Court of Massachusetts*. Suffolk. June 30, 1886.)

ATTACHMENT—BOND TO DISSOLVE ATTACHMENT—AMENDMENT OF DECLARATION IN ORIGINAL ACTION—EFFECT OF—SURETIES—NEW DEMAND.

Where, in an action upon a bond to dissolve an attachment, the defendants, sureties on the bond, contended that they were discharged by the allowance of an amendment to the declaration in the original action, adding a new count in place of the first and second counts in the declaration, *held*, that to have this effect the amendment must be such as to let in some new demand or new cause of action, and not merely to vary the mode of stating the liability upon the same cause of action.

This was an action of contract upon a bond to dissolve an attachment. A demurrer to the first two counts in the declaration in the original action was sustained, and thereafter the plaintiff, without notice to or consent of the sureties on said bond, filed, by leave of court, an amendment to his declaration, containing two counts. A demurrer to said declaration, as amended, was filed and sustained as to the first count contained in said amendment, and after trial a verdict was rendered for the plaintiff upon said two remaining counts; namely, the third count in the original declaration, and the latter count in the amendment. At the hearing of this cause in the superior court, before PITMAN, J., without a jury, the defendants claimed that the effect of said amendment to the declaration in the original action was to release them from liability upon said bond, but the court ruled otherwise, and found for the plaintiff for the penal sum of said bond, and reported the case to the supreme judicial court for a decision of the questions of law involved.

*S. H. Dudley*, for plaintiff.

*G. W. Morse* and *J. B. Goodrich*, for defendants.

C. ALLEN, J. The decision of the present case involves a further consideration of the pleadings in the much litigated action of the plaintiff against the principal in the bond now in suit, which was four times before this court. *Kellogg v. Kimball*, 122 Mass. 163, 135 Mass. 125, 138 Mass. 441, and 139 Mass. 296. It is now contended that the sureties on the bond given to dissolve the attachment in the original action were discharged by the allowance of the amendment to the declaration, adding a new count in place of the first and second counts in the original declaration. To have this effect the amendment must be such as to let in some new demand or new cause of action, and not merely to vary the mode of stating the liability upon the same cause of action. *Wood v. Denny*, 7 Gray, 540; *Smith v. Palmer*, 6 Cush. 519; *Gutter v. Richardson*, 125 Mass. 72. Pub. St. c. 167, § 85, provide that "the cause of action shall be deemed to be the same for which the action was brought, when it is made to appear to the court that it is the cause of action relied on by the plaintiff when the action was commenced, however the same may be misdescribed." The allowance of the amendment is conclusive evidence of the identity of the cause of action as between the original parties, but not as to third persons who have no notice of the application for leave to amend. *Id.* The same cause of action may be set forth in the count in contract and a count in tort. Pub. St. c. 167, § 2, cl. 5; *Mann v. Brewer*, 7 Allen, 202. In the present case it is stated on the face of the amended count that it "is for the same cause of action as the first and second counts and the third count in said declaration; it being doubtful to which class said action belongs." The allowance of the amendment shows that the judge who allowed it understood it to be of the same cause of action. The trial proceeded upon the same assumption; the case having been submitted to the jury, and a verdict having been taken upon the original third count and the amended count, as representing one cause of action. The defendants do not now contend, and we do not see, that the amended count was for a different cause of action from that set forth in the original third count; but they place their defense on the ground that the original declaration was insufficient because it contained counts in contract and in tort not averred to be for the same cause; which, therefore, could not legally be joined. There is no suggestion that the amended count introduced any new demand, or that it was anything else than a different mode of stating the original claim. The demurrer to the first two counts of the declaration was sustained on the ground that they were improperly joined with the third count, merely because, as we understand from the defendants' brief, there was no sufficient averment of identity in the cause of action. This defect was cured by inserting such an averment in the new count, and this does not have the effect to discharge the sureties. It is merely supplying a formal defect. This is the only question which we have to consider. Judgment affirmed.

(142 Mass. 221)

## SAFFORD and another v. WEARE.

(Supreme Judicial Court of Massachusetts. Essex. July 2, 1886.)

## ENTRY, WRIT OF—UNRECORDED DEED—ATTACHMENT—JUDGMENT—EXECUTION—LEVY AND SALE.

In a writ of entry, A.'s title to certain premises was by deed of one B., executed and delivered in 1878, and recorded in 1880. C.'s title was under a levy and sale on execution in 1881 in a suit against B., in which the premises were attached in 1879. A. held an unrecorded deed when the premises were attached as the property of his grantor, B., but had recorded his deed before judgment and execution. *Held*, that A.'s right was collaterally affected by the judgment against B.; and, as he was not a party or privy to that judgment so that he could reverse it on error, he could avoid it by proof, and was entitled to judgment in the writ of entry.

The facts appear in the opinion.

Geo. B. Ives, for demandant.

S. C. Bancroft, for tenant.

W. ALLEN, J. This is a writ of entry. The demandant's title is by deed from one Jacobs, executed and delivered in 1878, and recorded in 1880. The tenant's title is under a levy and sale on execution in 1881 in a suit against Jacobs, in which the premises were attached in 1879. The demandant held an unrecorded deed when the premises were attached as the property of the grantor, and had recorded his deed before judgment and execution. The question is whether the sale on the execution is valid against him.

The *ad damnum* in the writ against Jacobs was \$2,000, and the judgment was for \$2,117.14 damages, besides cost. As the judgment was in excess of the *ad damnum*, it was erroneous. *Grosvenor v. Danforth*, 16 Mass. 74; *Hemmenway v. Hickes*, 4 Pick. 497; *Hichins v. Lyon*, 35 Ill. 150. The demandant's right is collaterally affected by the judgment against Jacobs; and as the demandant was not a party or privy to that judgment so that he can reverse it on error, he can avoid it by proof. *Vose v. Morton*, 4 Cush. 27; *Laftin v. Field*, 6 Metc. 287; *Downs v. Fuller*, 2 Metc. 135; *Turbell v. Jewett*, 129 Mass. 457.

As this point is quite decisive of the case, it is unnecessary to consider whether, had the judgment been valid, the fact that the attachment (which was limited to \$2,000) was less than the amount of the levy, would have the effect upon the levy by sale that it would seem to have upon a levy by extent. See *Chickering v. Lovejoy*, 13 Mass. 51, 56.

Judgment for demandant.

(142 Mass. 216)

## KENT and others v. DUNHAM and others.

(Supreme Judicial Court of Massachusetts. Suffolk. July 6, 1886.)

## WILL—BEQUEST IN TRUST TO TESTATOR'S CHILDREN AND DESCENDANTS—PUBLIC CHARITY—RULE AGAINST PERPETUITIES.

A bequest to trustees, their heirs and assigns, forever, in trust, "to appropriate such part of the principal and interest as they may deem best for the aid and support of those of my [the testator's] children, and their descendants, who may be destitute, and, in the opinion of the trustees, need such

aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. Such a bequest is not a public charity, and, being too remote, as tending to create a perpetuity, is to be deemed invalid and without effect.

This was a bill in equity by the plaintiffs, heirs at law of Josiah Dunham, deceased, praying that the will of the said Dunham be annulled, and adjudged invalid and of no effect, so far as it contained a residuary clause, which clause, together with the facts, appear in the opinion. The defendants demurred to the bill. Hearing in the supreme court before C. ALLEN, J., who reserved the case for the full court.

R. M. Morse, Jr., and H. Dunham, for plaintiffs.

L. S. Dabney, for defendants.

DEVENS, J. The gift to "Samuel Leeds and Josiah Dunham, Jr., their heirs and assigns, forever, and to the survivors of them, and his heirs, forever, in trust, to sell, dispose of, invest, and manage the same, and appropriate such part of the principal and interest as they may deem best for the aid and support of those of my children, and their descendants, who may be destitute, and, in the opinion of the trustees, need such aid," will not admit of being construed as a gift to the testator's children and their descendants who might be living at the time of the testator's decease, or that of the last of his children. The language used, as well as the declared purpose, show that it is a gift in trust for the benefit of those who should thereafter, throughout an indefinite period of time, being descendants of the testator, become destitute and in need of aid and support. The words import that the bequest is ultimately to be administered by others than the trustees named, and that the testator has not sought to repose a special confidence in them exclusively, but to establish a permanent trust, for which trustees were ultimately to be appointed according to ordinary rules of courts of equity. That such a gift is too remote, as tending to create a perpetuity, when it is to be held for the benefit of those who may not have been living at the time of the testator's death, or that of his children, and who may not come into being until many years thereafter, cannot be controverted, unless it can be sustained as a public charity. *Nightingale v. Burrell*, 15 Pick. 104; *Brattle Square Church v. Grant*, 3 Gray, 142; *Sears v. Russell*, 8 Gray, 86; *Thorndike v. Loring*, 15 Gray, 391. The attorney general has therefore been made a party to this bill, as well as all the demandants of the testator. *Jackson v. Phillips*, 14 Allen, 539.

A public or charitable trust may be indefinite in duration, and its general object or purpose, as indicated, being charitable, the application and selection of the particular objects or individuals who are to receive its benefits may be confided to those who are its trustees. That a gift should have this character there must be some benefit to be conferred upon, or duty to be preferred towards, either the public at large, or some part thereof, or an indefinite class of persons. If a trust were created for the benefit of the poor of a particular town or parish, or of persons of a specified class or occupation, as seamen, laborers, or mechanics, it

would not be doubted that it would be good as a charity. So, if a sum were bequeathed, the income of which, from time to time, or in the discretion of the trustees, was to be applied to the relief of the destitute, by distribution of fuel or provisions, or in any other similar defined mode, or as the trustees might deem most expedient, the gift would be enforced as a public charity.

The gift in the case at bar is solely for the benefit of the children of the testator, and their descendants. The only public interest that there can be in connection with it is that where, as there may be hereafter, certain destitute persons, descendants of the testator, who might otherwise become a public charge, they will be entitled to relief from this fund. This legacy, it will be observed, is readily distinguishable from one by which the income of a fund is devoted to the poor of a particular town or parish, preference being given to the descendants or the relations of the testator. In such a donation there is a public object, as they are thus provided for only as a part of the poor who are to receive the benefit of the charity, although a preference is given them, on account of their descent or relationship, in its distribution.

There were certain English cases which, as the trustees contend, offered strong ground for holding this legacy to be public charity. In *Attorney General v. Bucknall*, 2 Atk. 328, (1741,) the point decided was that any person, though the most remote in the contemplation of the charity, might be a relator in an information in reference thereto. The facts, as stated in the note, do not show that any question arose as to whether the bequest was a public charity; the only inquiry apparently being whether the relator was one of the poor relations who were the objects of the bounty. In *White v. White*, 7 Ves. 423, (1802,) it was held that a bequest to poor relations of two families for putting out their children as apprentices, the duration of which would have exceeded the limits allowed by law, unless it was a public charity, might be executed by putting out those who were then ready as apprentices. There was no discussion of the subject in the opinion of the master of the rolls, Sir WILLIAM GRANT. In *Attorney General v. Price*, 17 Ves. 371, (1810,) there was a direction to pay £20 per annum to the testator's poor relations in the county of Brecon, which was held good as a charity, apparently upon the authority of *Isaac v. Defriez*, Amb. 595, and on the ground that it was entitled to have perpetual continuance for the benefit of a particular class of poor. In *Gillam v. Taylor*, L. R. 16 Eq. Cas. 581, it was held that where the testator gave the residue of his real and personal estate to trustees for investment in their joint names, and directed the interest from time to time to be paid to such lineal descendants as they might severally need, that the gift was charitable, and that it need not be distributed to those actually poor, but only to those relatively so, and thus that, if all the relations except one had £20,000 a year, and the latter £10,000 a year, he would be entitled. This decision is treated with but scant respect in *Attorney General v. Northumberland*, L. R. 7 Ch. Div. 745, by Sir GEORGE JESSEL, M. R., where it is said that such a charity would only be good in favor of those actually poor. In this latter case the gift gave only a preference to



the relations of the testator in the distribution of the income of the trust fund to the poor, which was provided for annually.

These cases do not fully sustain the position that the legacy here in question can be upheld as a public charity. In all of them there were persons so situated as to be entitled to the benefit of the charity, so that an indefinite accumulation was not to be permitted in favor of a class which might never have an existence, or might never come into existence within any period of time when its connection with the testator could be traced.

Bequests in favor of poor relations also are for a far more extensive class than descendants. While the failure of issue, and thus the termination of the line of lineal descent, is comparatively common, the ancestors of every person are indefinitely numerous, and there can be no failure of collateral relations, except such as may arise from the impossibility of tracing the descent of the testator.

Without desiring to express any opinion as to whether we should hold it to be our duty to follow the doctrine of these cases if the question presented by the case at bar was fairly within them, the reasons why the gift of the testator cannot be sustained as a public charity appear to us entirely sufficient. It is the policy of the law to prevent indefinite accumulation of property for the benefit of individuals. The descendants of the testator are now, and have been since his decease, in comfortable circumstances. Not only may a long time elapse before any descendant will exist who can be termed "a destitute person," but such a time may practically never occur, as it may be at so distant a period that descent cannot be traced, or the event of the failure of descent from the testator may render it impossible that it should ever occur. In the expectation of the remote contingency that there shall be a descendant who is a destitute person, the fund is to be permitted to accumulate if the will of the testator is followed. If the line of descent from the testator fails, it will have been accumulated for his heirs, it may be, in a remote generation. There is no general public object sufficient to justify this accumulation in the possible advantage which the public may obtain by having the descendants of the testator protected from beggary, and thus from becoming a public charge. To establish as a permanent charity a provision for a single family, and thus, it may be, to prevent an indefinite accumulation of property which might eventually be solely for the benefit of the testator's heirs, and those who may claim under them, would be foreign to the general principles of our law on this subject, and cannot be justified by so slight a prospective public benefit.

The result is that the portion of the eighth clause of the testator's will which seeks to establish a trust in two-thirds of the residue of his estate for the benefit of his children and their descendants "who may be destitute, and, in the opinion of said trustees, need such aid," must be deemed to be invalid and without effect. Demurrer overruled.

(102 N. Y. 719)

SEELEY v. NEW YORK CENT. & H. R. R. Co.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

## RAILROAD—FIRE CAUSED BY DEFECTIVE SMOKE-STACK—QUESTION FOR JURY.

Plaintiff's barn took fire soon after the passing of three of defendant's engines. There was some evidence that the fire-screens on two were in good order, but there was no proof given as to the condition of the third. *Held*, that it was by no means conclusive that the fire was caused by either of the two engines which it was claimed were in perfect order, and it was a question of fact for the jury to determine which engine caused the fire, and a nonsuit was improperly granted.

Appeal from New York supreme court, general term, Fourth department, reversing judgment of nonsuit in favor of defendant, and granting new trial.

Wm. H. Adams, for appellant, New York Cent. & H. R. R. Co.  
Stephen K. Williams, for respondent, Samuel Seeley.

PER CURIAM. The principal question involved in this case is whether the negligence of the defendant caused the barn of the plaintiff to be set on fire. There was a conflict in the evidence in regard to the fact whether the engine which caused the fire was sufficiently guarded by a screen on the top of the smoke-stack which prevented coals of fire from escaping. The defendant's counsel claims that the fire was caused by one of two engines passing at about the time of the fire, and which engines were both fully protected in respect to fire-screens. An examination of the testimony discloses that it is not entirely clear whether the fire was caused by either of the two engines mentioned, or by another which was not properly guarded so as to prevent the escape of coals of fire.

Harriet Burley, a daughter of the plaintiff, testified:

"Some five or six of defendant's locomotives passed there that morning before the fire, going in both directions. \* \* \* There were trains passing there frequently that morning. Trains do frequently pass there without my noticing them. \* \* \* The trains I have mentioned are the only ones I noticed within half an hour previous to the fire."

Mrs. Seeley, plaintiff's wife, testified:

"Had seen a number of trains of defendant's cars passing there shortly before I discovered the fire. Fifteen or twenty trains passed there that morning, more or less. \* \* \* I didn't notice any train until after I saw the smoke. \* \* \* I was at work in the kitchen just before I discovered the fire. I hadn't been giving attention to the trains. The last train I noticed before the fire was the work train. These three were the only locomotives I noticed."

Thomas Cram, a conductor for the defendant, testified that an empty engine went west about the time of the fire, about 15 or 20 minutes before they were called to the fire; that there were some fires after that engine passed; that he saw several fires immediately after it had passed.

There was no proof given as to the condition of this engine as to the fire-screen, but there was some evidence that the fire-screens on the other

<sup>1</sup>See 15 Wkly. Dig. 231.

two engines spoken of were in good order. It is, however, nowhere shown that the fire was caused by either of the last two mentioned engines. On the contrary, it is shown that it may have been caused by some other engine, the fire-screen of which was not in perfect or even good order, as many of them had holes cut in to make better draught. It will thus be seen that it is by no means conclusive that the fire was caused by either of the two engines which it was claimed were in perfect order, and, as the case stood, it would be a question of fact for the jury to determine which engine caused the fire. There is no other question in the case that requires attention.

The judgment should be affirmed.

(All concur.)

(102 N. Y. 449)

GRIFFIN v. LONG ISLAND R. CO.

(Court of Appeals of New York. June 1, 1886.)

1. ESTOPPEL—JUDGMENT—SECOND APPEAL.

Where, in a former action, the appointment of plaintiff as general receiver was alleged in the complaint, and denied in the answer, and the same issue was framed and tried as in this, the legality of the appointment is *res adjudicata*, and cannot be the subject of review upon this appeal.

2. SAME—WRONG DECISION.

Even if the decision was wrong, it does not impair the effect of the former judgment as a bar to the right to raise the same question. Nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal, as a matter of right, from the general term to this court.

Appeal by defendant from a judgment of general term supreme court, Second department, affirming judgment in favor of plaintiff.

*Edward E. Sprague*, for appellant, Long Island R. Co.

*H. E. Sickels*, for respondent, Augustus R. Griffin.

MILLER, J. It is very clear, we think, that the defendant is estopped from raising the question in this action as to the legality of the appointment of the plaintiff as general receiver. The whole subject was presented in a previous action between the same parties, and is *res adjudicata*. In the action referred to the appointment of plaintiff as general receiver was alleged in the complaint, and denied by defendant's answer in precisely the same language as in this action, and the same issue was framed and tried in that case as in the one now presented. It was found by the court in that case that the plaintiff was legally appointed receiver, and the precise question arising here was adjudicated. The judgment based upon the findings in that case was a complete determination of the question now raised, and it is not the subject of review upon this appeal.

The rule is well settled that a former judgment of a court of competent jurisdiction is final and conclusive between the parties, not only as to the matter actually determined, but as to every other matter which the parties might have litigated and have decided as incident to or essentially connected with the subject-matter of the litigation within the purview of the original action, either as matter of claim or of defense.

*Pray v. Hageman*, 98 N. Y. 351; *Jordan v. Van Epps*, 85 N. Y. 436; *Smith v. Smith*, 79 N. Y. 634; *Clemens v. Clemens*, 37 N. Y. 74. To ascertain what might have been determined in the former action it is proper to look beyond what appears on the face of the judgment, to every allegation which, having been made on one side and denied on the other, was at issue and determined in the course of the proceedings. *Clemens v. Clemens, supra*. The findings and the judgment must generally show what was determined, and they are conclusive on the subject.

In regard to the case now considered, the legality of the plaintiff's appointment was expressly raised by the pleadings, litigated on the trial, and determined by the court, in the former action. Whether it was rightly or wrongly determined, is a question that cannot be raised in this action. Even if the decision was wrong, it does not impair the effect of the former judgment as a bar to the right to raise the same question. Nor does it change the effect of the judgment because the amount recovered was not sufficient to entitle the plaintiff to appeal, as a matter of right, from the general term to this court. It might as well be urged that the opposite party would not be bound when the right of appeal existed, and the party failed to make the appeal. This rule would be more especially applicable here, as it does not appear that any application was made to the general term to allow the defendant to appeal, and it therefore cannot be said that the defendant might not have obtained the permission to do so had he made an application for that purpose in due season. Nor can it be said in this case that the question decided in the former action was immaterial to the issue, as it is apparent that the right of the plaintiff to maintain the action depended upon the legality of his appointment as receiver.

The claim of the appellant's counsel, that the determination of the validity of plaintiff's appointment in sequestration was not necessarily involved in the former action, is not well founded. Although the justice found that the plaintiff was duly appointed receiver in the foreclosure case, he had previously found that prior to the commencement of that action he was appointed receiver in the sequestration proceedings; that the former action was for trespass upon property of insolvent corporation committed prior to either of plaintiff's appointments as receiver. It was not a cause of action that accrued to him as receiver in the foreclosure proceedings, and he could only maintain the action by virtue of his general appointment as receiver. That action, therefore, depended, in part at least, upon this finding, and it cannot be rejected as not necessary to sustain the judgment. There is therefore no ground for claiming that it rested entirely on the finding of the appointment of a receiver in the foreclosure proceedings.

The judgment was right, and should be affirmed.

(All concur.)

(44 Ohio St. 420)

## BULLOCK v. HORN.

*(Supreme Court of Ohio. June 29, 1886.)*

## 1. MECHANIC'S LIEN—CONSTRUCTION OF STATUTE.

The statutes of this state upon the subject of mechanics' liens, being remedial in their nature, are to be liberally construed in order to carry out the purpose of the legislature in their enactment.

## 2. SAME—ACTION BY MECHANIC—SET-OFF—CLAIM AGAINST CONTRACTOR.

Where a mechanic, who, under the employment of a contractor, and with the knowledge of the owner, has performed labor upon the construction of a building, and, the account not being paid, takes all necessary steps, as provided by sections 8198, 8195, 8201, and 8202 of the Revised Statutes, to fix the liability of the owner, and to obtain a lien upon the premises, and brings his action against the owner to recover the amount due, and have the same declared a lien, such account being less than the balance unpaid on the contract, such owner cannot be allowed to set off a claim against the contractor, not growing out of the contract, acquired by him after the labor was performed, although such claim was acquired before notice that the mechanic's demand had not been paid.

Error to district court, Lorain county.

The action is brought to reverse a judgment of the district court of Lorain county reversing the judgment and decree of the court of common pleas of that county. In the last-named court the plaintiff in error, a carpenter, brought his action to recover upon an account for labor performed upon the dwelling of the defendant in error, and to have the same declared a lien upon the premises under the laws relating to mechanics' liens. From the findings of the court of common pleas the following facts appear:

In May, 1883, the defendant entered into a contract with one Asa Bullock to erect a dwelling-house on premises owned by defendant. Bullock was to be paid one-third when the building was inclosed, one-third when the plastering was finished, and the balance when the building was completed. Between the twelfth day of June and the twenty-fifth day of August, 1883, the plaintiff performed work upon the building at the instance of the contractor, (Asa Bullock,) which is the basis of the account. On the last-named date the house was completed and accepted. On that day, the amount due plaintiff being wholly unpaid, he demanded payment of the contractor, which was refused. On the eleventh day of September following, the plaintiff filed with the defendant an itemized account of the amount and value of his labor, with all credits, pursuant to the statute. At that time there remained unpaid on the contract a sum in excess of the amount due plaintiff. The account of plaintiff was acknowledged by the contractor to be correct, and the defendant was notified of that fact. Shortly after, the plaintiff filed with the county recorder a proper affidavit, and took all the steps necessary to complete his lien upon the premises. On the third day of September, 1883, the defendant purchased in good faith, for full consideration, of a lumber company, a valid account against the contractor for an amount in excess of the plaintiff's claim. The defendant was at the time a stockholder in the lumber company. At the time of the purchase the defendant knew the plaintiff had performed labor for the contractor upon the house, but did not know whether he had been paid or not, and the first knowledge he had of plaintiff's claim was on the eleventh day of September. It does not appear that the account of the lumber company was for material furnished for the building upon the premises in question, nor that it in any way had relation to the same. This claim he pleads in the court of common pleas as a set-off.

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*E. G. & W. H. Johnson*, for plaintiff in error, cited—

*Phil. Mech. Liens*, 26, 61, 89, 92, 210; *Develin v. Mack*, 2 Daly, 94; *Hoyt v. Miner*, 7 Hill, 525; *Mandeville v. Reed*, 13 Abb. Pr. 173; *Gilman v. Gard*, 29 Ind. 291; *Mitchell v. Evans*, 2 Brown, 329; *Buchanan v. Smith*, 43 Miss. 90; *Collins v. Central Bank*, 1 Ga. 435; *Tuttle v. Montford*, 7 Cal. 358; *Shaver v. Murdock*, 36 Cal. 293; *Jorda v. Gobet*, 5 La. Ann. 431; *Baldwin v. Wood*, 11 La. Ann. 453; *Fourcher v. Day*, 6 La. Ann. 60.

*Metcalf, Webber & Johnson*, for defendant in error, cited—

*Hade v. McVay*, 31 Ohio St. 231; *Copeland v. Manton*, 22 Ohio St. 398; *Dunn v. Rankin*, 27 Ohio St. 132; *Phil. Mech. Liens*, 92, 304, 305; *Miner v. Hoyt*, 4 Hill, 193; *S. C. 7 Hill*, 525; *Owens v. Ackerson*, 1 E. D. Smith, 691; *Cheney v. Troy Hospital Ass'n*, 65 N. Y. 282.

SPEAR, J. It is not claimed in this case that the defendant's assignor, the lumber company, had, by virtue of its claim against the contractor, any lien upon the premises, nor is it denied that the plaintiff had complied with the law entitling him to recover against the defendant, and to a lien. The only question is as to the right of set-off in favor of the defendant, and against the plaintiff. The proposition may be stated thus: Can the owner of premises, having knowledge that a mechanic has performed work upon a building thereon, under employment of the principal contractor, set off against a claim for work so done a claim against such contractor not arising out of the contract under which the building is constructed, or in any way having relation thereto, and acquired by such owner after the labor was performed by the mechanic, but before the owner had notice that the mechanic had not been paid?

The question is to be determined by a consideration of the several sections of our law relating to mechanics' liens. Without quoting at length from these sections, their effect, so far as they apply to the question here, may be stated. Sections 3184 to 3192, Rev. St., provide for the taking of a lien upon the premises by the contractor. Sections 3193 and following give the right to a lien to any subcontractor, laborer, or mechanic, who, under employment of the head-contractor, performs labor or furnishes material for the improvement, and who has not been paid. He may file with the owner a sworn and itemized account of the amount and value of the labor or material, with all credits and set-offs, and upon receiving such notice the owner shall detain in his hands all subsequent payments from the principal contractor upon the contract in an amount sufficient to satisfy the claim. Within five days after receiving such account the owner is required to notify the contractor; and if, within five days thereafter, he does not notify the owner of his intention to dispute or commence an action to adjust the account, he is deemed to assent to its correctness, and therefore such subsequent payment shall be applied by such owner to the amount. If the contractor neglect to pay within five days after such assent to the correctness of the account, the owner shall pay, when due, the whole, or, in case other claims have been filed, a *pro rata* amount, as the case may be, out of subsequent payments owing to the contractor, and, on his

failure for 10 days, the subcontractor, workman, or material-man may recover against the owner, in an action for money had and received, when due, the whole or a *pro rata* amount, as the case may be, not exceeding in any case the balance due to the principal contractor. In addition to this remedy, the workman or material-man, by complying with subsequent provisions, may have a lien upon the premises which shall date back from the date of performing the first item of labor, or of the first material furnished, which shall have the same operation, effect, and duration, and be subject to the same obligations, with respect to the owner, as the lien of the head-contractor in similar cases. Such lien shall take precedence over any lien already taken or to be taken by the contractor, and an assignment or transfer by such contractor of his contract with the owner, as well as proceeding in attachment, or otherwise, against such contractor, to subject or incumber his interest in such contract, shall save and be subject to the claim of every laborer, mechanic, or material-man who has furnished labor or material towards the erection or repair of the structure.

The statute is highly remedial in its character, and should receive such liberal construction as will carry out the purpose of the legislature in its enactment. The labor of the workman and the material of the material-man having contributed to the erection of the structure,—having, indeed, created, in part, the very property on which the lien is sought to be attached,—the purpose of the law is to give to such parties the right, where the contractor refuses to pay, to be paid for their labor and material out of the fund which has been earned under the contract, and out of the structure, and the land upon which it stands; such claim, as to amount, not to be in excess of the claim of the contractor, as measured alone by the contract and his performance of it.

In giving a construction to this statute, by fair inference it may be assumed that the rights of the workman and material-man, as against the owner, are based upon the latter's contract with the contractor, and while they are subordinate to the contract, and are to be worked out through it, those parties have the right to rest in security upon it, and the means provided by law to secure its application to their demands. In the absence of fraud, they are presumed to have notice of the terms of the original contract. Hence, if the original contract showed that payment had been made in advance to the contractor, or if it contemplated the allowance, by the contractor, of set-off then held or to be acquired by the owner as payment, such provisions would bind the workmen and material-men, as they would be held to have accepted employment of the contractor with an implied assent to such terms. But where the contract was silent as to advance payments, and as to claims of the owner against the contractor, the workmen and material-men could not be held to have accepted employment with a view to such contingencies.

The purpose of laws of this character is, as stated by Phillips, in his work on *Mechanics' Liens*, "to take from the owner money actually owing by him upon his contract, and apply it in payment for the labor and materials which the workmen and material-men have contributed towards

the performance of the same contract." And where it is provided, as in our statute, that an assignment or transfer by the contractor of his contract with the owner shall save and be subject to the claims of the workmen and material-men who have furnished labor or material towards the construction of the improvement, such provisions operate as an equitable transfer to the workmen and material-men of the money due to the contractor by the owner, subject only to such obligations as spring out of the contract itself. This construction is believed to be founded in reason, and to be supported by the holdings of courts in other states upon the subject. The amount owing to the contractor under the contract being then found to be transferred to the workmen and material-men, it would seem to follow that any process, proceeding, or device which has for its object the wresting from the workmen and material-men of their equitable hold upon the amount due under the contract, being the result of and produced by their labor and material, would be directly against the spirit of the law, if not against the very letter itself.

All proceedings, by attachment or otherwise, to subject or incumber the contractor's interest in the contract, are to save and be subject to the claim of the workmen and material-men, and it is difficult to perceive why the allowance of a set-off against the contractor, acquired by the owner after the labor is performed or the material is furnished, would not work the same substantial result that would be reached by attachment; nor why it would not divest the security afforded by the contract from those whom the statute contemplates shall have the benefit of it, and thus accomplish indirectly, in favor of the owner, that which the statute provides shall not be done by any one directly. Had the defendant's assignor sought to reach the interest of the contractor in this contract, as against the claim of the plaintiff, by proceedings in attachment, or by any proceeding known to the law, the very letter of this statute would have proved an effectual bar. How can it (the company) evade the law by selling the claim to another? Ordinarily the purchaser of an overdue claim stands in no better position than his assignor. The rule admits of many exceptions, especially as to matters of remedy; but to regard the present case as affording a ground of exception would, to our mind, work a clear violation of the spirit of the statute.

It is contended that the defendant's claim against the contractor was a cross-demand in such sort that a statutory set-off existed in his favor. As against the contractor, in a suit upon the contract, the set-off might be effective, but the equities of the mechanic under this statute introduce another element into the case. The doctrine of set-off is of equitable origin,—is a graft from equity upon the law,—and, though incorporated into our statute, is to be administered in accordance with the principles of equity, and is not to be extended beyond the words of the statute in cases where, under the rules of equity, it should not be held to apply. Our statute—which provides that where cross-demands have existed between persons under such circumstances as that if one had brought an action against the other the set-off could have been set up, neither can be deprived of the benefit thereof by assignment, but the two



demands shall be deemed compensated—applies to a case where, an action being brought by one upon a claim obtained from another, the party sued seeks to set off a cross-demand against that other. In such case he cannot be deprived of his remedy because of the fact that the action is brought by the assignee, rather than the assignor. And a sufficient reason is that, aside from the consideration of avoiding circuitry of action and multiplicity of suits, it would be inequitable to allow one to deprive another of his right of set-off by an assignment of the claim to a third person, in favor of whom no equity of any kind exists. His claim is based wholly upon the consideration moving in favor of the assignor. The assignee stands in his shoes, and hence he cannot have any advantage which the assignor might not have had in a suit brought by himself. But we have not that case here. The workman or material-man stands in the contractor's shoes only as regards the contract itself, and payments upon it, and not as regards matters or claims extrinsic of the contract. The consideration which supports his claim is his labor or material upon the structure wherein the owner himself has an interest, and of which he gets the benefit. There is therefore a consideration moving directly in favor of the workman or material-man, and it would be grossly inequitable for the doctrine of set-off to be interposed to prevent him from receiving the benefits of the statute, and thus to enable the owner to take one man's property to pay another man's debt.

It is further contended that the set-off of defendant should be treated as a payment upon the contract; that it is the balance due from the owner to the contractor which the workman or material-man may stop the payment of,—the language of the statute being "not exceeding, in any case, the balance due to the principal contractor;" and that this balance due cannot be ascertained until the cross-demand is deducted from the contract price. This claim is not tenable. Taking the whole statute together, it is reasonable to construe this phrase as applying only to the moneys due by the owner to the contractor *under the contract*. This follows because the rights of the workman and material-man, as against the owner, are controlled by the contract, and are in strict subordination to its terms; and to construe the language quoted as implying balance due on general account would be to ingraft upon the contract other and inconsistent terms, the effect of which would be to incumber the contractor's interest in the contract. It would be to supplant the implication that the consideration was to be paid in money by a provision that it could be paid or satisfied in some other way. We have already said upon the general subject of set-off and cross-demands all that seems necessary. Keeping in mind that it is the subsequent payments which the statute gives the workman and material-man a right to have kept back, upon what principle can the set-off be treated as payment? A payment is said to be a mode of extinguishing obligations. Not only that; but, where the contract calls for money, ordinarily it is money which must be paid unless the creditor agrees to accept something else as its equivalent. This act calls for the exercise of the will,—of consent,—and without consent it cannot be regarded as extinguishing the obligation.

Without reference to the peculiar wording of section 3204 of the statute, wherein payment is treated of, the conclusion that this set-off could perform the office of a payment seems irresistible. But a reference to that section may not be unprofitable. It provides that if, by collusion or fraud, the owner pay in advance of the payments due under the contract, and diminish the amount of the funds, he shall be liable in the same manner as if no such payment had been made; but any such payment, made in good faith, to complete the work according to the original contract, shall not be held as fraudulent or collusive. It would seem not unreasonable to claim from the language of this section that, as to advance payments, the owner may not make them simply to accommodate the contractor, or even to accommodate himself, but that the advance payment allowed, and described as not fraudulent or collusive, being one made in good faith, in order to complete the contract, that a payment made in advance for any other purpose would not avail the owner as against the workman or material-man, but, as to them, would be held to be fraudulent and collusive. A construction of this section is not necessary to a determination of the case at bar, but it is suggested that the significant language therein throws much light upon the purpose and object of the whole statute, and re-enforces the conclusions we have drawn from the other sections.

Again, it is contended that the term "set-off," as used in section 3202, refers to set-off as against the contractor in the hands of the owner; as though there is some magic in the word "set-off" in the connection in which it is used, which shows that the claim of the workman and material-man is subject to every set-off. We do not so construe it. To expect those parties, before filing a claim, to inquire into and ascertain whether a set-off exists in favor of the owner against the contractor, and incorporate that into their claim, is manifestly unreasonable.

Nor is the claim of hardship, as regards the owner, apparent. It was no more reasonable to require him, before purchasing a claim against the contractor, to learn whether the workman, whom he knew had performed labor on his house, had been paid, than to ask that workman to anticipate the possibility of the purchase of a claim against the contractor, and give earlier notice. He may have had good reason to rely upon the contractor, in the full belief that if the money should be paid by the owner that same money would forthwith pass to him. At all events, he had the right to rely upon the contract and the law.

We do not deem it necessary to undertake a review of the many decisions in the courts of the several states cited by counsel. They have all been examined, as well as many others, and it is believed that, while there is not uniformity in the holdings, owing, in a measure at least, to variance in the terms of the statutes, the general drift will be found in the direction of the conclusions we have reached in construing the statutes of our own state. Nor is it necessary to review the two cases in Ohio referred to. *Copeland v. Mantor*, 22 Ohio St. 398, an instructive case, was based upon dissimilar facts, and the question here presented was not before the court. Besides, very marked changes have been made

in the statute since the facts of that case arose. The same may be said as to *Dunn v. Rankin*, 27 Ohio St. 132, where the opinion was delivered by the learned judge who pronounced the opinion in the earlier case.

The judgment of the district court is reversed, and that of the common pleas affirmed.

(107 Ind. 75)

CITY OF FT. WAYNE v. COOMBS and others.

(*Supreme Court of Indiana. June 16, 1886.*)

1. NEGLIGENCE—PLEADING—INJURY TO PROPERTY—CONTRIBUTORY NEGLIGENCE.

A complaint to recover for injuries to property caused by negligence must show that the plaintiff was not guilty of contributory negligence.

2. MUNICIPAL CORPORATIONS—NEGLIGENCE—SEWERS—NOTICE OF DEFECTS.

Where a municipal corporation itself constructs a sewer, it is bound to use ordinary care and skill, and is liable for injuries resulting from its negligence, without proof that it had notice of defects in the work or materials.

3. SAME—WABASH & ERIE CANAL.

The right of the public to construct sewers under the Wabash & Erie canal was not extinguished by the sale of the canal by the state.

4. SAME—USE OF HIGHWAYS.

A municipal corporation may rightfully use highways for the purpose of constructing sewers.

5. SAME—USE OF PRIVATE PROPERTY.

A city is liable for negligence in constructing and maintaining a sewer, although it is constructed in part on private property, and in order to obtain the right to make use of such property the municipal authorities were compelled to build the sewer according to the plans and specifications furnished by the owner of such property.

6. SAME—LIABILITY TO PROPERTY OWNERS WHO MAKE CONNECTION WITH SEWER FOR THEIR PRIVATE BENEFIT.

A municipal corporation is liable for injuries arising from the negligent construction of a sewer to property owners who make connection with such sewer for their private benefit.

7. WITNESS—EXPERT WITNESS—RIGHT TO A PRELIMINARY CROSS-EXAMINATION.

It is not error to refuse to permit the defendant to cross-examine an expert witness called by the plaintiff before the examination in chief by the latter.

8. EVIDENCE—QUALIFICATIONS OF AN EXPERT.

No standard exists by which to determine the qualifications of an expert witness. If it appears that he is *prima facie* qualified to testify, the court may allow his testimony to go to the jury, allowing the adverse party to cross-examine as to his qualifications, and leaving to the jury the duty of determining the weight of the testimony.

9. SAME—MUNICIPAL CORPORATION—SEWERS.

In an action to recover for injuries resulting from negligence in constructing a sewer, it is not necessary for the plaintiff to prove that the ordinance directing its construction was regularly adopted.

10. SAME—NOTICE.

For the purpose of establishing notice of the defective condition of a sewer, it is proper to prove that the sewer gave way at a point not far distant from the break which caused the injury.

Appeal from Allen superior court.

*Henry Colerick, W. G. Colerick, and Allen Zollars*, for appellants.

*Coombs, Bell & Morris*, for appellees.

ELLIOTT, J. There are two paragraphs in the appellees' complaint, both seeking a recovery for injuries caused by a defective sewer. The difference in the paragraphs is that one alleges negligence in constructing

the sewer, and the other alleges negligence in maintaining it. We shall not notice all of the objections to the complaint discussed by counsel, for we find, upon an examination of the record, that many of them are based upon a mistake as to its allegations.

We concur with counsel that, where negligence is the issue, the plaintiff must show that he was free from contributory fault, and that this is so whether the action is for injuries to person or property. The decision in *Roll v. City*, 52 Ind. 547, on this point, is in conflict with the rule which has long prevailed in this court, and that case cannot be regarded as well decided. While it has not been in terms overruled upon this point, it has been in effect overruled by decisions which broadly and explicitly deny the doctrine which it asserts. *Lyons v. Terre Haute, etc., R. Co.*, 101 Ind. 419; *Wabash, etc., Ry. Co. v. Nice*, 99 Ind. 152; *Stevens v. La Fayette, etc., R. Co.*, Id. 392; *Cincinnati, etc., Ry. Co. v. Hiltzhauser*, Id. 486, see page 490; *Wabash, etc., Ry. Co. v. Johnson*, 96 Ind. 40; *Louisville, etc., Ry. Co. v. Lockridge*, 93 Ind. 191, and cases cited page 192; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322. To the cases we have cited many might be added, but it is not thought necessary, as the principle which they assert is a familiar one, and is decisively against the doctrine of *Roll v. City*; for the sole foundation of such an action as this is the negligence of the municipal corporation, and the case is a pure type of action for the redress of injuries resulting from negligence. The principle so long and so firmly established inexorably demands the conclusion that, in actions against municipal corporations for injuries resulting from the negligent construction or maintenance of sewers, the plaintiff must show that he was free from contributory negligence.

We cannot assent to counsel's assumption that the complaint does not aver that the plaintiffs were free from contributory fault. It is the rule in this state that a general allegation upon this subject is sufficient, and there is here such an allegation so framed as to cover all the acts, injuries, and losses described in the complaint. We can find nothing in the complaint which is inconsistent with the general averment that there was no contributory negligence.

Where a municipal corporation constructs a sewer, it is bound to use ordinary care and skill, and it is not necessary that it should be averred that the corporate authorities had notice of defects caused by want of care and skill in doing the work. The doctrine that it must be shown that the corporation had notice of defects does not apply to defects in the work of constructing the sewer. Where a city undertakes to construct a sewer, and does it negligently, it is liable for injuries resulting from such negligence without proof that it had notice of the defects. 2 Dill. Mun. Corp. (3d Ed.) § 1024. Where a sewer is constructed with care and skill a municipal corporation is liable for injuries for negligently failing to keep it in repair; and where it is suffered to remain out of repair for such a length of time as that it was the duty of the corporate authorities to take notice of its condition, the law will charge the corporate officers with notice. In this case the complaint charges that the sewer was suffered to remain out of repair for two years prior to the

injury done to the plaintiff's property, and there can be no doubt that this was sufficient to charge the corporation with notice. There are many cases holding that notice will be implied where a sewer or a street is suffered to remain in a defective condition for a much shorter period of time. *City of Madison v. Baker*, 103 Ind. 41; S. C. 2 N. E. Rep. 236; 2 Dill. Mun. Corp. (3d Ed.) § 1025.

It is alleged in the fourth and fifth paragraphs of the appellant's answer that it had no authority to construct a sewer under the Wabash & Erie canal without the permission and in the manner prescribed by the officers of the canal company; that it was necessary to provide an outlet for the sewer to cross under the canal; that the appellant did secure permission to carry the sewer under the canal, and did construct it according to plans and specifications prepared by the canal company's engineer. To these answers the appellees replied that, at the time of the construction of the sewer in Clinton street, that street was a public street, and had been for more than 20 years, and that it crossed the canal at right angles; that the sewer was constructed on the line of the street to the canal; that the city, at the time of the construction of the sewer on Clinton street, had constructed other sewers, and in order to provide an outlet for these sewers it was necessary to cross the canal. The court overruled a demurrer to the reply.

The right of the public in the street was not lost by the occupancy of the land by the canal company. The right of the public to make use of the street in any lawful manner that did not injure the canal company, or impair its rights, remained in the public. *City of Logansport v. Shirk*, 88 Ind. 563; *Shirk v. Board, etc.*, 5 N. E. Rep. 705, (November term.) We suppose it cannot be doubted that the city might have built a bridge over the canal, provided there was no interference with the company's rights; and, if it could do this, surely it might construct a sewer beneath the channel of the canal. We cannot yield to a doctrine that would lead to a denial of the right of the public to enjoy and use its highways where such use and enjoyment would work no injury to the canal company. While we recognize the doctrine of the decisions following *Water-works Co. v. Burkhart*, 41 Ind. 364, we do not regard them as going to the extent of holding that the public lost its right to use and enjoy its highways in a lawful manner, although we do regard them as holding that neither the public nor a citizen can do any act that will interfere with the use of the canal property for canal purposes. We should therefore have no hesitation in upholding the reply on the ground assumed by appellees, that the public had not lost its rights if it affirmatively appeared that the highway existed before the canal was constructed; but, as this does not appear, a further discussion is necessary.

It is alleged that a highway called Clinton street crossed the canal, and that it had been in use for more than 20 years. This establishes the important fact that there was a lawfully existing highway, since user for 20 years vests an indefeasible right in the public. *Strong v. Makeever*, 102 Ind. 578; S. C. 4 N. E. Rep. 11. As the city had exclusive au-

thority over the highway, it had an undoubted right to use it for any purpose for which a highway might lawfully be used, and it is well settled that the use of highways for sewerage purposes is a lawful one. *Cummins v. City*, 79 Ind. 491, see page 498; 2 Dill. Mun. Corp. §§ 656-688; Ang. Highways, § 216. The appellant, therefore, had authority to construct this sewer, and it cannot escape liability to one who has suffered an injury from its negligence on the ground that it yielded its rights to the groundless demand of the canal company.

The authority to construct sewers is a general one, and resides in all municipal corporations, unless expressly denied to them by the legislature. *Leeds v. City of Richmond*, 102 Ind. 372; S. C. 1 N. E. Rep. 711. This authority is one which may be rightfully exercised upon any of the highways of the municipalities, for they are invested with exclusive authority over all streets and highways within their limits. It was therefore within the power of the city of Fort Wayne to have built the sewer in its own way, provided, of course, no injury was done the canal company. The servitude in the streets of a city is much more extensive than in rural highways, and includes the right to dig sewers, lay pipes, and the like. As there was a lawfully existing highway, the city had all the rights which the urban servitude conferred, and among them was the right to construct and maintain the sewer described in the pleadings.

Where a municipal corporation has it in its power, by the exercise of ordinary care and diligence, to secure its rights, and protect property owners from an injury that will probably result from the construction of a sewer, it will be liable if the failure to do its duty results from a wrongful surrender of its authority. *City of Logansport v. Dick*, 70 Ind. 65.

Another question is discussed by counsel on both sides in their argument on the ruling upon the demurrer to the reply, and, as the question is elsewhere presented in the record rendering a decision necessary, we give it attention here, although what we have said establishes the sufficiency of the reply. The question to which we here refer may be thus stated: Is a municipal corporation which makes use of private property for the purpose of constructing a sewer, and, in order to obtain the privilege of using the property, submits to the demand of the owner to construct the sewer according to plans and specifications prepared by him, liable for negligence in constructing or maintaining the sewer? A very careful study of the authorities has convinced us that the question must receive an affirmative answer. It is the law that if a municipal corporation, by its system of constructing sewers, renders an outlet necessary, it must provide one. *City of Evansville v. Decker*, 84 Ind. 325; *City of Crawfordsville v. Bond*, 96 Ind. 236; *Van Pelt v. City of Davenport*, 42 Iowa, 308; *Byrnes v. Cohoes*, 67 N. Y. 204. The outlet is therefore a necessary part of the sewer; and, if the municipal corporation enters upon the work of constructing a sewer, it assumes control over the entire work, and must construct and maintain it with ordinary care and skill. This obligation extends to the entire sewer, not merely to such parts of it as are on property owned by the corporation, and it cannot escape the consequences resulting from negligence by asserting that part of the sewer was con-

structed on private property. A municipal corporation is not bound to construct a sewer, except where its own act makes one necessary; but, if it does undertake to do so, it must exercise proper care and skill in constructing and maintaining it, no matter where it may be located. *Cummins v. City, etc., supra*. As the general duty of using ordinary care and skill rests upon the municipality, it must construct and maintain its sewers where it can exercise that care and skill; and, if it locates them on property where it cannot control them, the fault is its own, and it cannot escape liability to one who has suffered injury from its negligence, because it has located a sewer where it cannot control its construction or maintenance. To permit this to be done, would put it in the power of the municipality to evade the liability arising from a breach of duty by locating a sewer where it could not exercise supervision over it. The only conclusion that can be maintained on principle or authority is that the corporation is liable for negligence, no matter where it locates the sewer.

It is a familiar principle that a municipal corporation may, by adoption, make itself liable for a negligent use of the property thus acquired. This principle was asserted by this court in *City of Indianapolis v. Lawyer*, 38 Ind. 348, and *City of Indianapolis v. Tate*, 39 Ind. 282, and is well supported by the authorities. In the recent case of *Kranz v. City of Baltimore*, 2 Atl. Rep. 908, this doctrine was applied to a case similar to the present, and it was said: "This right of acquisition by adoption and dedication, and the consequent responsibility on the part of a municipal corporation or the public, is sustained by many well-considered cases where the question has arisen." The cases of *Yates v. Judd*, 18 Wis. 119; *Houfe v. Town of Fulton*, 34 Wis. 608; and *Emery v. Lowell*, 104 Mass. 13,—assert a like doctrine. In *Lourey v. City of Delphi*, 55 Ind. 250, it is held that a city is responsible for negligence in maintaining a bridge across the Wabash & Erie canal, and the principle on which that decision rests is the same as the one which rules here. In *City of Aurora v. Colshire*, 55 Ind. 484, the rule is stated in strong terms, for it was there said:

"We cannot perceive how the fact that the wrong complained of was caused on the premises of another can excuse the city. The city had adopted the space, and used it as a street. If the whole street had been established over private property, without authority, and used by the city, it would not have afforded the city the least justification, excuse, or even palliation of the wrong of which the appellee complained. It was sufficient that the city adopted the private wall as part of the street, whether rightfully or wrongfully, to make it liable."

A like doctrine was declared in *Sewell v. City of Cohoes*, 75 N. Y. 45, and this doctrine was approved in *Veeder v. Village of Little Falls*, 3 N. E. Rep. 306.

It may be said here, as in the case from which we have quoted, that the city adopted the place beneath the canal as part of its sewer, and this is enough to make it responsible for negligence in constructing or maintaining that part of the sewer. The part under the canal was as much

part of the sewer as any other, and over that the city is charged with exercising ordinary care and skill.

Still another question is presented by the record, and argued by counsel, which may as well be disposed of here as elsewhere, although it is more directly presented by the evidence, the instructions, and the answers to interrogatories. That question is this: Is a municipal corporation liable to one who, for his private benefit, connects his premises with a sewer constructed by the corporation, for injuries resulting from the negligent construction or maintenance of the sewer? We find that the authorities settle this question against the corporation; for it is held, without diversity of opinion, that the municipality is liable in such cases. *Semple v. Vickaburg*, 62 Miss. 63; S. C. 52 Amer. Rep. 181; *Child v. Boston*, 4 Allen, 41; *Barton v. Syracuse*, 36 N. Y. 54. The property owners along the line of a sewer are assessed for the cost of its construction, and it is but reasonable that they should enjoy a special benefit. Indeed, the whole theory of special assessments rests on the principle that the special benefits are a compensation for the special burdens. It is but bare justice that the property owners who have a special burden laid upon them should reap a special benefit. But another principle requires it to be affirmed that the city should be held responsible to those who tap its sewers by its invitation; for, by such an invitation, the city impliedly undertakes that it will not be guilty of negligence in maintaining the sewer. Yet another principle sustains this doctrine, and that is that the health and comfort of the citizens require that sewers should be so maintained as that private property may be drained. It is true that the necessity is greater in large cities than in small, and the larger the city the plainer the principle seems; but, whether the city be large or small, if a sewer is constructed, and owners of adjoining property are invited to tap it, the city impliedly declares the necessity for its existence, and announces its purpose to do its duty by using ordinary care and skill in constructing and maintaining the sewer.

The decision in *Roll v. City, etc.*, *supra*, does not conflict with the views here expressed, for in that case there was an agreement that the city should be absolved from all liability, and it was on this agreement that the decision was grounded. That decision has not escaped criticism on the point here under immediate mention, and its soundness on other points has been denied. It is, indeed, doubtful whether a municipal corporation can stipulate for immunity from the consequences of a breach of duty; but, however this may be, it is quite clear that where there is, as here, no such stipulation, it cannot escape the consequences of its negligence on the ground that the adjoining property owners, acting on its invitation, tapped the sewer. *City of Loganport v. Dick*, *supra*, *vide* page 81.

A witness was introduced by the appellees and testified to facts showing that he was qualified to testify as an expert. The appellant asserted a right to examine him as to his qualifications before the appellees proceeded with their examination, but the court denied the request. It is for the court to determine whether the witness is or is not qualified to tes-



tify as an expert, and the question as to his competency is exclusively for the court. *Forgey v. First Nat. Bank*, 66 Ind. 123; *McEwen v. Bigelow*, 40 Mich. 215; *Dole v. Johnson*, 50 N. H. 452; *Castner v. Stiker*, 33 N. J. Law, 96; *Jones v. Tucker*, 41 N. H. 546; *Flynt v. Bodenhamer*, 80 N. C. 205; *Perkins v. Stickney*, 132 Mass. 217; *Wright v. Williams' Estate*, 47 Vt. 222; *Howard v. City of Providence*, 6 R. I. 515; *Bemis v. Central Vt. R. Co.*, 3 Atl. Rep. 531; 1 Greenl. Ev. (14th Ed.) § 440, note; Rog. Exp. Test. 23; *Lawson*, Opin. Ev. 238.

Some of the cases go very far upon this point, for some of them hold that the decision of the trial court is conclusive; but we think the cases which hold that where there is no evidence at all tending to prove that the witness is qualified to testify as an expert, or where there is a palpable abuse of discretion, the ruling of the trial court is subject to review, are supported by the better reason. *Southern Life Ins. Co. v. Wilkinson*, 53 Ga. 535; *Wiggins v. Wallace*, 19 Barb. 338. But, whatever may be the true rule upon this point, it is quite clear that the court must decide the question of the qualification of the witness; and, when it is made to appear *prima facie* that the witness possesses the requisite qualification, the court may admit the testimony, and is not bound to allow a preliminary cross-examination. This was so expressly decided in *Sarle v. Arnold*, 7 R. I. 582. It is, indeed, difficult to perceive how any other conclusion could be reached when once it is granted that the court need only be satisfied that, *prima facie*, the witness is competent. Rog. Exp. Test. 50. No exact standard by which to determine the competency of the witness exists, and much is necessarily left to the discretion of the trial court. *Forgey v. First Nat. Bank*, *supra*; *Colee v. State*, 75 Ind. 511; *Sage v. State*, 91 Ind. 141; *Goodwin v. State*, 96 Ind. 550, see page 558; *State v. Maynes*, 61 Iowa, 119; S. C. 15 N. W. Rep. 864; *McEwen v. Bigelow*, 40 Mich. 217; Rog. Exp. Test. 27. If the evidence satisfies the court of the qualification of the witness, it is not bound to permit a preliminary cross-examination, though it would, no doubt, have a right to do so; and, in our judgment, this right is one that should be very liberally exercised. But the question which we are compelled to decide is whether the court is bound to check the examination of the witness, and allow a preliminary cross-examination, and on that question the law is with the appellees. A text writer says:

"When a witness has been adjudged competent upon the preliminary examination, opposing proof going to his incompetency is to be addressed to the jury to affect the value of his testimony, and not to the court for the purpose of excluding his testimony." Rog. Exp. Test. 50.

In our own case of *Davis v. State*, 35 Ind. 496, it was said of a witness that "whether he is competent to testify at all as an expert is a question for the court; but, after he has been allowed to testify, the weight of his testimony is for the jury."

It is generally held by the courts, and uniformly by ours, that the regular cross-examination may fully go into the question of the competency of the witness; and, if it appear that he is not a qualified expert witness, his testimony will be weakened or entirely destroyed. *Davis v. State*, *su-*

*pra*; *Goodwin v. State, supra*; *Louisville, etc., Co. v. Falvey*, 104 Ind. 409; S. C. 3 N. E. Rep. 389, and 4 N. E. Rep. 908. The right to a full cross-examination is thus secured; and, if it turns out that the witness is not qualified, the jury may be told that his opinion is of no weight; but, without such a direction, it must be presumed—as jurors are to be treated as men of fair intelligence—that the opinion of one not qualified would not be given any weight by them. *Louisville, etc., Co. v. Falvey, supra*; *Washington v. Cole*, 6 Ala. 212. This plenary right of cross-examination affords full opportunity to discover the extent of the qualifications of the witness, and prevents material harm to the party against whom he testifies.

The statements of the witness Ludlum, both in his examination in chief and in his cross-examination, showed that he was competent to give an opinion. He stated that he had experience in constructing work of a character similar to the appellant's sewer, and that his experience was such as enabled him to judge of the liability of timbers placed under ground to decay. This was sufficient at least to carry his testimony to the jury. *House v. Fort*, 4 Blackf. 293; *City of Indianapolis v. Scott*, 72 Ind. 196; *Ferguson v. Davis Co.*, 57 Iowa, 601; S. C. 10 N. W. Rep. 906; *Central R. Co. v. Mitchell*, 63 Ga. 173; *Hand v. Brookline*, 128 Mass. 324; *Nelson v. Wood*, 62 Ala. 175; *Sheldon v. Booth*, 50 Iowa, 209. It is the doctrine of the authorities that study of a business, without practical experience, will qualify a witness as an expert. *Howard v. Great Western Ins. Co.*, 109 Mass. 384; *Swett v. Shumway*, 102 Mass. 365. It is also held that, where a witness has studied an art or science, he may be deemed an expert in a kindred art or science. *Barnes v. Ingalls*, 39 Ala. 198. In this instance the witness testified that he was a civil engineer, and had knowledge of the construction of sewers, and of the materials of which they were constructed; but his testimony did not stop with this statement, for he also testified that he had a practical knowledge of sewers and culverts. There can be no doubt, therefore, that he was qualified to testify as an expert. It appears from the record that the appellant was allowed the full benefit of a cross-examination, and that the cross-examination clearly developed the competency of the witness; so that, if it were conceded that the court erred in denying it the privilege of a preliminary cross-examination, no harm resulted, and, as is well known, a harmless error will not reverse a judgment.

The trial court permitted the appellees to prove that there was a break in the sewer about 100 feet distant from the point where the break occurred which caused the injury for which a recovery is sought. This evidence was competent, in connection with the other testimony in the case, for the purpose of charging the city with knowledge, as well as for the purpose of showing that the materials used were defective, or the work of construction was not well done, and also for the purpose of showing that the sewer had, by reason of time and use, got out of repair. *Cleveland, etc., R. Co. v. Newell*, 104 Ind. 264; S. C. 3 N. E. Rep. 836; *Nave v. Flack*, 90 Ind. 205, see page 214; *Lowery v. City of Delphi*, 74 Ind. 520; *District of Columbia v. Arms*, 107 U. S. 519, see page

525; S. C. 2 Sup. Ct. Rep. 840; *Darling v. Westmoreland*, 52 N. H. 401; *Hill v. Portland R. Co.*, 55 Me. 439; *City of Chicago v. Powers*, 42 Ill. 169; *Quinlan v. City of Utica*, 74 N. Y. 603; *Kent v. Lincoln*, 32 Vt. 591; *Augusta v. Hafers*, 61 Ga. 48; *Lanning v. Chicago, etc., R. Co.*, 27 N. W. Rep. 478.

There was no error in permitting the appellees to give in evidence the ordinance, advertisements, bids, and contracts relating to the building of the sewer, for these instruments of evidence tended to prove that the sewer was constructed by the city.

It is not necessary, in such a case as this, for the plaintiff to prove that the ordinance directing the construction of the sewer was regularly adopted. It was enough to prove that the city had assumed to adopt the ordinance, and that, acting under it, the corporate authorities had constructed the sewer. It is quite clear that, if the sewer was owned by the city, and was so negligently constructed or maintained as to cause injury to property, an irregularity in adopting the ordinance, or in any other part of the proceedings, would not relieve the city from liability. The controlling question in such cases as this is not whether the city authorities have proceeded regularly, but whether they have assumed to exercise the general authority to construct sewers conferred upon the municipality, and have negligently built or maintained its sewers.

A municipal corporation is not an insurer of the condition of its sewers, but it is bound to use ordinary care and skill in constructing and maintaining them, and for a failure to exercise such care and skill is responsible to a citizen who suffers loss from such negligence. This care and skill requires the municipal corporation to take notice of the liability of timbers to decay from time and use, and to take such measure as ordinary care and skill dictate to guard against a sewer becoming unsafe because of the decay of timbers used in its construction. *City of Indianapolis v. Scott*, 72 Ind. 196; *Board Com'rs v. Legg*, 93 Ind. 523; *Board Com'rs v. Bacon*, 96 Ind. 31; *Indiana Car Co. v. Parker*, 100 Ind. 181, see page 193; *Rapho v. Moore*, 68 Pa. St. 404; *Morristown v. Thayer*, 67 Pa. St. 335; *Todd v. Troy*, 61 N. Y. 506.

What we have said disposes of all the questions in the case, and we deem it unnecessary to notice the rulings on the instructions in detail. It is sufficient to say that those given express the law as we have here stated it, and that those refused are founded on an erroneous theory. Judgment affirmed.

ZOLLARS, J., did not take any part in the decision of this case.

(107 Ind. 69)

ZENOR v. JOHNSON and others.

(*Supreme Court of Indiana*. June 18, 1886.)

1. TRIAL—INSTRUCTIONS—ORAL ADMISSIONS.

It is error to instruct the jury that oral admissions are to be received with great caution because a witness may not have correctly understood them, or correctly repeated them.

**2. SAME—CONSTRUCTION OF WRITTEN INSTRUMENTS.**

It is the duty of the court to give a construction to written instruments, and it is error to submit their construction to the jury.

**3. SAME—MISTAKE.**

It is error to instruct, in general terms, that a mistake in a written instrument renders it ineffective.

Appeal from Harrison circuit court.

*W. N. & R. J. Tracewell and Geo. W. Denbo*, for appellant.

*Geo. W. Self, D. A. Cunningham, and W. T. Zenor*, for appellees.

ELLIOTT, J. The controversy in this case is as to the ownership of personal property, and there is much conflict in the evidence. The appellant complains of the instructions of the court, and, as we think, with just reason, for there is much confusion and material error in them as they appear in the record.

The instructions on the subject of verbal admissions are in direct conflict with the rule declared by our decisions. An instruction that oral admissions of a party should be received with great caution because a witness may not have correctly understood them, or may not have correctly recollected and repeated them, is erroneous. *Morris v. State*, 101 Ind. 560; S. C. 1 N. E. Rep. 70; *Newman v. Hazelrigg*, 96 Ind. 73; *Finch v. Bergins*, 89 Ind. 360; *Davis v. Hardy*, 76 Ind. 272; *Garfield v. State*, 74 Ind. 60.

It is error for the court to submit the construction of a written instrument to the jury, except in cases where the instrument is so ambiguous that the court cannot give the instrument a reasonable construction. The court must construe all written contracts, and not leave the question of construction to the jury, except in a case where parol evidence is necessary to make the contract intelligible. This rule was violated by the court in this instance, for it was the duty of the court to inform the jury of the meaning of the written instrument given in evidence, and not to leave that matter, as was done, to the judgment of the jury. There was some question as to whether the instrument had been altered by the appellant, and this as a question of fact ought to have been submitted to the jury under proper instructions; but it was error to leave the construction and effect of the contract to the jury.

It was also error to charge the jury, in general terms, that if there was a mistake in the written instrument it was without effect. The court should have instructed the jury that it is only a mutual mistake of fact that will avoid a contract. Mistakes of law cannot have that effect.

We do not deem it necessary to notice the other errors in the instructions, as the case must be again tried.

Judgment reversed, with instructions to grant a new trial to the appellant.

(44 Ohio St. 430)

**MERIDEN SILVER PLATE CO. v. FLORY and another.***(Supreme Court of Ohio. June 29, 1886.)*

1. **PRINCIPAL AND SURETY—DISCHARGE OF SURETY—NOTICE TO SUE PRINCIPAL.**  
The requirements of section 5833 of the Revised Statutes, providing for notice by a surety to his creditor to commence action forthwith against the principal debtor, are satisfied by substantial compliance; and a notice which is positive in its request to sue, and does not mislead the creditor as to the instrument to be sued upon, is sufficient.<sup>1</sup>
2. **SAME—NOTE HELD BY FOREIGN CORPORATION.**  
A corporation of the state of Connecticut, holding a matured joint note executed in this state by C. M. Rider, principal, and Flory & Havens, sureties, residents of this state, made demand of payment by mail upon the sureties, who at once returned the following: “\* \* \* Yours of the 12th came to hand. If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal, and we are only sureties, and we notify you to commence an action on the note forthwith, and proceed to collect it. Rider is able to pay his own notes. Yours, FLORY & HAVENS.” *Held*, the notice was sufficient.
3. **SAME—DILIGENCE IN SUING.**  
This notice was received on October 17, 1878. The action was commenced January 25, 1879. The delay was unexplained, except by the fact that the plaintiff was a resident of the state of Connecticut. *Held*, there was no error in finding, as a conclusion of law, that the action was not commenced within a reasonable time after notice.
4. **SAME—DUTY OF CREDITOR—RIGHT OF SURETY.**  
The duty of the creditor to proceed within a reasonable time after such notice is imperative. It is the right of the surety to require that action be brought against the principal, and diligently proceeded with; and this right is not qualified or affected by the fact of solvency or insolvency of such principal.
5. **SAME—NON-RESIDENCE OF CREDITOR.**  
Where the principal and surety are residents within the same jurisdiction, the duty of the creditor to commence an action, as required, is not affected by the fact that he is a resident of another state.
6. **SAME—SURETY ON NOTE.**  
To entitle the surety upon a note to the benefit of section 5833, *supra*, it is not necessary that the fact of suretyship should appear upon the face of the note.

Error to district court, Licking county.

June 1, 1878, C. M. Rider, principal, and Flory & Havens, sureties, all residing and being in Licking county, Ohio, drew their joint note of that date for \$326.58 to the order of Meriden Silver Plate Company, a corporation of the state of Connecticut, and doing business therein, due four months after date, and delivered it to the payee. October 14, 1878, the note being unpaid, Flory & Havens received at Newark, Ohio, a letter of the following tenor:

“WEST MERIDEN, CONN., October 12, 1878.

“Messrs. Flory & Havens, Newark, Ohio—GENTLEMEN: No doubt you are aware that the joint note made in our favor by C. M. Rider and yourselves, due 1-4 inst., was protested for non-payment. Please see that we have N. Y. funds by return mail in settlement of the protested note, - \$326 58

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\$328 08

and much oblige,

“Yours, truly,

THE MERIDEN SILVER PLATE CO.  
“ROBERT H. CURTIS, Treasurer.”<sup>1</sup>See note at end of case.

Flory & Havens at once wrote and mailed a response of the following tenor:

"NEWARK, OHIO, October 14, 1878.

"*The Meriden Silver Plate Company, West Meriden, Conn.*: Yours of the 12th came to hand. If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal, and we are only his sureties, and we notify you to commence an action on the note forthwith, and proceed to collect it. Rider is able to pay his own notes.

"Yours, respt.,

FLORY & HAVENS."

The plaintiff commenced suit on this note, in the Licking common pleas court, against all the makers, on January 23, 1879. The pleadings are voluminous, and the issues below were numerous. There is no bill of exceptions in the record. The trial court, on request of the plaintiff, stated its findings of fact and conclusions of law. So far as they involve the questions considered in the opinion, they are:

"The court finds, as matters of fact, \* \* \* that the treasurer of the plaintiff's corporation, Robert H. Curtis, wrote a letter as set out and stated in the plaintiff's reply to the third defense in the defendants' answer, and that, in reply to the letter of said Curtis, as such treasurer, the defendants, Flory & Havens wrote and mailed at Newark, Ohio, the answer dated October 14, 1878, a copy of which is also set out, and correctly stated in plaintiff's reply to the third defense, and which is the notice the defendants, Flory & Havens, claim to have served upon said plaintiff in said third defense. The court finds that on the issue made concerning the giving of the notice claimed by the defendants, that the notice, a copy of which is set out in the reply, as aforesaid, was duly deposited in the post-office at Newark, Ohio, on October 14, 1878, duly directed to the plaintiff at West Meriden, in the state of Connecticut; that by due course of mail said notice would reach the plaintiff in thirty-six hours after such deposit in the Newark post-office; that this suit was commenced January 23, 1879, and from said evidence the court finds, as a matter of fact, that the said plaintiff received said notice on or before October 17, 1878; *that no other notice was sent or given them than as above stated.* The court also finds, as a matter of fact, that since December 25, 1878, the said Rider has been and is insolvent, and has no property subject to levy and sale on execution.

"And the court finds, as matters of law arising upon said facts, that said notice was sufficient in law and under the statute, and that the said plaintiff did not, within a reasonable time after said notice was deposited in the post-office at Newark, Ohio, as aforesaid, and received by the plaintiff, as aforesaid, commence action on said note, and have thereby forfeited the right which it would otherwise have to demand and receive of said Flory & Havens, as such sureties, the amount due thereon."

The letters referred to in these findings are those heretofore set forth in this statement.

Upon the facts so found, and those admitted by the pleadings, judgment was rendered for the defendants, Flory & Havens. This judgment was affirmed on error in the district court. The present proceeding is prosecuted to reverse the judgment below.

*Chas. Follett & Son*, for plaintiff in error.

*J. A. Flory*, for defendants in error.

OWEN, C. J. These alleged errors are assigned as grounds of reversal of the judgments below: (1) That the facts found by the court did not

warrant the conclusion that the letter of Flory & Havens to the plaintiff, dated October 14, 1878, notifying it to commence an action on the note, etc., was received by the plaintiff, October 17, 1878, or at all; (2) that the court erred in finding that such letter was sufficient notice under the statute authorizing notice by surety to the holder of a note to commence action, etc.; (3) that, even if the notice was sufficient, the court erred in finding that the plaintiff did not, within a reasonable time, commence action on the note.

1. Assuming that the finding is based solely upon the facts stated by the court, it is evident that it proceeded upon the presumption that the alleged notice reached the plaintiff by due course of mail. We have in the record, however, further admitted fact. The company alleges, in its reply to an answer of Flory & Havens filed in the case, that this letter "was mailed at Newark, Ohio, on or after the date thereof, October 14, 1878, and in due course of the mail taken from the post-office at West Meriden, in the state of Connecticut, *by some one for said plaintiff corporation*, but who plaintiff cannot state, or when it came to the notice of the officers or directors of said corporation." If this letter was taken from the post-office by some one "*for the corporation*," this was equivalent to its receipt *by the corporation*. It was not necessary that such person should have been either an officer or director. If he was a stranger, or had no authority to receive it, there was no warrant for the statement that it was taken from the post-office *for the corporation*. There was no error in this finding of the court.

2. Was the notice insufficient in law, in that it was conditional? Section 5833, Rev. St., provides that a surety in such case "may require the creditor, by notice in writing, to commence an action on such instrument forthwith against the principal debtor," etc. It was held in *Baker v. Kellogg*, 29 Ohio St. 663, cited and relied on by plaintiff, that the notice under this provision "must contain an unconditional requirement to commence an action forthwith; and a notice that the surety 'wishes' the creditor 'to proceed against the principal debtor,' and collect 'the claim, or have it arranged some way,' and that the surety does 'not wish to remain bail any longer,' is not sufficient." The notification in the case at bar was qualified with no condition. True, the sureties said: "If you hold any note signed by C. M. Rider and ourselves, C. M. Rider is the principal, and we are only his sureties," etc. There was but one note in question. There could have been no doubt at all concerning the note to be put in suit. The plaintiff was then urging its payment by the defendants. But the notice then continues, "and we notify you to commence an action on the note forthwith, and proceed to collect it." Here was no condition, and there was a substantial compliance with the statute. This is sufficient. *Clark v. Osborn*, 41 Ohio St. 28. The requirement of the notice was unmistakable. There was no error in finding it to be a legally sufficient notice. Technical accuracy is not required. It is sufficient if the notice is positive, and the creditor is not misled. *Brandt*, Sur. § 504; *Routon's Adm'rs v. Lacy*, 17 Mo. 399.

3. Section 5833, *supra*, further provides that, unless the creditor re-

ceiving the notice "commence such action within a reasonable time thereafter, and proceed with due diligence, in the ordinary course of the law, to recover judgment against the principal debtor for the money, \* \* \* and to make, by execution, the amount thereof, the creditor \* \* \* so failing to comply with the requisition of such surety shall thereby forfeit the right which he would otherwise have to demand and receive of such surety the amount due thereon." The notice was received on the seventeenth of October, 1878. Suit was not commenced until January 23, 1879. The court found, as a conclusion of law, that the plaintiff did not commence action upon the note within a reasonable time after notice. Did the court err in this? We may take judicial notice of the fact that the January term of the court, in which the action was brought, commenced January 6, 1879. How far this fact entered into the consideration of the trial court, or whether that court considered the length of the next prior term, does not appear. We consider the question in the light of the facts found and stated by the court.

The plaintiff was a Connecticut corporation. It held the note of these parties residing in Ohio. This note being unpaid at maturity, the plaintiff caused it to be protested for non-payment. It then demanded payment of these defendants in error. They at once notified it that they were sureties for the first-named maker, who was able to pay his own notes, and required that it commence an action on the note forthwith, and proceed to collect it. After a lapse of two months and eight days from the notice the principal became insolvent. After the lapse of three months and six days from the notice action was commenced.

We are asked to say that the court ought to have found, and erred in not finding, that this fully answered the requirement of a statute providing for notice to commence suit forthwith, that such suit be commenced within a reasonable time thereafter, and with due diligence proceeded with, etc. We cannot say this. We attach no importance, however, to the question of solvency or insolvency of the principal. The statute is not qualified by such considerations. It is imperative. It leaves no discretion with the creditor. It is the surety's right to require that action be brought, and diligently proceeded with, that a test may be made of the principal's ability to pay. The terms "reasonable time" and "due diligence" are to be construed with, and in the light of, the term "forthwith," to be used in the notice to commence the action. *Reid v. Cox*, 5 Blackf. 312; *Overturf v. Martin*, 2 Cart. (Ind.) 507; *Miller v. Childress*, 2 Humph. 320; *Brandt, Sur.* § 511; *Garraff v. Eliff*, 4 Humph. 323.

The case of *Davis v. Hatcher*, decided by the United States circuit court for Southern district of Georgia, is cited as authority for the proposition that "the omission of the creditor to sue a principal residing in another state could not, as between him and the surety, make him chargeable with gross negligence." 10 Amer. Law Reg. 519. In that case the surety resided in Georgia, while the principal resided in Alabama. It was simply held that the plaintiff need not go to the latter state to bring action against the principal.



In the case at bar the sureties and the principal were all within the same jurisdiction. The plaintiff was compelled to come within that jurisdiction to sue either of them. There is nothing in the principle of the case last cited, nor in the fact that the plaintiff resided in another state, that excused it from obeying the requirement of the statute and of the notice. No hardship was imposed upon the plaintiff which was not contemplated by the statute. The third assignment of error is not well taken.

The position contended for by plaintiff in error that the statute does not apply to the note in suit, for the reason that there was nothing on the face of it to indicate the fact of suretyship, is untenable. In *Baker v. Kellogg*, 29 Ohio St., cited *supra*, where the same defense was interposed by the surety as in the case at bar, there was nothing on the face of the note to indicate suretyship. It was held that parol evidence was admissible to prove that fact. The surety was discharged.

There is no error in the judgments below.

#### NOTE.

It was held in *Smith v. Freyler*, (Mont.) 1 Pac. Rep. 214, that if, when a debt is due, the surety request the creditor to sue the principal debtor who is then solvent, and the creditor fail to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The court says that "the great majority of the cases on the subject hold, in the absence of any statutory provision, that if, after the debt is due, the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes solvent, the surety is not thereby discharged. The ground upon which these decisions rest is that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. *Brandt, Sur. & Guar.* 208, referring to *Jenkins v. Clarkson*, 7 Ohio, 72; *Carr v. Howard*, 8 Blackf. 190; *Halstead v. Brown*, 17 Ind. 202; *Ex'rs of Dennis v. Rider*, 2 McLean, 451; *Davis v. Huggins*, 8 N. H. 231; *Pickett v. Land*, 2 Bailey, (S. C.) 608; *Nichols v. McDowell*, 14 B. Mon. (Ky.) 6; *Frye v. Barker*, 4 Pick. 382; *Stout v. Ashton*, 5 T. B. Mon. (Ky.) 251; *Gage v. Bank*, 79 Ill. 62; *Dillon v. Russell*, 5 Neb. 484; *Inkster v. Bank*, 30 Mich. 143; *Langdon v. Markle*, 48 Mo. 357; *Hartman v. Burlingame*, 9 Cal. 557; *Dane v. Corduan*, 24 Cal. 157; *Hickok v. Bank*, 35 Vt. 476; *Hogaboom v. Herrick*, 4 Vt. 131; *Caston v. Dunlap*, Rich. Eq. Cas. 77; *Croughton v. Duval*, 3 Call. (Va.) 69; *Boutte v. Martin*, 16 La. 133; *Taylor v. Beck*, 18 Ill. 376; *Huey v. Pinney*, 5 Minn. 310, (Gil. 246;); *Bizzell v. Smith*, 2 Nev. Eq. (N. C.) 27; *Thompson v. Bowne*, 39 N. J. Law, 2; *Hogshead v. Williams*, 56 Ind. 145; *Harris v. Newell*, 42 Wis. 687; *Pintard v. Davis*, 1 Spenc. (N. J.) 205; S. C. 1 Zab. (N. J.) 632."

Mere failure of a creditor to institute an action against the principal at the time the debt becomes due will not discharge the surety. *Sheldon v. Williams*, (Neb.) 9 N. W. Rep. 86.

The notice contemplated in section 1210, Rev. St. Ind. 1881, whereby a surety may require the creditor to bring suit forthwith, cannot be given before a cause of action accrues to the creditor; and delay of the creditor to bring suit will not discharge the surety where no other notice has been given. *Scales v. Cox*, (Ind.) 6 N. E. Rep. 622.

It is said in *German American Bank v. Denmire*, (Iowa,) 12 N. W. Rep. 237, that, in order to hold a surety on a note after notice to sue, the holder is bound, not only to direct suit within the time prescribed by statute, but he must see that suit is actually commenced.

In *Moore v. Peterson*, (Iowa,) 20 N. W. Rep. 744, H., who had guaranteed the payment of goods sold to P. by M. & Co., gave them the following notice: "I again notify and request you to begin suit against P. for the collection of the amount due, for which I am his security, or to permit me to begin suit against him in your name at my cost." In an action by M. & Co. against P. and H., in which H. claimed that he had been discharged by giving such notice, held, that the plaintiff was not thereby notified, in terms, to sue upon the contract, and that the notice was not sufficient to entitle H. to a discharge under Code, §§ 2108, 2109; the former section providing that "when a person, bound as surety for another for the payment of money, or the performance of any other contract in writing, apprehends that his principal is about to become insolvent, \* \* \*

he may, by writing, require the creditor to sue upon the same, or permit the surety to commence such suit in such creditor's name and at the surety's cost;" and the latter, that "if the creditor refuse to bring suit, or neglect so to do for 10 days after the request, and does not permit the surety so to do, and furnish him with a true copy of the contract, or other writing therefor, and enable him to have the use of the original, when requisite in such suit, the surety shall be discharged."

(107 Ind. 39)

STATE *ex rel.* BOARD OF COM'RS OF ALLEN CO. *v.* MILLER, Auditor, etc.

(*Supreme Court of Indiana.* June 15, 1886.)

1. CRIMINAL LAW—CHANGE OF VENUE FROM COUNTY—COSTS—STATUTE—REPEAL OF.

Section 414, Rev. St. 1881, in regard to costs on change of venue from one county to another, is impliedly repealed, so far as criminal causes are concerned, by sections 1778, 1779, Rev. St. 1881.

2. SAME—APPOINTMENT OF ATTORNEY TO ASSIST—ALLOWANCE.

Where a change of venue is taken from a county in a criminal case, the court to which the cause is taken may appoint attorneys to prosecute and defend, and make them a reasonable allowance, for which the county from which the change is taken will be liable.

Appeal from Adams circuit court.

*Coombs, Bell & Morris*, for appellant.

*Peterson & Hoffman* and *France & Merryman*, for appellee.

NIBLACK, J. This was an application by the board of commissioners of the county of Allen, in the name of the state, for a writ of mandate against Lewis C. Miller, as auditor of Adams county, requiring him to issue his warrant upon the treasurer of the latter county for the alleged amount of expenses incurred and paid by Allen county in two trials of Frederick Richards, upon an indictment for murder, on a change of venue from said county of Adams. The complaint was duly verified by affidavit, and stated, in general terms, that at the May term, 1884, of the Adams circuit court, Richards was indicted upon a charge of murder in the first degree; that on June 4, 1884, the venue of the cause was changed to the criminal court of Allen county, and the defendant transferred to the jail of that county for safe-keeping; that on July 24, 1884, Richards, on application to said last-named court, was by the court permitted to defend as a poor person, and two attorneys were appointed to make such defense, and that, on motion of the prosecuting attorney, the court appointed two attorneys to assist in the prosecution,—said attorneys to be allowed and paid such sums for such services as the court might specify; that at the April term, 1884, of said court, the case was tried, and resulted in a verdict of guilty, with punishment of death affixed, which verdict was afterwards set aside by the court, and a new trial granted; that on October 31, 1884, by order of the court, and pursuant to the provisions of the act of the general assembly, approved February 27, 1883, abolishing said criminal court, said cause was transferred to the Allen circuit court, which thereafter appointed attorneys to assist to prosecute and defend the case on a second trial; that the case was tried at the February term, 1885, of the Allen circuit court, result-

ing in conviction, and a sentence of imprisonment for life; that said last-named court duly audited and allowed the expenses which had been incurred by said Allen county in consequence of said change of venue and said trials, and a certified copy of the order of the court was exhibited and made part of the application, giving an itemized statement and total amount; that the same had been paid by Allen county; that such allowance had been duly certified and presented to the defendant as auditor, who refused to issue his warrant for such allowance, and an alternative writ of mandate was asked, requiring him to do so, or show cause why he should not so issue his warrant. The alternative writ was ordered to issue, whereupon the defendant appeared, and demurred to the complaint. The circuit court sustained the demurrer thus filed to the complaint; and, the relator of the plaintiff declining to plead further, final judgment was rendered for the defendant. Consequently the only question presented by this appeal is, was the demurrer to the complaint rightly sustained?

We have no brief from the appellee, and hence no argument against the sufficiency of the complaint. Nor is there anything in the record informing us as to the precise ground upon which the demurrer to the complaint was sustained,—whether upon the ground that Adams county is not liable to pay any part of the amount demanded, or whether the objection was only to some of the items, or part of the account accompanying the complaint. The fair inference, however, from the argument submitted on behalf of the appellant is that the objection was to the allowances made to the attorneys appointed to assist in the prosecution of Richards, as well as to those assigned to the duty of conducting his defense, upon the assumption that there was, at the time, no law in force which authorized the Allen circuit court to make such allowances.

The act of March 10, 1873, (Acts 1873, 221,) made a comprehensive provision for the allowance and payment of all costs and expenses incurred by reason of changes of venue, whether in civil or criminal cases, and it was under that act that the case of *Gill v. State*, 72 Ind. 266, cited and much relied on by counsel, was decided. The body of that act is now known as section 414, Rev. St. 1881, and has been so designated and republished as applicable to changes of venue in civil cases. But whether the act is still in force for any purpose is a question not now fully before us. On that subject, see repealing section 1291, Rev. St. 1881. It is sufficient for the present emergency to hold that so much of the act as applied to criminal causes was superseded, and hence impliedly repealed, by sections 1778 and 1779 of the present Criminal Code. These latter sections are as follows:

"Sec. 1778. In all changes of venue from the county, the county from which the change was taken shall be liable for the expenses and charges of removing, delivering, and keeping the prisoner, and the *per diem* allowance and expenses of the jury trying the cause, and of the whole panel of jurors in attendance during the trial.

"Sec. 1779. All costs and charges specified in the last preceding section, or coming justly and equitably within its provisions, shall be audited and allowed by the court trying such cause; but, where specific fees are allowed by

law for any duty or service, no more or other costs shall be allowed therefor than could be legally taxed in the court from which such change was taken."

It is now a well-settled legal proposition that a circuit or a criminal court, as the case may be, may assign counsel to defend poor persons charged with crime, and may make allowances for services performed under such an assignment of counsel. *Webb v. Baird*, 6 Ind. 13; *Board, etc., v. Wood*, 35 Ind. 70; *Gordon v. Board, etc.*, 52 Ind. 322. It is also settled that a circuit or criminal court may, in its discretion, appoint an attorney to assist in the prosecution of a criminal offense, and make him an allowance therefor out of the county treasury. *Tull v. State*, 99 Ind. 238. It follows, as a necessary consequence, that the same powers are devolved upon a court to which a criminal cause is taken by a change of venue. This was decided by the case of *Gordon v. Board, etc., supra*, and was reaffirmed by the recent well-considered case of *Board, etc., v. Courtney*, 4 N. E. Rep. 896. The reasonable inference therefore is that allowances regularly made to attorneys, either for prosecuting or defending in a criminal cause, by a circuit or criminal court, on a change of venue, come "justly and equitably within" the provisions of section 1778, above set out.

As to the conclusiveness of allowances made under the provisions of sections 1778 and 1779, in question, we think they ought to stand substantially upon the same footing as those made under the two sections of the Revised Statutes of 1843, set forth and construed in the case of *Board v. Summerfield*, 36 Ind. 543. Upon that point the case of *Gill v. State*, to which allusion has been made, is not now a precedent of binding authority, since it was decided under a law different from the statutory provisions both of 1843 and 1881, and no longer in force in criminal cases.

Our conclusion is that the complaint stated facts sufficient to require the appellee to show cause, if any he can, why he should not issue his warrant upon the treasurer of his county for the amount claimed to be due to the relator of the appellant, and that on that account the circuit court erred in sustaining the demurrer to the complaint. *State v. Morris*, 103 Ind. 161; S. C. 2 N. E. Rep. 355.

The judgment is reversed, with costs, and the cause is remanded for further proceedings.

ZOLLARS, J., expressed no opinion in the cause.

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#### BLOOMINGTON SCHOOL TP. v. NATIONAL FURNITURE CO.

(*Supreme Court of Indiana*. June 16, 1896.)

#### SCHOOLS AND SCHOOL-DISTRICTS—TOWNSHIP—LIMITED AUTHORITY OF TRUSTEE—CONTRACT FOR SUPPLIES—COMPLAINT.

A complaint against a school township, on a contract with the school trustee for school supplies must aver that the articles contracted for were suitable and necessary for the schools, and that they had been delivered to and accepted by the school township.

Appeal from Monroe circuit court.

*Mulky & Pittman*, for appellant.

*Buskirk & Duncan*, for appellee.

Howk, C. J. In this case the first error of which complaint is here made by appellant, the defendant below, is the overruling of its demurrer to appellee's complaint. The complaint was in two paragraphs. In the first paragraph the appellee alleged that it was a duly-organized corporation; that on May 8, 1883, appellant entered into a written contract with appellee, a copy of which contract was filed with and made part of such paragraph, by which contract appellant purchased of appellee certain goods, therein named, to the amount of \$155; that such goods, by the terms of such contract, were to be shipped to Frank R. Woolley, who was then the trustee of appellant, and such amount was to be paid immediately on the receipt of such goods in the freight-office in Bloomington, Indiana; that, in pursuance of such contract, appellee shipped such goods, marked as aforesaid, and they were received at such freight-office in Bloomington; and that appellant had wholly failed to pay therefor, though requested so to do. Wherefore, etc. In the second paragraph of its complaint appellee sued for the recovery of the same alleged indebtedness, under the same written contract declared upon in the first paragraph. There is some difference in the phraseology of the two paragraphs, but substantially the same facts were stated in each of the paragraphs of complaint. We need not, therefore, give the substance, even, of the second paragraph of complaint.

The written contract, whereof a copy was filed with and made part of each paragraph of the complaint, was in the words and figures following, to-wit:

"Contract for school supplies, made this third day of May, 1883, between the school trustee of Bloomington township, Monroe county, Indiana, and the National School-furnishing Company, of Chicago, Ill., for the following school supplies, the goods to be shipped by freight, marked, 'Mr. Frank R. Woolley, Freight-office at Bloomington, Monroe Co., state of Indiana:' Lunar telluric globe; 8 C. S. sets of Menteith's maps U. S., Europe, etc.; 8 Menteith's grand map of world; Bade's reading case; 8 Menteith's pictorial charts and hand-books; Blanchard's historical map; Extra book for charts, by mail, at once. Ship August 1, 1883. Total, \$155. For which the school trustee of said township agrees to pay to the National School-furnishing Co. the sum of one hundred and fifty-five dollars cash, on receipt of goods. If paid in a school order, the same shall bear interest at the rate of 8 per cent. per annum."

Appellant demurred to each paragraph of the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer as to both paragraphs of complaint, and this ruling is assigned here as error.

We are of opinion that each paragraph of appellee's complaint was insufficient, and that the demurrer thereto ought to have been sustained. We do not doubt that, under the statutes in force at the time, appellant's trustee was authorized to purchase, for the use of the free common schools of his township, such school supplies and furniture as were necessary and suitable for such schools; nor do we doubt his power, under

such statutes, when such supplies and furniture had been delivered to and accepted by his township, to bind the school corporation whereof he is trustee for the payment of the fair and reasonable price or value thereof. In the execution of the written contract, which is made the basis of the complaint in this case, appellee was affected with notice of the limited powers of appellant's trustee, under our laws. Such trustee does not and cannot act as the agent merely of his township. He is a public officer, and his relations to his township, as the name of his office clearly imports, are all of a fiduciary nature. In dealing with such trustee all persons are bound to take notice of his official and fiduciary character, and to know that he can only bind his township by his contracts, verbal or written, when it appears, or is shown by proper averment and proof, that such contracts are authorized by law. This is the doctrine of our decisions upon the point under consideration. *Pine Civil Tp. v. Huber Manuf'g Co.*, 83 Ind. 121; *Act v. Jackson School Tp.*, 90 Ind. 101; *Reeve School Tp. v. Dodson*, 98 Ind. 497; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464; S. C. 2 N. E. Rep. 194; *Summers v. Board, etc.*, 103 Ind. 262; S. C. 2 N. E. Rep. 725; *Platter v. Board, etc.*, 103 Ind. 360; S. C. 2 N. E. Rep. 544.

Upon the question we are now considering the case in hand cannot well be distinguished from *Reeve School Tp. v. Dodson*, *supra*. In the case cited Dodson sued Reeve school township upon two promissory notes executed by the trustee of such township, and each note recited that it was given for certain tellurians purchased for the benefit of the schools of such township. The sufficiency of Dodson's complaint was the only question considered here; and it was held that for the want of averments that the tellurians were necessary for the schools, and suitable for use therein, and that they had been delivered to and accepted by the school corporation, such complaint was bad, on demurrer thereto for the want of sufficient facts. So, in the case under consideration, for the purpose of showing that appellant's trustee, in the execution of the contract sued upon, was acting within the scope of his limited powers, appellee ought to have averred, in each paragraph of its complaint, that the school supplies mentioned in such contract were necessary and suitable supplies for the use of the public schools of Bloomington school township; and, for the purpose of showing that such contract was a valid and binding obligation of the school corporation for the payment of the sum of money mentioned therein, appellee ought to have averred that such supplies had been delivered to and accepted by such school township. For the want of such averments as those indicated, each paragraph of appellee's complaint was clearly bad, and the overruling of the demurrer thereto was erroneous.

This conclusion renders it unnecessary for us now to consider or decide any of the questions arising under the other errors of which appellant complains.

The judgment is reversed, with costs, and the cause is remanded, with instructions to sustain the demurrer to each paragraph of complaint, and for further proceedings in accordance with this opinion.

(107 Ind. 54)

## BILLINGS v. STATE.

*(Supreme Court of Indiana. June 17, 1886.)*

## CRIMINAL LAW—INFORMATION.

The use of the word "affiant" instead of the words "prosecuting attorney," where the context shows that the error was a clerical one, is not such an error as will render an information fatally defective. NIBLACK, J., dissents.

Appeal from Daviess circuit court. On petition for rehearing. See 6 N. E. Rep. 914.

*Baker & Padgett*, for appellant.

*The Attorney General*, for appellee.

ELLIOTT, J. In the argument on the petition for rehearing it is insisted that we did not decide one of the points made by counsel as to the sufficiency of the information. The argument upon this point in the original brief was exceedingly meager, as counsel evidently relied upon other points for the reversal of the judgment. As stated in the original brief, the objection now under discussion was that "the prosecuting attorney nowhere charges the forgery of the note by making the same or causing it to be done." and this objection is discussed at much length in the brief on the petition. We think it without merit. The introductory clause of the information reads thus: "Hiram McCormick, the prosecuting attorney of the Forty-ninth judicial circuit, prosecuting the pleas of the state of Indiana, gives the court to know and be informed that heretofore, to-wit," etc. The conclusion of the information reads thus: "So the said prosecuting attorney says that said Jesse Billings was then and there guilty of forgery." In the body of the information the word "affiant" is used where the words "prosecuting attorney" should be employed, and on this mistake is founded appellant's argument; but the whole information, taken together, clearly and unmistakably shows that the charge was preferred by the proper officer. As this appears, we cannot hold that there was any defect in the information available on a motion in arrest of judgment. We do not deem it necessary to again discuss the questions considered by us in our former opinion. Petition overruled.

NIBLACK, J., dissents from this opinion.

(107 Ind. 94)

LANG, EX'R, etc., v. STRAUS and others.<sup>1</sup>*(Supreme Court of Indiana. June 19, 1886.)*

## 1. CONTRACT—ELEMENTS—IMPLICATION OF LAW.

The law is a factor in all contracts, and what the law implies is as much a part of the contract as the words written therein.

## 2. EVIDENCE—LEGAL IMPORT OF LANGUAGE.

Parol evidence is not admissible to vary the legal obligation of a contract implied from the language employed by the parties.

<sup>1</sup> See 24 N. E. 664.

8. **BANKS AND BANKING—CERTIFICATE OF DEPOSIT—IMPLIED PROMISE TO REPAY.**  
A certificate of deposit contains, by implication of law, a promise to repay the depositor his money, and is a written contract for the payment of money.

Appeal from Noble circuit court. On petition for rehearing.  
*Green & Bothwell* and *H. G. Zimmerman*, for appellant.  
*J. I. Best* and *J. H. Baker*, for appellees.

ELLIOTT, J. The instrument declared on is a contract. It is a written contract. It cannot be contradicted or varied by parol evidence. The law enters into it as a silent factor, and the obligation implied by law from the language employed is as much part of the contract as though what the law implies had been fully expressed in words. Where there is an express contract, there can be no implied one. An express written contract contains the only competent evidence of the agreement of the parties. There is here an express written contract, and therefore there is no implied one. But this written contract is to be given legal effect, and to give it effect the courts must consider it as embodying all the legal obligations implied from its language. These obligations, we repeat, are part of the written contract. The law imported into the contract does not create an independent agreement, but makes the instrument express the full agreement of the parties. All the words found in a contract are to have a meaning attributed to them, and are not to be thrust aside. We cannot, therefore, disregard the words, found in the contract before us, "on deposit, in national currency." We know that the words "national currency" denote money, and we know, therefore, that those words, taken in connection with the words "on deposit," mean that the appellees had received a deposit in money from the appellant's testator. *Phelps v. Trun*, 14 Mich. 373. We know, also, that the law, as a factor, is an essential part of the contract, and it seems very plain to us that the express agreement of the parties, considered in conjunction with this factor, imports a contract to repay the deposit on demand. Suppose the appellees to have attempted to show by parol that they were not to repay this money, would not the attempt be defeated by the proposition that such a contract cannot be varied by parol evidence? Of this there can be no doubt. *Tisloe v. Graeter*, 1 Blackf. 353; *Hull v. Butler*, 7 Ind. 267; *Jones v. Clark*, 9 Ind. 341; *Pribble v. Kent*, 10 Ind. 325, *vide* page 328; *Henry v. Henry*, 11 Ind. 236; *McKernan v. Mayhew*, 21 Ind. 291; *Foulks v. Falls*, 91 Ind. 315.

All contracts have imported into them legal principles, which can no more be varied by parol evidence than the strongest and clearest express stipulations. We have already given one example, that of the days of grace added by force of law to a promissory note. A more striking example, perhaps, is that supplied by the contract of indorsement, for, in such cases, although not a word more than the name of the indorser is written, the contract which the law implies cannot be varied by parol. The authorities all agree that the regular indorsement of a promissory note is as perfect a contract as though the liability which the law implies were written out in full. *Smythe v. Scott*, 6 N. E. Rep. 145 (November



term.) In contracts under seal, as deeds, leases, and the like, covenants are ingrafted into the agreement of the parties by operation of law; and, indeed, into every conceivable contract the law enters as an essential element.

Into the contract before us the law enters, and makes it an agreement to repay the money received on deposit. As the contract is a written one, not subject to variation by parol evidence, the agreement to repay the money must exist in it, or not exist at all, and surely no just man would assert that one who receives money on deposit, and so states in a written contract, does not undertake to repay it. If he undertakes at all, he does so by his written contract, for there is and there can be no other contract, as all oral negotiations and stipulations are merged in the writing. That, and that alone, expresses the agreement of the parties. *Oiler v. Gard*, 23 Ind. 212; *Cincinnati, etc., R. Co. v. Pearce*, 28 Ind. 502, *vide* page 506. The law implies a promise to pay the depositor his money, and where there is a written contract the law conducts this implied promise into the contract as one of its elements, so that the entire contract is a written one. Where there is an effective written contract, there can be no verbal one. *Board of Com'rs v. Shipley*, 77 Ind. 553; *Pulse v. Miller*, 81 Ind. 191. As there is here a written contract into which the law imports a promise to pay, the statute of limitations governing written contracts to pay money is the only one that applies. We thus find that, reasoning on elementary principles, the conclusion must be that the contract is a written one for the payment of money.

Our conclusion reaches further than that there is an implied promise to pay the depositor his money, for it goes to the extent of affirming that this promise is created by law as an element of the contract, and as such enters into and forms part of the written agreement. We do not regard the promise as an independent one, existing outside of the written contract, but as a promise forming one of the terms of the contract. In short, we look upon it as a part of the contract, put there by law, for the parties are presumed to have contracted with reference to the law. The principle on which we proceed is thus stated by Mr. Bishop: "What is implied in an express contract is as much part of it as what is expressed." Bish. Cont. § 121. On this subject the supreme court of the United States said: "Undoubtedly, necessary implication is as much part of an instrument as if that which was so implied was plainly expressed." *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, *vide* page 288.

We maintained in our former opinion, as we maintain here, that the law implies a promise to pay back to the depositor his money, and that, where there is a written contract stipulating that money has been received on deposit, that promise is an essential part of the written contract itself. It is a promise in the written instrument, and not outside of it. "The acknowledgment of indebtedness on its face implies a promise to pay the plaintiff," said the court in *Kimball v. Huntington*, 10 Wend. 675. So we say here, an acknowledgment that the money was received on deposit implies a promise to pay it to the depositor, and we hold, as was held in the case cited, that this promise is implied by law as an ob-

ligation arising from the language of the contract, thus forming one of its terms. As there is an express contract, and as the promise forms part of the contract, it is a contract for the payment of money, or else it is no contract at all. Once it is granted that the promise to pay back the depositor his money is created by law, then it follows, with absolute, logical certainty, that the promise is as much part of the written instrument as though it were written therein in express words.

The authorities which bear most directly upon the question lead to the conclusion at which we have arrived. We find an able court saying: "Money on deposit means, *ex vi termini*, money placed where the owner can command it at any time." *Curtis v. Leavitt*, 15 N. Y. 9, *vide* page 265. In giving effect to an instrument similar in all material respects to the one before us, that court in a very recent case said:

"Being a deposit, a demand of the money was essential to a cause of action, unless there was a wrongful conversion or loss by some gross negligence on the part of the depository. The distinction between a deposit and a loan is considered in *Payne v. Gardiner*, 29 N. Y. 146, and within the rule there laid down the instrument in question was a certificate of deposit." *Smiley v. Fry*, 100 N. Y. 262; S. C. 3 N. E. Rep. 186.

We referred to *Smiley v. Fry* as declaring such an instrument to be in the nature of a certificate of deposit, and in this we are, as the quotation we have made shows, sustained by the latest expression upon the question. At another place in the opinion from which we have quoted, it is said: "As the instrument in question was not a promissory note, but a certificate of deposit, the defense of the statute of limitations interposed by the defendant was not available." It is perhaps true that the decision in *Hotchkiss v. Mosher*, 48 N. Y. 478, is in conflict with the views we have expressed; for it holds, as we understand it, that a certificate of deposit may be contradicted by parol evidence. As the court says: "We are of the opinion that parol evidence was admissible to explain the certificate in the same manner as in the case of a receipt." This ruling is in conflict with our own cases, and with the cases in New York and elsewhere, and cannot be accepted as the law. The case is not a well-considered one, for no authorities are cited in support of the conclusion announced. It is held by many courts, including our own, that an order for property, accompanied by a direction to change its value to an owner, is a written contract containing the promise to pay its value. *Garmire v. State*, 104 Ind. 444; S. C. 4 N. E. Rep. 54; *U. S. v. Book*, 2 Cranch, C. C. 294; *U. S. v. Brown*, 3 Cranch, C. C. 268; *State v. Morgan*, 35 La. Ann. 293; *State v. Ferguson*, Id. 1042; *Anderson v. State*, 65 Ala. 553; *Burke v. State*, 66 Ga. 157; *Peete v. State*, 2 Lea, 513; *State v. Keeler*, 80 N. C. 472; *People v. Shaw*, 5 Johns. 236; *Com. v. Fisher*, 17 Mass. 46. The principle which those cases declare is the same as that here involved, for the principle on which they proceed is that the law imports into the order a promise to pay; and that is true of such an instrument as the one now before us.

In the case of *White v. President, etc.*, 22 Pick. 181, the instrument read thus:

"Dr. *Franklin Bank in Account with B. F. White.* Cr.

"February 10, 1837. To cash deposited, \$2,000.

"The above deposit to remain until the tenth day of August.

"B. F. BUNNELL, Cashier."

—and this was held to be a promise to pay money at a future day.

In our original opinion we said that the instrument signed by the appellees may not be "just what is known in the commercial world as a certificate of deposit, but it is nevertheless a contract in writing, evidencing the receipt of money on deposit, to which all the legal incidents attach. It is by no means certain whether it is not a regular certificate of deposit. It is said by a late author, in speaking of certificates of deposit, that "usually they embody an express promise in terms to pay; but, even if they do not, they are yet the bank's acknowledgment of its indebtedness, and so are nearly of the same effect as if they expressly promised payment. Substantially, therefore, they resemble promissory notes, and the courts have always inclined to regard them as promissory notes; especially when they are made payable otherwise than immediately and upon demand. But this is not a necessary feature. If they are payable at a future day certain, they are simply promissory notes, neither more nor less." Morse, Banking, 63.

Our cases, in accordance with the very great weight of authority, hold that a certificate of deposit, written in full and regular form, is a promissory note, and as such negotiable. *Gregg v. Union Co. Bank*, 87 Ind. 238; *Brown v. McElroy*, 52 Ind. 404; *National, etc., Bank v. Ringel*, 51 Ind. 393; *Drake v. Markle*, 21 Ind. 433. If the instrument we have under consideration had been written out in full, although payable on demand, it would be a promissory note, and it seems, under the principles we have stated, that it is a promissory note, and as such negotiable, for it is well settled that no precise form of words is necessary to constitute a promissory note, as any form that expresses a promise, although not in direct terms, will be sufficient. Thus a written statement that a designated sum is due a person named, or a certificate that a specified sum is due a person designated, or a mere general statement that a certain amount is due, is considered a promissory note, and yet in none of these instances is there an express promise to pay. *Russell v. Whipple*, 2 Cow. 536; *Franklin v. March*, 6 N. H. 364; *Jacques v. Warren*, 31 Mo. 28; *Cummings v. Freeman*, 2 Humph. 145; *Bell v. Brewer*, 6 Ga. 587, *vide* page 589; *Hussey v. Winslow*, 59 Me. 170; *Knight v. Connecticut, etc., Co.*, 44 Wis. 472; *Fleming v. Burge*, 6 Ala. 373; *Draher v. Schreiber*, 15 Mo. 602; *Marrigan v. Page*, 23 Tenn. 245.

There are two well-considered cases applying the principle declared in these cases to certificates similar, in all essential respects, to the one here declared on: *Lynch v. Goldsmith*, 64 Ga. 42; *Hart v. Life Ass'n*, 54 Ala. 495. In the case last cited the instrument read thus:

"This certifies that the Life Association of the South has on deposit with me the sum of \$1,723.45, in currency. H. C. HART,

"President and Treasurer Local Board of Trustees."

Whether the instrument declared on is or is not negotiable is not here an important question, and we need not and do not decide it, for all that the record requires us to decide is that it is a contract, a written contract, and a contract for the payment of money. The character of the instrument, as to negotiability, does not affect the question before us; for, as Mr. Morse says, "a certificate of deposit may or may not be made negotiable." Morse, Banking, 65.

The authorities we have cited sustain our decision, and it rests on the elementary principle we have expressed in language borrowed from Mr. Bishop. Indeed, we do no more than apply to the contract before us the rule declared in *Foulks v. Falls*, *supra*, where it was said:

"This agreement being implied by the law as a part of the writer's contract, the averment of it in the complaint, or the proof of it by oral testimony, added nothing to the contract, or to the responsibility of the appellants." 2 Pars. Cont. 54, 515. *Reilly v. Cavanaugh*, 29 Ind. 435; *Weeks*, Attys. § 259; *Walpole v. Carlisle*, 32 Ind. 415; *Skillen v. Wallace*, 36 Ind. 319; *Hillgass v. Bender*, 78 Ind. 225; *Falmouth, etc., Co. v. Shawhan*, 5 N. E. Rep. 410.

If the appellees had inserted the words in this contract, "we promise to pay back the depositor his money," it would not have added to the legal force and effect of their contract, for what the law implies is in it as it is written. Petition overruled.

(142 Mass. 196)

ROGERS and others v. HALDEN and others.

(*Supreme Judicial Court of Massachusetts*. Suffolk. July 1, 1886.)

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—SALE BELOW PRICE—ACTION AGAINST BUYER.

A principal is not bound by the unauthorized acts of his agent who sells goods at a price below that authorized by the principal, and the latter may maintain an action of contract against a buyer, who, with knowledge of the extent of the agent's authority, purchases goods at a price less than that authorized, under an agreement with the agent, for the full amount due for the goods when sold at the authorized price.

This was an action of contract for goods sold and delivered.

Trial in the superior court, before ALDRICH, J., who ordered a verdict for plaintiff, and reported the case to the full court. The facts appear in the opinion.

*D. C. Linscott*, for plaintiffs.

*C. L. Gardney* and *G. A. Torrey*, for defendants.

GARDNER, J. 1. The defendant contends that upon the report of the auditors the plaintiff cannot recover in contract; that there were two courses open to him: one to ratify and adopt the contract of their agent, and the prices he had made; the other to repudiate the contract, and replevy the goods, or sue for their value in trover. The law is clear that if the plaintiff's property was sold by a person assuming to act for him, but without authority, and the plaintiff waives the tort, and ratifies the contract, in an action against the purchaser, he must ratify it as the agent made it. *Brigham v. Palmer*, 3 Allen, 450.

The case finds that Norris was employed by the plaintiffs as their traveling agent, to sell their goods at prices not less than the so-called "minimum prices," and that the several defendants, from the commencement of their dealings with Norris, not only knew that he was the plaintiffs' agent, but they "had notice, at the times of the sales of the several bills of goods to them, and, at the time of settlement therefor, of the limitations of the authority of Norris, the plaintiffs' agent, to sell at prices not less than the so-called minimum prices. The transactions between the defendants and Norris and the plaintiffs were as follows: Norris, the agent, made a schedule or order of the goods wanted by the defendants, and the minimum prices were marked thereon. At the same time it was agreed between the defendants and Norris that the defendants should settle the bills at prices then agreed upon between them, and not according to the prices stated in the order. Norris sent the order to the plaintiffs at Boston, who shipped the goods ordered to the defendants, charged them on their books with the amount of goods shipped, at the prices stated in the order, and at the same time sent to the defendants by mail a bill of the goods sent, containing a description of the goods shipped, and prices corresponding to the description and prices stated in the order by them received from Norris. After the defendants had received the goods, and the next time Norris went to the defendants' store, he settled the bill according to the prices agreed upon at the time the orders were given, and at less than the minimum prices, and receipted the bill in full sent by plaintiffs to defendants. He then informed the plaintiffs that he had collected of the defendants a certain sum of money, the sum so stated being equal to the full amount of the bill, when in fact he received a less sum. The plaintiffs thereupon credited the defendants with the amount paid as stated by Norris, and charged Norris with the money which he reported he had received. There were more than 100 of these orders, and the transaction was substantially the same in each. The plaintiffs had no knowledge of the private agreement between the defendants and Norris.

There is sufficient evidence in these transactions to show that Norris and the defendants combined together to deceive the plaintiffs, and that this was done by means of a pretended contract. The defendants ordered the goods of the plaintiffs at a certain price, which they did not intend to pay, and permitted the plaintiffs to charge them with the goods, and send them bills for the same at prices which they had agreed with Norris should not be paid. The plaintiffs now have the right to insist upon the execution of the contract which the defendants have by implication made. They ordered the goods at the minimum prices. When the goods arrived, and the bills with them, charging the defendants with the goods at the prices at which they were ordered, they did not refuse to receive the goods, nor did they notify the plaintiffs of any mistake in the price. By remaining silent while the numerous bills were sent to them, they have impliedly ratified the sale of the goods by the plaintiffs at the prices named in the bills. *Bearce v. Bowker*, 115 Mass. 129.

The defendants say: "We did not make this contract, although we knew that Norris ordered the goods for us at the minimum prices, and although we received the bills of the goods at the same prices at which they were ordered, and we have remained silent ever since; yet we made no agreement with Norris which we knew he was not authorized to make, —to buy the goods at a less price." We think that the defendants cannot set up their agreement for the purpose of denying the contract which the law says exists between them. They will not be permitted to take advantage of their own wrong for their own benefit. *Hill v. Perrott*, 3 Taunt. 274; *Walker v. Davis*, 1 Gray, 506.

The cases at bar are not to be confounded with *Jones v. Hoar*, 5 Pick. 285; *Brigham v. Palmer*, *ubi supra*; *Berkshire Glass Co. v. Woltott*, 2 Allen, 227; and other cases of that class, —cited by the defendants for the purpose of showing that the plaintiffs cannot waive the tort and sue in contract unless they bring their actions upon the contract made by the agent, Norris, with the defendants. The cases at bar have in them an element which is wanting in all of the above-cited cases. It is this: that the defendants knew that the agent, Norris, had no authority to make the contract which he attempted to make with them; that the agreement between them was a transaction to obtain the goods from the plaintiffs at a less price than they were willing to sell them. It brings the plaintiffs' case directly within that of *Hill v. Perrott*, *ubi supra*. In the note to *Jones v. Hoar*, above cited, containing the opinion given in that case by Judge STRONG in the court of common pleas, a clear distinction is made between the case of *Hill v. Perrott* and those sustaining the doctrine contended for by the plaintiffs. In that case Perrott had procured the delivery of the goods upon a pretended sale to one Dacosta, under the impression that the defendant was to be his surety, but the whole was a "swindling transaction" to enable the defendant to get possession of the goods. The court held that the law would imply a contract to pay for the goods on the part of the defendant, and that he could not be permitted to control this implication by setting up the sale to Dacosta, which he had himself procured, because no man can take advantage of his own fraud. Judge STRONG in his opinion says:

"Although the plaintiff, on account of the fraud of the defendant, might perhaps consider him as a trespasser, yet, as the transaction assumed the form of contract by the acts of the defendant himself, and the goods went from the possession of the plaintiff by his consent, and through the form of a sale, if the plaintiffs chose to consider it as a sale, I do not see how it would be competent to the defendant to dispute it. It may be considered as belonging to a class of cases where the plaintiff may maintain *assumpsit* on account of some act of the defendant which varies it from the common cases of tort, and authorizes an action as upon a contract."

Upon the facts disclosed in the case at bar, we think the plaintiffs are entitled to maintain their action in contract.

2. The defendants contend that the plaintiffs cannot recover in any form of action, (clearly not in contract,) because the account between the plaintiffs and defendants is balanced and closed, and the debt in suit

stands charged upon the plaintiffs' books to Norris. The facts which have already been stated, the auditor found, cannot be regarded as payment of these bills in full, as the plaintiffs made these entries on their books in ignorance of the real facts, and they have had a final settlement with Norris. These charges and credits were apparently a convenient way of keeping the account with Norris, and were intended as a transaction in the nature of a novation. We think that the auditor was correct in his finding.

8. The defendants also deny that the plaintiffs can recover for boxes, barrels, crates, packing, and carting. The auditor's report does not set out the evidence; it finds the facts only. He finds that these charges were on all the bills sent with the goods to the defendants, and also that they were made in accordance with the customs of Boston merchants. We see nothing inconsistent in this finding by the auditor, as matter of law.

4. The defendants further contend that the plaintiffs cannot recover upon the items that did not accrue within six years before suing out the plaintiffs' writ. The auditor has allowed all the items, and he has found no fact in conflict with his conclusion. He has not reported the evidence, and his conclusion is therefore final.

This disposes of all the exceptions argued by the defendants.

Judgment on the verdict.

(142 Mass. 240)

MORRILL, Trustee, v. PHILLIPS and others.

(Supreme Judicial Court of Massachusetts. Essex. July 8, 1866.)

**WILL—BEQUEST—GRANDCHILDREN OF TESTATOR TAKE BY PER CAPITA.**

A testator, after making provision for his widow, bequeathed a certain portion of his estate to his executors as trustees, to pay the income to his two sons, J. and F., in equal shares, during their lives, and, on the decease of either leaving no children or wife, the reversion to go to such children and wife. The third clause of the will provided that if J. and F. "leave no issue, then my will is that said reversion, in both cases or either case, shall go to all my grandchildren in equal shares, as hereinafter provided in reference to other portions of my estate." A subsequent clause in the will provided that certain other portions of the estate should be given to J. and F., and with the same disposition of the reversion and the remainder to their wives and children as provided in said third clause; and, if they should leave no wife or children, "then equally to all my grandchildren that may be living." *Held*, that upon the death of J. leaving no wife or children, that all the grandchildren of the testator were entitled to have the share of J. held by the trustees, divided among them *per capita*, and that the fund was not to be divided *per stirpes*. *Held, also*, that the words "that may be living" meant "living at the death of J. or F."

This was a bill in equity to obtain the instructions of the court as to the construction to be put upon the will of Samuel M. Phillips, deceased. The facts appear in the opinion.

Albert Poor, for plaintiff.

C. H. Swan and Geo. H. Poor, for defendants.

MORTON, C. J. By his will the testator gives to his widow the use of the homestead, and the income of a fund of \$10,000, during her life.

He directs in the third clause that the residue of his estate shall be divided into four equal parts. One part he gives for the benefit of his grandson Walter R. Phillips, the son of his deceased son, Samuel S. Phillips. The other two parts he gives to his executors as trustees to pay the income to his two sons, Joseph R. Phillips and Flavel M. Phillips, in equal shares, during their lives, and, on the decease of either leaving children and a wife, the reversion is to go to such children and wife. The third clause then provides:

"But if they leave no issue, then my will is that said reversion, in both cases, or either case, shall go to all my grandchildren in equal shares, as hereinafter provided in reference to other portions of my estate."

By the fourth clause he directs that the reversion and remainder of the homestead and of the said \$10,000 shall be divided into four equal parts; and he gives one part for the benefit of his grandson Walter R. Phillips upon the same terms named in the third clause; one part to his son George A. Phillips, absolutely; and the other two parts to his executors, in trust for the use of his sons Joseph R. and Flavel M. Phillips on the same terms as hereinbefore provided, "and with the same disposition of the reversion and the remainder to their wives and children, if any children they should leave, and, if not, then equally to all my grandchildren that may be living." The widow died in 1874. Joseph R. Phillips died in 1885, and the object of this bill is to obtain the instructions of the court as to the disposition of the share held by the trustee under the will, for the benefit of the said Joseph R. Phillips.

It was clearly the intention of the testator that the funds provided for in both the third and the fourth clauses should, upon the death of Joseph or Flavel, leaving no children, go in the same manner and to the same persons. The provision of the third clause, that the reversion shall go to his grandchildren "as hereinafter provided in reference to other portions of my estate," by necessary construction refers to the fourth clause, and was intended to provide that the same grandchildren should take such reversion as took under the fourth clause. By the latter clause the reversions and remainders are, upon the death of Joseph or Flavel, respectively, to go to their wives and children, "if any children they should leave, and, if not, then equally to all my grandchildren that may be living." The natural and obvious meaning of the words quoted is that the property is to go to the grandchildren living on the death of Joseph or Flavel. The words "that may be living" cannot fairly be referred to any other time. It seems to us clear that the intention of the testator, which must control the construction of the will, was that the funds should go to all his grandchildren who were living at the period fixed by him for the final distribution of the funds. *Denny v. Kettell*, 135 Mass. 138. The provision that the property was to "go to all my grandchildren in equal shares," and that it was to go "then equally to all my grandchildren that may be living," shows clearly that the testator contemplated and intended that each grandchild should have the same share, and repels the claim that the property is to be divided among the grandchildren *per stirpes*.



The result is that the 10 grandchildren of the testator who were living at the death of Joseph R. Phillips are entitled to have the funds in question divided among them equally *per capita*. Decree accordingly.

(142 Mass. 249)

NEW HAVEN HORSESHOE NAIL CO. v. LINDEN SPRING CO. and others.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 6, 1886.*)

CORPORATIONS — FOREIGN CORPORATION — LIABILITY OF STOCKHOLDERS — JURISDICTION OF COURTS.

The alleged liability of individual defendants to a foreign corporation cannot be enforced in a court which has no jurisdiction over such corporation except such as results from an appearance by attorney.

The facts appear in the opinion.

*H. R. Bailey*, for plaintiff.

*Ambrose Eastman*, for defendants.

DEVENS, J. The claim of the plaintiff, a foreign corporation, is upon certain promissory notes signed by the principal defendant, also a foreign corporation. This latter corporation has no property which can be reached so as to be attached, and the plaintiff seeks to establish, as against the individual defendants, that they are under such a liability to the principal defendant that they may be treated as its debtors, and ordered to pay their debt as its equitable trustees, so far as that may be necessary, in order to discharge the plaintiff's claim against the defendant corporation. The plaintiff also contends that, by the facts set forth in his bill, he states a case which is good as a creditors' bill, under the equity jurisdiction of the court.

The plaintiff does not set forth any contract made by the defendant stockholders, except that they subscribed for and took the capital stock of the corporation. Nor does it allege any promise made by them in relation thereto, or in regard to the liability which it says they incurred "independently of any statute or penal liability." In the absence of any promise definite in its character, on the part of the stockholders, there can be no liability to the corporation, or the creditors of the corporation, which does not proceed from a statute of Connecticut, under which it is created. The corporation is one formed under general laws of that state, and the liabilities of stockholders, or of subscribers of the stock, are such as are prescribed by those laws. Their subscription to the stock can have imposed upon them no others. The allegation of the plaintiff must therefore be interpreted as meaning that the alleged obligation of the subscribers is independent of any statutory or penal liability, which is imposed in terms. Where no promise is alleged, the only contracted obligation on the part of the subscribing stockholder must be that which arises from this relation. Whether it be expressed in terms, or derived from this relation under the laws of the state of Connecticut as those laws may be interpreted by competent authority, it is not a common-law obligation, but one created by the statute under which the corporation is formed. *Terry v. Little*, 101 U. S. 216.

The liability of stockholders in a Connecticut corporation must be determined by the laws of that state. *Hutchins v. New England Coal Co.*, 4 Allen, 580; *Jones v. Sisson*, 6 Gray, 288; *Penobscot & K. R. Co. v. Bartlett*, 12 Gray, 244; *Blackstone Manuf'g Co. v. Blackstone*, 13 Gray, 488. That the statutes of a state do not operate extraterritorially, *proprio vigore*, will be conceded. How far they should be enforced beyond the limits of the state which has enacted them must depend upon several considerations; as whether any wrong or injury will be done to the citizens of the state in which they are sought to be enforced, whether the policy of its own laws will be contravened or impaired, and whether its courts are capable of doing complete justice to those liable to be affected by their decrees. Where the rights sought to be passed upon and determined, are those which arise from the relation between a corporation and its members, they depend upon the local law which exists at the place of its creation, and true policy would seem to require us to leave them to be there determined. The liability which the stockholders are alleged to be under to the corporation and its creditors has little analogy to a demand for a debt due, according to the generally recognized principles of law. It is of a peculiar character, involving the organic law by which the corporation is created, and requiring local administration. We have heretofore, in similar cases, declined to pass upon them, and determine the relation existing between a foreign corporation and its members, and the obligations arising therefrom. *Halsey v. McLean*, 12 Allen, 438; *Smith v. Life Ins. Co.*, 14 Allen, 336, 341; *Kansas Const. Co. v. Tripeka, S. & W. R. Co.*, 135 Mass. 34.

The reasons why we should not, in the case at bar, undertake to enforce the alleged obligations of the members of this corporation, appear decisive. They are quite different from those which arise in Massachusetts from a contract to have and subscribe for shares. By our laws, as settled by many decisions, in the absence of an express promise to pay for shares, none is created by a mere subscription therefor. Nor is any created by the mere agreement to take shares. No personal liability exists, as the corporation can by law assess such shares, and sell them for non-payment of assessments, which is held to be a sufficient remedy. *Andover & Medford Turnpike Corp. v. Gould*, 6 Mass. 45; *Same v. Hay*, 7 Mass. 102; *Franklin Glass Co. v. White*, 14 Mass. 285; *Ripley v. Sampson*, 10 Pick. 371; *Mechanics' Foundry & M. Co. v. Hall*, 121 Mass. 271; *Katama Land Co. v. Jernegan*, 126 Mass. 156. While a different rule prevails in many states, the grounds upon which these decisions rest have also been approved in others. *Kennebec & P. R. Co. v. Kendall*, 31 Me. 470; *Railroad Co. v. Johnson*, 10 Fost. 403; *Railroad Co. v. Bailey*, 24 Vt. 465; *Seymour v. Sturgess*, 26 N. Y. 134. It does not seem advisable that we should seek to enforce a liability thus differing from any which would have been incurred if the defendants had subscribed for shares of stock in a corporation formed in this state.

Again, the bill alleges that the defendants were bound to have made a full and honest payment for the shares, as subscribed for by them, to the extent of their par value; that they actually paid for the same by a

transfer of property, knowingly reckoned by them at a price which exceeded by far its real value; that they are now liable to make further payment for their shares of stock; and that by the laws of Connecticut, and according to the ordinary rules of equity, any stockholder who has not paid up his stock in full can, upon the insolvency of the corporation, be made personally and directly liable, at the instance of any creditor, for the amount remaining unpaid and equitably due. The individual defendants were the sole stockholders and also the officers of the corporation, and the transaction by which they paid for their stock was a transfer of a certain amount of cash, machinery, tools, and other property, together with certain inventions, and the letters patent therefor. It is alleged that in reckoning the payment an exaggerated value was knowingly placed upon all these descriptions of property. That in the absence of fraud an agreement may ordinarily be made by which stockholders may be allowed to pay for their shares in patents, mines, or other property, to which it is not easy to assign a determinate value, would appear to be well settled. The bill does not aver any fraud intended to be committed or actually committed on the public or plaintiff by these defendants, by obtaining from those with whom the corporation dealt a false credit. The liability alleged is one due to the corporation, growing out of the relation of these parties to it as stockholders. The extent of that liability, and the mode in which it shall be enforced, and the position in which the stockholders are placed, must be determined by the laws of Connecticut, and by a tribunal that can control the conduct and action of the corporation. The mere appearance, by attorney, of the defendant corporation, does not enable the court so to do.

In a clause subsequent to that we have considered, the plaintiff avers that, as promoters and officers of the corporation, the defendants owed the duty to it to see that the stock subscribed for was fully and honestly paid in; that they failed to perform that duty, and were thus guilty of a breach of trust in not requiring the full and fair payment of the capital stock. No allegation is here made of any fraud committed upon the plaintiff as a creditor of the corporation. That which is set forth is a misfeasance on the part of the officers of the corporation, for which it may be they would be liable in damages to the corporation, but the plaintiff cannot on this account hold the defendants as debtors of the corporation, who had failed to pay for their stock, which is the ground upon which, in either aspect, its bill proceeds. Nor, if these averments are sufficient to show that the transaction by which simulated payment was made, constituted a fraud upon the corporation, would the defendants become the debtors of the corporation, and liable as such to pay as stockholders. As the corporation retains what it has received, even if it were defrauded in the transaction, its remedy would, according to the ordinary rule of law, be in damages for the wrong it had sustained from the stockholders. *Foreman v. Bigelow*, 4 Clif. 508. The bill does, indeed, aver that by the law of Connecticut the defendants in such a case are liable as stockholders for a further payment upon their stock, so as to make it a full and honest payment. If such is the local law of Con-

necticut, and if such a liability may be treated as a debt, this law varies so much from that which ordinarily controls in regard to similar liabilities, and also in the enforcement of contracts, that we are compelled to leave it to local administration. Bill dismissed.

(142 Mass. 356)

WILLETT and another v. RICH and another.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 6, 1886.*)

**WAREHOUSEMEN—INJURIES TO GOODS—BURDEN OF PROOF.**

In an action of contract against a warehouseman to recover damages for injuries to goods intrusted to him, the burden of proof is upon the plaintiff to show that the goods were injured by the negligence of the defendant while they were in his custody; overruling *Case v. Boston & L. R. Co.*, 14 Allen, 448.

This was an action against the defendants as warehousemen. Trial in the supreme court, in which a verdict was returned for the plaintiffs, and the defendants alleged exceptions. The facts appear in the opinion.

*R. M. Morse, Jr.*, for defendants.

*L. S. Dabney*, for plaintiffs.

MORTON, C. J. This is an action of contract against the defendants as warehousemen. The declaration contains four counts; but as the third and fourth counts are the same as the first and second, except that they apply to a different lot of goods, we need consider only the first two counts.

The first count alleges that the defendants, as warehousemen, received goods of the plaintiffs, and agreed to keep the same safely, and to deliver the same to the plaintiffs, upon demand, in the same order and condition as when received; that the goods were damaged while in the custody of the defendants; that they delivered them to the plaintiffs thus damaged and injured, and not in the same condition as when received, and thereby broke their contract. The second count alleges that the defendants, as warehousemen, received goods of the plaintiffs, and agreed to store and keep the same safely, and to deliver the same to the plaintiffs upon demand; that they did not keep the same safely, but so negligently conducted themselves that, through the negligence of the defendants and their servants, the goods were injured. The case was tried apparently upon the second count. The injury to the plaintiffs' goods was caused by the fall of the warehouse, and the only ground upon which they claim the right to recover was that the warehouse was not properly constructed, and that the defendants were negligent in not using reasonable care and diligence in examining and watching their warehouse, and ascertaining its condition. After the evidence was all in, the defendants asked the court to instruct the jury that the burden of proof was on the plaintiffs to show that the injury and damage occurred through the neglect of the defendant, or those in their employ, to use ordinary care in regard to the building. The court refused this ruling, and instructed the jury that the burden of proof was on the defendants to show that such injury and damage occurred without their fault, or

the fault of those in their employ; to which refusal and ruling the defendants duly excepted.

The fundamental rule as to the burden of proof is that whenever the existence of any fact is necessary in order that a party may make out his case, or establish a defense, the burden is on such party to show the existence of such fact. In *Stephens on Evidence* the rule is stated to be that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence or non-existence of facts which he asserts or denies to exist, must prove that those facts do or do not exist." *Steph. Ev. (Amer. Ed.)* 175.

The test of the question before us, then, must be the further question, whether the existence of the fact of negligence on the part of the defendants is necessary to create a liability for a breach of their contract. This depends upon the character of the contract which, by implication of law, the warehouseman enters into when he receives goods for storage. It is clear that this contract is not such a one as is set out in the first count of the plaintiff's declaration. He does not agree that he will keep them safely, and, on demand, deliver them in the same order and condition as when received by him. This would make him an insurer of the goods against all damage by accidents, deterioration, or any other cause. But the authorities clearly show that the implied undertaking of the warehouseman is not that he will at all events keep the goods safely, but that he will use ordinary care and diligence in keeping them. *Thomas v. Boston & P. R. Corp.*, 10 Metc. 472; *Lamb v. Western R. Corp.*, 7 Allen, 98; *Cass v. Boston & L. R. Co.*, 14 Allen, 448; *Gay v. Bates*, 99 Mass. 263; *Roberts v. Gurney*, 120 Mass. 38; *Aldrich v. Boston & W. R. Co.*, 100 Mass. 81; *Lane v. Boston & A. R. Co.*, 112 Mass. 455. Unless he fails to use due care in keeping the goods, he has not broken his contract, but has done all that he agreed to do.

Suppose a plaintiff, in a case like the one before us, should prove that he had deposited goods with the defendant as a warehouseman; that they were delivered to him in a damaged condition; and should admit that the defendant had used due care, and the goods were damaged without any fault on his part,—it could hardly be contended that the defendant was liable. In such a case the existence of some negligence on the part of the defendant is an essential element of the plaintiff's case. He cannot ask the judgment of the court in his favor, unless such negligence exists, and we cannot logically escape from the conclusion that, therefore, the plaintiff must allege and prove this fact. We are therefore of the opinion that in the case at bar the jury should have been instructed that the burden of proof was on the plaintiffs to show that the damage to their goods was caused by negligence of the defendants or their servants.

The ruling at the trial was made in deference to the decision in *Cass v. Boston & L. R. Co.*, above cited, and the plaintiffs contend that that case covers and is decisive of the case at bar. That case might be distinguished from the case at bar. It was an action of contract against a warehouseman for the refusal to deliver, upon due demand, goods which

had been intrusted to him for storage. The answer alleged that, without any negligence of the defendant, the goods were stolen from its warehouse. The decision and opinion of a majority of the court is carefully confined to the precise case before it. It recognizes fully the general principles which we have stated above, both as to the nature of the warehouseman's contract and as to the burden of proof, and the utmost scope of the decision is that where there has been a refusal to deliver goods upon demand, and the warehouseman alleges that they have been stolen without his fault, the burden is upon him to prove this fact. This does not reach the case at bar. The plaintiffs do not and could not allege that there has been a refusal to deliver upon demand. On the contrary, they are compelled by the facts to allege, as they do in the second court, that the goods were damaged while in the custody of the defendants, by their negligence. Negligence is an issue raised by the pleadings; and is a fact which must exist in order to create any liability of the defendants. We see no reason to suppose, from the decision or the opinions in *Cass v. Boston & L. R. Co.*, that, if the case before the court had been like the case at bar, the decision would have been different from ours. But we think the two cases really depend upon the same principles; and upon careful consideration we can see no principle upon which the decision in that case can be maintained. It seems to proceed upon one or both of two grounds: *First*, that, as the plaintiff does not allege negligence in his declaration, therefore negligence was not an issue; and, *second*, that, as the plaintiff could make out a *prima facie* case by proof of a refusal to deliver on demand, any excuse which the defendant set up for the refusal to deliver was matter in discharge and avoidance, which must be proved by him. The opinion recognizes the question of negligence as one of the issues in the case; for the case proceeds upon the ground that, if the defendant shows that he was not negligent, it is a complete answer to the plaintiff's case.

As the only contract of the warehouseman is that he will use due care in keeping the property, and deliver it on demand, if, after using due care, he shall have it in his possession, a plaintiff must show a breach of this contract to enable him to recover either in contract or in tort. We do not see how, by changing the form of his declaration, he can change the liability or rights of the warehouseman. Whatever the form of the declaration is, he is required to prove a breach of the contract. It may be that, where there is a refusal to deliver, the plaintiff may make out a *prima facie* case upon proving this fact, because such refusal, if unexplained, is some evidence of the breach of the contract. But this does not shift the burden, originally on the plaintiff, to prove a breach of contract. The majority of the court say in their opinion that "if the defendants, indeed, prove that the goods are stolen or lost without direct fault on their part, so that performance is impossible, then, if the plaintiff charges that the loss occurred through negligence, he must prove it, and the burden of proof shifts upon him to do so." We understand the doctrine to be well settled in this commonwealth that the burden of proof never shifts, and we think that in the case we are discussing, and in the

case at bar, the burden to show negligence was upon the plaintiff from the beginning, and remained upon him throughout the trial. And it also seems clear to us that the fact set up by the defendant, that the goods were stolen without its fault, was not matter in discharge or avoidance of the plaintiff's case. It did not admit a breach of contract, and set up new matter to excuse or avoid the effect of such breach. On the contrary, the evidence went to show that there had been no breach of the defendant's contract. It did not excuse and avoid, but denied, the plaintiff's case. We do not discuss these questions at great length, because to do so would only repeat the arguments of the exhaustive dissenting opinion of Chief Justice BIGELOW in that case.

For the reasons stated we are of opinion that the instructions requested by the defendant should have been given. Exceptions sustained.

(142 Mass. 290)

**BANK OF AMERICA v. SHAW and another.**

(*Supreme Judicial Court of Massachusetts. Middlesex. July 8, 1886.*)

**PROMISSORY NOTE—COPARTNERSHIP—MEMBER OF—INDORSER—NOTICE OF PROTEST—SUFFICIENCY OF.**

A notice to a member of a firm, indorsers of certain promissory notes, that the makers have, on demand, refused payment, is good if sent to what had been the place of business of the firm, where its affairs are actually in process of settlement under a trust deed of assignment, the firm being insolvent; it being the place where the member expected that notices and letters would be sent to him, and had arranged that if sent there they should be handed to his counsel to be forwarded to him, and there was no other place of business of the firm, or of the member, and he had absconded. And notice so sent is good, although the court finds that the member's family was residing in a town which was the member's domicile because he intended to return there when he thought he was safe from arrest.

This was an action to recover of Fayette Shaw and Brackley Shaw, copartners under the name of F. Shaw & Bros., the balance due on four promissory notes. No service was made upon Brackley Shaw, who was out of the commonwealth, and the suit proceeded against Fayette Shaw alone. Hearing in the superior court, before KNOWLTON, J., who found for the plaintiff, and reported the case for a decision of the questions of law involved. The facts appear in the opinion.

*G. W. Morse*, for defendants.

*S. D. Warren, Jr.*, and *L. D. Brandeis*, for plaintiff.

FIELD, J. The report in this case raises the question of the sufficiency of the notice given to F. Shaw & Bros., indorsers of certain promissory notes, that the makers had, on demand, refused payment. The report finds that Fayette Shaw and Brackley Shaw constituted the firm of F. Shaw & Bros.; that no service of the writ was made upon Brackley Shaw, who was out of the commonwealth; that Fayette Shaw, who alone was served with process, and alone defended the suit, before the notes matured, "had left the country to avoid liability to arrest upon civil process," and was, at the maturity of the notes, in hiding in Canada, and only "Mr. Morse, one confidential friend, and Mr. Shaw's immediate

family, knew of his address at that time." "Before he left Boston," for Canada, he "left his address with Mr. Morse, his counsel there, [in Boston.] who had charge of his business and his affairs, and it was understood between them that Mr. Morse should send him anything relating to his affairs that he deemed important. It was also understood that everything that was addressed to him or to F. Shaw & Bros., at No. 268 Purchase street, should be turned over to Mr. Morse." "At the time the plaintiff's notes became due, defendant had no place of business in Boston, or elsewhere in this commonwealth, but their sign remained over the door at No. 268 Purchase street, and Wyman, their assignee, was there, in the performance of his duties under the instruments of assignment." F. Shaw & Bros. had done business at No. 268 Purchase street, in Boston, until they became insolvent, and assigned their property to Wyman, by instruments, copies of which are annexed to the report. "A notice of protest, in proper form, upon each of the plaintiff's notes, was duly sent to 268 Purchase street, addressed to F. Shaw & Bros., but these notices were not sent from there to the defendant or his counsel, and the defendant had no knowledge of them, and no other notice was given him or Brackley Shaw of the dishonor of the notes." "Soon after the defendant went [to Canada] said Morse was informed by Mr. Wyman that notices of protest for F. Shaw & Bros. were pouring in by the hundreds, and he told Mr. Wyman, in substance, that he need not do anything with them, and said Morse never saw any of them, nor sent the defendant any communication regarding them, although he was in constant correspondence with him about his business affairs." It is also found that for several years prior to the indorsement of the notes Fayette Shaw had his domicile in Newton, in this state, "and it has remained there ever since." "The plaintiff knew of the defendants' insolvency, and of the assignments to Wyman, before the notes became due, but it had no knowledge that the defendants ceased to have a place of business at No. 268 Purchase street, unless such knowledge is to be inferred from knowledge of the assignments." "The plaintiff had no notice or knowledge of any other address of the defendant, or of Brackley Shaw, and there was no evidence that the plaintiff knew, before commencing this suit, that Fayette Shaw or Brackley Shaw had, or ever had, a residence in this commonwealth; nor was there any evidence that the plaintiff had made any effort to find out the residence of either Fayette Shaw or Brackley Shaw."

The first assignment was by Fayette Shaw, of Newton, Massachusetts, and Brackley Shaw, of Montreal, Canada, doing business under the style of F. Shaw & Bros., to Ferdinand A. Wyman, of the property of the firm, in trust—*First*, if said Shaws, or either of them, be adjudged insolvent debtors, to convey to the assignee in insolvency such of the property as the assignee would be entitled to if the assignment had not been made; *second*, to reduce the property to money by selling it, with the right in Wyman "to carry on the business of said firm for the completing of the manufacture of stock now on hand, and otherwise so far as shall be necessary and proper for the faithful and economical administration of the



trusts herein and hereby declared and imposed on him, or shall be requested by the beneficiaries;" *third*, to pay the proceeds (after deducting the expenses) equitably and ratably to the creditors; *fourth*, to pay the balance to Fayette Shaw and Brackley Shaw, or to the survivor; and it was provided that Wyman "shall have power, in and concerning the premises, to use the name of them, or either of them, and of said co-partnership, and, as their attorney, irrevocable to do all things in and touching the same which they, or either of them, might lawfully do if personally present, had these presents not been executed." The assignment is upon the condition that if they, or either of them, "shall hereafter make any arrangements with their creditors whereby such creditors, or a large majority of them, consent that said property, or any portion of the same, shall be reconveyed to" them, or either of them, Wyman shall convey the same "to the parties entitled thereto under said settlement or arrangement with creditors." The second assignment was subsequent to the first, between the same parties, and of the same property, and it provided for a sale of the property, the payment of the proceeds, after deducting the expenses, ratably to creditors, and the payment of the balance remaining to the Shaws, or the survivor of them, with a power to "do all things in and touching the premises which the Shaws might do if personally present."

This case has been argued by the defendant as if the Shaws had gone out of business, and one of them had retained his residence in Newton; but it is plain that they were still interested in the management of the trust, and that what remained of their business was still carried on at No. 268 Purchase street, Boston, even if "they had no place of business there, or elsewhere, in this commonwealth," and that the defendant was an absconding debtor in concealment without the commonwealth.

It is important that the law of negotiable paper be definite and certain; and, when notice has not been actually received in due time by an indorser, the question is whether due diligence in giving notice has been shown; and this, when the facts are all found, is a question of law. Notice may be given at the place of residence or the place of business; and, when the place of residence is not the place of domicile, notice at the place of residence is sufficient, although it has not been decided that notice at the place of domicile is not also good. The facts may, indeed, be such as to make it difficult to determine what is the place of residence or the place of business, or whether there is any place of business distinct from the place of residence, and courts must deal with such cases as best they can. The guiding principle is that notice should be sent to the place where the party to be notified will be most likely to receive it, and reasonable diligence must be shown in ascertaining where that place is. When the indorser is a partnership, notice to one partner is notice to all; but as the partners may reside at different places, and sometimes far distant from the place where the business is carried on, a notice at the place of business, if there is such a place, is plainly the better, because there the partnership can best consult and act so as to protect itself from loss.

In *Chouteau v. Webster*, 6 Metc. 1, "the defendant's general domicile and place of business were in the city of Boston, where he had at all times an agent, who had charge of the management of his affairs," but "he was actually resident in Washington, in discharge of his public duties as senator;" and the court held "that notice to the defendant, addressed to him at Washington, was good and sufficient notice of the dishonor of these notes." It did not appear as a fact that the notice had been actually received by the defendant. The court distinguish between domicile and residence, and found the decision upon the circumstances of the case, and the general rule "that notice shall be so given, and at such a place, that it will be most likely to reach the indorser promptly." See *Young v. Durgin*, 15 Gray, 264.

It is also plain that Morse, who had charge of the defendant's business and affairs, did not mean that the defendant should actually receive the notices of protest, although he was informed where they were sent. On the facts found by the court, if the plaintiff had known them all, it must have been considered more likely that the defendant would receive the notices if sent to 268 Purchase street, Boston, than if sent to Newton. It does not appear that the defendant had any agent at Newton, or anything there, but a naked domicile, while he was concealed in Canada. Even if his family were there, which does not distinctly appear, it is not found that they had any authority over his business, or the business of the firm.

In *Bliss v. Nichols*, 12 Allen, 443, the court say:

"But the broader and more precise ground on which the sufficiency of the evidence of notice in this case rests is this: that, the bill being drawn in the partnership name, notice to the partnership, while it continued, was notice to all the members; that the holder having had no notice of the dissolution of the partnership, had a right to treat it as subsisting; and that the notice sent by mail, addressed to the partnership at its place of business, and where the draft was drawn, was there duly received by the agent employed to settle the partnership affairs."

The execution of the assignment in the present case did not necessarily dissolve the partnership, and the notes were all expressly made payable in Boston. It may be said that Wyman was not the agent of the firm to receive notices of protest of notes so as to bind the members of the firm personally, but the notices were not addressed to Wyman,<sup>1</sup> but to the firm at its former place of business, where its affairs were being settled in accordance with the assignments, and there was, so far as appears, no other place of business of the firm, or of the defendant, and his actual

<sup>1</sup> It was held in *House v. Vinton Co. Nat. Bank*, (Ohio,) 1 N. E. Rep. 129, that, where an indorser of a promissory note assigns all his property for the benefit of his creditors before the maturity of the note, notice of the demand of payment and non-payment at maturity should be given to the indorser, and that notice of demand and non-payment given to the assignee in insolvency is not sufficient to fix the liability of the indorser. In the course of the opinion the court say:

"The liability of Aleshire by his contract was conditional. His contract was that he would pay the note, if the maker, on demand at maturity, should fail to pay it, provided the holder of the note should duly notify him of such demand and non-payment. There is no pretense that such notice was given to Aleshire, or that by the exercise of reasonable diligence it could not have been given. The claim is that the giving of such

residence was without the commonwealth and unknown. We are not required to decide whether notice addressed to the defendant, or to the firm at Newton, would, under the circumstances, have been a good notice, or whether in all cases the holder of a note may assume that the place of business of an indorser continues the same from the time of indorsement to the maturity of the note, unless he knows, or has reason to know, that it has been changed. On the facts of this case, we think it was the duty of the court below to rule that the notice was good, because it was sent to what had been the place of business of the firm, where its affairs were actually in process of settlement under the trust. It was the place where the defendant expected that notices and letters would be sent to him, and had arranged that, if sent there, they should be handed to Mr. Morse, who alone had charge of his business and affairs, to be forwarded to him in Canada if Mr. Morse deemed them important, and there was no other place of business of the firm or of the defendant, and he had absconded.

notice to Aleshire's assignee was a reasonable compliance with the conditions of the contract of indorsement, or, if not such compliance with conditions as would render Aleshire personally liable, it would, at least, bind the property in the hands of the assignee.

"The last proposition has been sufficiently considered. It may, however, be well to add that the power of the assignee was confined to the care of the assets placed in his hands, and the payment of debts already existing, conditionally or unconditionally, against the property or the assignor, but did not include the right to create new and additional debts either against the assignor or the property which had been placed in his hands, other than expenses of the administration.

"I admit that the contract of indorsement must be fairly and reasonably interpreted. A literal compliance with its terms will be excused where it would be unreasonable to exact it. For instance, if the indorser be dead at the time notice of dishonor should be served, notice to his personal representative is sufficient. Notice to the general agent of the indorser is sufficient. If, under the circumstances, notice be impossible or impracticable, it is excused altogether. In such cases the liability of the indorser becomes fixed."

"If, therefore, the personal liability of the indorser, who is also assignor in insolvency, be desired by the holder of the indorsed paper, the notice of its dishonor by the makers should be given to the indorser, and not to his assignee in insolvency. If the liability of the indorser be thus fixed, it appears to me, as a necessary result, that the claim may be proved against the assignee, whether he has or has not received notice of the dishonor. The claim being thus fixed as a debt against the assignor, the holder becomes a beneficiary under the express terms of the assignment. If the doctrine last stated needed any authority to sustain it, it is abundantly supported by the reasoning in the recent case of *Ex parte Baker and In re Bellman*, L. B. 4 Ch. Div. 785."

"But little aid in the solution of this question has been derived from books. The writers of text-books have generally recommended the giving of notice of dishonor to both the assignor and assignee. We think such double notice to be unnecessary. It has never been said by court or text-writers that notice to the indorser is not sufficient; but that such notice is sufficient to bind the assignee in bankruptcy or insolvency in the administration of his trust has frequently been said and adjudged. That notice to the assignee is sufficient has been adjudged, as far as we are informed, only in a single reported case, (*Callahan v. Bank of Kentucky*,) by the court of appeals of Kentucky, reported 6 Ky. Law Rep., October, 1884. While we entertain the highest respect for that court, we are not satisfied with the conclusion or logic of that case. We think that case should not be followed, especially in a state where an assignment does not absolve the debtor from his personal liability on his debts, or any portion thereof, which remains unprovided for or unpaid by the assignee."

In a dissenting opinion in this case, Judge JOHNSON says:

"This is a vexed question, in the solution of which the text-books furnish us little aid. The undertaking of an indorser is collateral and conditional. If he is not duly notified of the non-payment of the note, and there is no valid excuse for such want of notice, he is discharged. The object of this notice is to put him on the alert, to enable him to look to the prior parties on the note to save himself from such liability.

Although, perhaps, it may be assumed that the defendant's family remained in Newton, and although the court has found that the defendant's domicile was there, which must mean that he intended to return there when he thought he would be safe from arrest, yet, under the decision in *Grafton Bank v. Cox*, 13 Gray, 503, we think, on the facts, a demand at 268 Purchase street would have been good if the defendant had been the maker of the note; and the law governing a demand upon the maker is somewhat more strict than that governing notice to an indorser. See *Pierce v. Cate*, 12 Cush. 190.

We find it unnecessary to express any opinion upon the correctness of the ruling of the court upon the admissibility and effect of the proceedings in insolvency, or in the suit in equity, as that ruling, if erroneous, has not harmed the defendant. By the terms of the report it is only if the defendant has been harmed by any ruling of law that the finding is to be set aside, and a new trial ordered.

#### Judgment on the finding.

This is the assignee's duty, and therefore he should be notified. The question here is, in case the indorser has assigned all his property that is subject to execution to his chosen assignee, whether the notice to such assignee is sufficient to charge the estate in his hands.

"In Pars. Bills & Notes, 499, 500, it is said: 'If a person entitled to notice be bankrupt, notice should be given to him *if his assignee is not yet appointed*.' This is a strong implication that if he has been appointed notice to him would be sufficient. He leaves the question in doubt, however, by saying the safest course is to give notice to both; but he adds that 'if the insolvent has absconded notice should be given to the assignees, and if they are not appointed a delay until an appointment is made; and, although notice may be given to *any one holding or representing the estate*, we should think it better to notify the assignee when appointed.'

"Story, Bills, §§ 805, 889, says: 'If the party entitled to notice becomes bankrupt, and assignees have been chosen or appointed, notice to the assignee is proper, and *will be sufficient*.'

"Chit. Bills, 228, says: 'If the party entitled to notice be a bankrupt, notice should be given to him before the choice of assignees, and *after such choice to them*.'

"Byles, Bills, 216, leaves the matter in doubt by saying: 'If the assignees are appointed, perhaps notice should be given to them.'

"Daniel, Neg. Inst. § 1002, says: 'It is best to give notice to both; but, if no assignee is appointed, notice to the bankrupt is sufficient, and perhaps it might be sufficient if one had been appointed.'

"In *Ex parte Tremont Nat. Bank* the question arose as to the power of a bankrupt after adjudication, and before the appointment of the assignee, to waive demand and notice on commercial paper. It was then held, upon the authority of Lord Eldon, (*Ex parte Moline*, 19 Ves. 216,) that until an assignee was appointed the bankrupt is the trustee of his estate; and Judge LOWELL quotes from *Robt. Bankr.* 178, that notice should be given to the trustee or assignee. This precise question arose, and was determined by the court of appeals of Kentucky, in *Callahan v. Bank of Kentucky*, 6 Ky. Law Rep. 188. All the authorities are there reviewed, and it was held that notice to the assignee was sufficient. It was said in that case, as it can be here, that when the insolvent chooses his own assignee the latter is charged with the duty of acting as his trustee or agent to settle up the estate, and, being thus clothed with full power to act as his general representative, notice given to him is notice given to his general agent, and is valid as to the principal. This is an exhaustive examination of the point here involved, and should have great weight, especially as no case can be found to the contrary. In view of the importance of a uniform rule of commercial law, and of the high character of the court of appeals of Kentucky, this case is entitled to respect. In this proposition all the authorities agree. Daniel, Neg. Inst. § 2, p. 998; 1 Pars. Bills. 499; *Fassin v. Hubbard*, 55 N. Y. 465; *Wilkins v. Commercial Bank*, 6 How. (Mass.) 217; *Bank of Auburn v. Putnam*, 3 Keyes, 344."

(142 Mass. 186)

## GRANGER v. PARKER and others.

*(Supreme Judicial Court of Massachusetts. Norfolk. June 30, 1886.)*

## APPEAL—BOND—RECOGNIZANCE—ACTION ON—SURETIES.

In an action upon a bond given to perfect an appeal, the objection is not open to the defendant that the court has no jurisdiction because the appeal should have been completed by a recognizance, where the original action proceeded to a hearing and final judgment, without objection being taken, and the condition of the bond is substantially that of the recognizance; and, the judgment being valid, it cannot be impeached by the sureties on the bond.

This was an action of contract on a bond executed by said Parker as principal, and the other defendants as sureties, to perfect his appeal to the superior court for the county of Norfolk, from a judgment rendered against him by the district court of East Norfolk, held at Quincy, December 20, 1882, in the summary process of ejectment brought by plaintiff for possession of certain premises in Randolph, in said county, then in the possession of said Parker. Said process was dated December 4, 1882, and the case entered in said superior court, and there tried, with verdict for the plaintiff, and judgment rendered thereon after a rescript was sent by the supreme judicial court, on which execution issued, by which the plaintiff was put in possession of said premises. The present action was brought to recover the rent, costs, and damages referred to in said bond. After the defendants had answered that said district court had no legal right to require said bond, and also that it was given under duress, they filed a motion to dismiss the action for want of jurisdiction, as the appeal should have been taken by recognizance, by Pub. St. c. 175, § 6, which motion was heard at a former term and overruled, and an appeal taken, and renewed at the present term, and again overruled by the presiding justice. The verdict was for the plaintiff, and the defendants alleged exceptions.

*N. C. & J. K. Berry*, for defendants.

*John F. Colby*, for plaintiff.

C. ALLEN, J. The defendants, in various forms, take the objection that the bond declared on is wholly invalid, and that the appeal from the district court should have been completed by a recognizance instead of the bond. They contend that they made the bond under duress, by order of the district court; but offer no evidence of actual duress. They rely on the ground that it should be presumed to have been executed because the district court required it in order to perfect said appeal. It is conceded that the district court had jurisdiction of the cause and of the parties. The judgment of that court being for the plaintiff, the defendant Parker sought to exercise his right of appeal to the superior court, and entered into the bond now in suit; this being the form of security adopted to make the appeal effectual. The defendants now contend that the form of security should have been a recognizance instead of a bond. There is no suggestion that the condition of the bond contains anything which the

recognizance ought not to have contained. So far as appears, no question arose as to whether a bond or a recognizance was the proper form of security. The appeal was entered in the superior court, and tried there; the decision of the district court was affirmed; exceptions were taken, which were heard and overruled in this court, (137 Mass. 228;) and judgment for the plaintiff was finally entered in the superior court for possession of the premises. The proper parties were before that court; the subject was within its jurisdiction; and the only possible objection to its judgment is that the defendant Parker did not file the proper form of security to get the cause properly transferred then.

Without now considering whether the security should have been by way of a recognizance instead of a bond, we are of the opinion that the objection is not now open to the defendants. It might have been taken by the adverse party, or by the court itself, at any time before judgment. *Santom v. Ballard*, 133 Mass. 464; *Henderson v. Benson*, 141 Mass. 218; S. C. 5 N. E. Rep. 314. But where the objection to the jurisdiction rests simply on the ground that the party appealing did not give security for the prosecution of his appeal in the proper form, but gave a bond instead of a recognizance; where there was no actual requirement to adopt the particular form of a bond; where the conditions of the bond are the same as those which are prescribed by statute, and it is not apparent that any injury can have resulted from the substitution of a bond in place of a recognizance; where no suggestion of a mistake in this respect was made in the appellate court, but the cause proceeded without any objection, or suggestion of mistake, to a hearing and final judgment; and where the party appealing thus got the full benefit of his appeal by an unobstructed and full hearing on the merits in the appellate court,—it is not open to him afterwards to question the validity of the judgment on the ground of his own failure to furnish security for the prosecution of his appeal in the proper form. As to him, the judgment stands valid and irreversible. *Glazier v. Carpenter*, 16 Gray, 385; *Com. v. Sullivan*, 11 Gray, 203.

But if the party himself is not entitled to a reversal of the judgment on a writ of error or review, neither can the surety avoid it by plea and proof. There is no suggestion of any collusion or fraud on the part of the defendant in improperly submitting to a judgment in order to charge the sureties. The provisions of the bond are no more onerous than those which a recognizance would have contained. The bond contemplates precisely the proceedings which were actually had, and the result which was reached. The object for which it was given has been fully accomplished. The liability on a bond is no greater than it would have been on a recognizance. Execution is only awarded for so much of the penal sum as is due and payable in equity and good conscience. Pub. St. c. 171, § 10. The judgment being valid as against the principal, there is no good ground upon which the sureties can impeach it. *Fall River v. Riley*, 140 Mass. 488; S. C. 5 N. E. Rep. 481. The difficulty with the argument of the sureties is that the judgment was valid and not void.

By putting the decision on the ground that the bond is valid at common law, if not as a statutory bond, we do not mean to intimate that a recognizance should have been taken. Exception overruled.

(102 N. Y. 536)

FITZSIMMONS v. CITY OF BROOKLYN.

(Court of Appeals of New York. June 1, 1886.)

MUNICIPAL CORPORATIONS — POLICEMAN — MONEY EARNED DURING UNLAWFUL SUSPENSION, NOT TO BE DEDUCTED FROM SALARY DUE.

The rule that a servant unjustly discharged must deduct from his recovery for wages whatever he has earned since his discharge does not apply to the case of an officer of a city unjustly suspended, who sues for his salary, as there is no broken contract, or damage for its breach, where there is no contract.

Appeal from judgment general term of city court of Brooklyn, affirming a judgment in favor of plaintiff.

John A. Taylor, for appellant, City of Brooklyn.

Chas. J. Patterson, for respondent, Edward Fitzsimmons.

FINCH, J. This case presents the question whether an officer entitled by law to a fixed annual salary, but prevented for a time by no fault of his own from performing the duties of his office, and earning during that time the wages of another and different employment, must deduct them from his recovery when he sues for his unpaid salary. It is quite true that the question is not raised by the pleadings, but no objection was interposed on that account. The necessary facts were proved or admitted, and upon them the question was presented to and decided by the trial court, and an exception taken to that decision. If the question of pleading had been raised, the difficulty might have been obviated, and an issue tried and determined by the consent of both sides, irrespective of the shape of the pleadings, cannot be thrust out of the case upon an appeal.

The plaintiff was a policeman of the city of Brooklyn, duly appointed to that office, and having entered upon the performance of his duties. He was attempted to be removed from office by the police commissioners, but upon a *certiorari* the order of removal was reversed, and the plaintiff restored to his office. Between the order of removal and that of restoration he rendered no service as policeman, because not permitted so to do, but during the interval resumed, for a time, his old occupation as a machinist, and, that failing, engaged in work at Schutzen park, the character of which is not disclosed; and from these two sources earned, during the period of his removal, the sum of \$500. The defendant conceded that plaintiff was entitled to recover the unpaid salary of his office, but insisted that his earnings of \$500 should be applied upon and deducted from it. The court refused the deduction, the general term affirmed the judgment, and the defendant brought this appeal.

The rule sought to be applied by the city to the claim of the plaintiff finds its usual and ordinary operation in cases of master and servant,

and landlord and tenant,—relations not at all analogous to those existing between the officer and the state or municipality. The rule in those cases is founded upon the fact that the action is brought for a breach of contract, and aims to recover damages for that breach, or compensation for the servant's loss actually sustained by the default of the master. That loss he is required to make as small as he reasonably can. His discharge without just cause is not a license for voluntary idleness at the expense of the master. If he can obtain other employment, he is bound to do so; and, if he engages in other service, what he thus earns reduces his loss flowing from the broken contract. But this rule of damages has no application to the case of an officer suing for his salary, and for the obvious reason that there is no broken contract, or damages for its breach, where there is no contract. We have often held that there is no contract between the officer and the state or municipality, by force of which the salary is payable. That belongs to him as an incident of his office, and so long as he holds it; and, when improperly withheld, he may sue for it and recover it. When he does so, he is entitled to its full amount, not by force of any contract, but because the law attaches it to the office; and there is no question of breach of contract or resultant damages out of which the doctrine invoked has grown. We think, therefore, it has no application to the case at bar, and the courts below were right in refusing to diminish the recovery by applying the wages earned.

The judgment should be affirmed, with costs.

(All concur.)

(102 N. Y. 683)

SCHWENCK and another v. NAYLOR.<sup>1</sup>

(Court of Appeals of New York. June 1, 1886.)

1. FRAUD—FALSE REPRESENTATIONS AS TO PROPERTY OF CORPORATION, WHERE SHARES OF STOCK ARE SOLD ON THE STRENGTH OF SUCH REPRESENTATIONS.

A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentation, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material, in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it for his individual benefit.<sup>2</sup>

2. SAME—EXTENT OF PROPERTY.

The contract of sale had a list appended of the property, and provided that plaintiff might visit the mill within 30 days, and annul the contract if the property was not found. Plaintiff Kilpatrick did so, and defendant pointed out what he said was the wharf, tramway, and a water front of 800 feet, which he represented to belong to the mill property, and to be on the mill side of the city line, whereas only 50 feet belonged to the company, and the rest defendant claims to be his individual property by purchase subsequent to sale to plaintiff. There was nothing on the land to indicate the city line, and, if he had examined the deed to the company, it would have only shown a bound-

<sup>1</sup> Reversing 50 N. Y. Super. Ct. (J. & S.) 57.

<sup>2</sup> For full discussion of the question of false and fraudulent representations in a sale, see *Cook v. Churchman*, (Ind.) 3 N. E. Rep. 759, and note, 767; *Bowker v. De Long*, (Mass.) 4 N. E. Rep. 834, and note, 835-837; *Dillman v. Nadlehoffer*, (Ill.) 7 N. E. Rep. 88, and note, 98-99; *Booth v. Smith*, (Ill.) 7 N. E. Rep. 610.



ary by the city line. Defendant also said that he had a perfect title, etc. *Held* that, under the circumstances, plaintiff had the right to rely upon the representation of the defendant as to the extent and boundary of the property.

Appeal from judgment general term superior court affirming judgment for defendant, dismissing complaint entered upon direction of judge at trial before a jury.

A. R. Dyett and Joseph Fettretch, for appellants, Samuel K. Schwenck and another.

Wm. B. Putney, for respondent, Robert Naylor.

RAPALLO, J. This action was brought to recover damages claimed to have been sustained by the plaintiffs by reason of fraudulent representations made to them by the defendant in November, 1880, whereby the plaintiffs were induced to purchase from him two-thirds of a mill property in Florida, or of the capital stock of an incorporated saw-mill and lumber company organized under the laws of this state, to which said property had been conveyed by defendant, and to furnish the sum of \$15,000 for operating the mill and business of the company.

The representations alleged in the complaint were that the defendant was the holder or owner of all the capital stock of said company, and that the company owned and had title to about 35 acres of land situated at Apalachicola, Florida, having thereon a large and valuable saw-mill, with its machinery, etc., and also having an extensive water front of over 2,000 feet on Turtle harbor, with large and commodious wharves, all of which property was of the value of \$125,000, and that said mill was and could be made very profitable, and would yield a profit of \$100,000 a year; that the lands of said company included, as a part thereof, and of said water front, the whole of a dock extending in length 250 feet, or thereabouts, in a southwesterly direction along the shore of Turtle harbor, and a tramway leading from the mill to the dock, and the land upon which said dock and tramway were situated, and all the land adjoining, extending, in a south-westerly direction from the mill, to a certain ditch or creek which the defendant showed to the plaintiff, Kilpatrick, and represented to him was the boundary line of the city of Apalachicola, and were part of and used in connection with said mill.

The complaint further alleged that the whole of said dock and tramway, so represented by the defendant to be included in the lands of said company, were material and necessary to the mill, and the operation thereof, and that without the same the mill could not be successfully and profitably operated; that, believing and relying upon said representations, the plaintiffs were induced by the defendant to enter into an agreement with him to take and purchase two-thirds of the capital stock, and to provide and furnish the sum of \$15,000 to operate the mill, and did also, at the request of the defendant, furnish and advance further sums, which the defendant represented to be necessary for the operation of said mill and business; and that such advances were induced by the representations alleged to be false and fraudulent. The representations were alleged to be false in this: that the lands of said corporation did not, as the defend-

ant then well knew, include the whole of said dock and tramway, nor the whole of the land on which they were situated, nor any of said dock, tramway, or land, except a small and inconsiderable part thereof, nor did the land of the company, as the defendant then well knew, include all the land which the defendant represented that the same did include, nor was the ditch or creek, before mentioned, the boundary line of the city of Apalachicola, and that said false representations were fraudulently made, with intent to deceive and defraud the plaintiffs.

The complaint further alleged that, as part of the agreement, the defendant took charge of the mill and business at Florida, and the plaintiffs paid out, for the purpose of said business, in addition to the \$15,000 first mentioned, the further sum of \$20,000 on the faith of said false representations; that said mill and property, without the whole of said dock, tramway, and land, were worth \$35,000 less than they would have been worth had the representations been true, and they would not have entered into the agreement, or furnished any of the money, or purchased the stock, if they had known that the representations were false, and they claim damages to the amount of \$35,000.

The answer admitted the making of the agreement alleged in the complaint; and stated that, at the time it was made, the defendant owned or controlled all the capital stock of the company, but denied the false representations charged, and set up other matters of defense.

On the trial the plaintiff Kilpatrick was called as a witness on his own behalf, and produced a written agreement between himself and his co-plaintiff, Schwenck, of the one part, and the defendant of the other part, dated November 11, 1880, whereby the defendant agreed to sell to the plaintiffs, and they agreed to purchase, one undivided third interest each, of and in the mill, and machinery therein, unfinished tug, real estate, and all other property at Apalachicola, Florida, belonging to said Naylor, on the following terms, viz.: That the plaintiffs should provide and furnish \$15,000, as required for working the mill and business effectually; that all profits of the business for three years should belong to Naylor, in payment for said two-thirds interest, except \$55,000, which should be paid to the plaintiffs out of two-thirds share of profits; that, a company having been already incorporated under the laws of the state of New York for the purchase and working of the mills, the sole control of which was then in the hands of the defendant, the capital stock of said company should be divided equally between all the parties to the agreement, immediately upon said working capital being furnished; that the defendant having furnished a list of the property and machinery at Apalachicola, which list was attached to the agreement, the only condition of the contract was that all the property stated in said list should be found there when the plaintiffs, or one of them, should visit the mill, and, if not so found, they should be free to withdraw from the agreement should they so determine; that one of them should visit the mill within 30 days, or the condition should be deemed waived, and the property be considered finally accepted by them. The agreement contains other provisions not important to the present inquiry. At-

tached to the agreement was a list entitled, "Machinery in Saw-mills and Premises at Apalachicola, Florida, belonging to R. Naylor." Then follows a minute inventory, covering several pages, of the various articles of machinery, but the only reference to real estate was: "These saw-mills have an extensive water front of some 2,000 feet immediately on Turtle harbor, with wharf, etc." "The site comprises about thirty acres." "The log-pond will store 10,000,000 feet of logs." "The buildings comprise large saw-mill, 50 ft. x 150; two stories." "Engine and boiler houses, 40 x 60 ft."

The plaintiff Kilpatrick testified that the defendant made representations to him at the time the agreement was made; that the defendant stated to him the condition of the mill, the formation of the company, the necessity of capital to complete the machinery, and its worthlessness in its then present condition, but its capacity of being made very profitable with a small outlay of money; and the witness proceeded to set forth the negotiation which ensued. The witness testified that the defendant stated that the water front embraced docks from 500 to 600 feet long; that the water front attached to the mill, and available for its use, was at least 2,000 feet, and that already a dock had been built, 500 or 600 feet long, on the portion of the water front adjoining the mill; that after the agreement had been executed, the witness went down to the mill, where the defendant had preceded him; that he found the mill there, and the heavy machinery, and the defendant took him down to the dock, and pointed out what he said was the water front, and the line between the town of Apalachicola and the mill property, which ran to the line of the town; that he pointed out a little creek, from 800 to 850 feet south of the mill, and besides that, in the distance, a little bay or ditch, that formed the line between the town of Apalachicola and the mill property; that the witness was accustomed to measure distances with his eye, and he should judge that from the end of the dock to that line was about 800 feet, and they agreed that, if they had so much land on that side of the mill, it was abundant room for all practical purposes; that when the defendant made these representations to the witness in regard to the wharf and the lines of the city of Apalachicola, he (witness) believed them, and did not doubt them for a moment, and then returned to New York, having authorized the defendant to draw upon him for the required funds; that this wharf and the tramway, which ran the whole length of the wharf, were indispensably necessary for the operation of the mill; that to the north of it was all swamp land.

From the testimony of this witness it appears that the wharf, as then standing, was about 250 feet long, part of it having been previously carried away; that the line pointed out to him by the defendant as the line between the mill property and the city of Apalachicola was about 800 feet south of the south end of the wharf, and about 1,000 feet south of the mill, but that, as he afterwards ascertained, the line between the mill property and the city was in fact only about 30 feet south of the mill, and that there was left belonging to the mill property and to the company in fact only about 30 feet of wharf and water front south of the

mill, instead of 1,000 feet of water front and 250 feet of wharf, while at least 800 feet of wharf was necessary to run the mill, and could not be obtained on the north side of the mill at a cost of less than \$50,000, owing to the location and character of the property.

The witness further testified that in January, 1882, the defendant being then in New York, the witness had a conversation with him, in which witness said to him: "Mr. Naylor, I have learned that the property embracing the docks and tramways has been purchased by you, and taken in your name, and that you personally have not conveyed the property to the mill company, but that you have sold it;" and that the defendant replied: "I will never convey it in the world. You can't make me. I have conveyed it to another party for fear of your getting it;" and witness thereupon called upon other persons who were present to take note of what the defendant said, and violent language then passed between plaintiff and the defendant. The witness further stated that he did not discover, until after October, 1881, that the wharf did not belong to the company, and after he had made large advances in addition to the \$15,000.

The plaintiff Schwenck corroborated the testimony of Kilpatrick. Schwenck testified that when the agreement of November 11, 1880, was made, the defendant represented that the property consisted of 33 to 35 acres, with a river front of about 2,000 feet, and extensive wharves to be used in the shipment of lumber; that the witness was present at the conversation in January, 1882, testified to by Kilpatrick; that Kilpatrick told the defendant that he had discovered that the lots which he had sold to plaintiffs, as a part of the wharf property belonging to the mill, had not belonged to defendant at the time he sold them to plaintiffs, and that afterwards he (defendant) had bought them in his own name, and so held them; and Kilpatrick said, "Mr. Naylor, you know you cannot do that;" and Naylor replied, "I have taken counsel in the matter, and I can do it;" and Kilpatrick said, "You will have to convey that to us;" and Naylor said he would not do it, and Kilpatrick replied, "You will have to either do it, or we will put you behind the bars;" that some other strong expressions were used, and Mr. Naylor said, "I will make you pay \$50,000 for those lots. I have already conveyed them to some one else to prevent your getting them." On the cross-examination of Schwenck, the defendant put in evidence a contract dated January 18, 1882, between the defendant and Schwenck, whereby the defendant agreed to sell to Schwenck for \$15,000, one-third of the capital stock of the Central Florida Mill & Lumber Company, and to convey, or cause to be conveyed, to him, the real estate recently purchased by the defendant, and owned or controlled by him, contiguous to the land and improvements of the company, including that forming the wharf frontage, and furnishing the right of way for passing in and out, loading and unloading vessels, and Schwenck agreed to pay to Naylor any sum found due him for salary, or for money expended by him in carrying out the business of said company.

The plaintiff Kilpatrick testified that he never saw or knew or heard

of this agreement before it was produced in court, and the plaintiff Schwenck testified that the agreement was never carried out.

Edward W. Kilpatrick, a son of the plaintiff, who was also present at the conversation in January, 1882, testified to by the plaintiffs, corroborated their testimony in that respect, and stated that in that conversation the plaintiff Kilpatrick said, "Mr. Naylor, do you know that there is a portion of this land which you represented as belonging to the property that did not belong to it?" and Naylor answered, "Yes;" and then followed the demand and refusal of a conveyance of that property, and the declaration of Naylor that he would make plaintiffs pay \$50,000 for it if necessary.

Charles H. Storking, another witness for the plaintiffs, who had gone to the property, stated, from declarations made to him in December, 1881, while in Florida, by Naylor, with a map then before them, that the property which Naylor claimed to own individually took away from the mill property all but about 50 feet of the wharf. The deed to Naylor of this property was put in evidence, and bore date September 8, 1881.

The foregoing, together with the deed from Naylor to the company, dated January 15, 1880, constituted the substance of all the evidence, and at the close of the testimony the defendant moved to dismiss the complaint, but no ground for such dismissal is stated in the case.

The judge presiding at the trial granted the motion, assigning as reasons that the representations were not made concerning the stock, but concerning the length of the water front and the size of the dock; that upon these representations the plaintiffs parted with their money, not to the defendant for his individual benefit, but to him to be used in the improvement of the company's property, and the money was so used; that it was not proved that all the representations were untrue, and therefore the only remedy the plaintiffs had was to rescind, and recover back their money on a tender back of the stock; that they could not sue in affirmance of the contract and for partial damages, because it was necessary, in such a case, as in the case of a warranty, that the false or fraudulent representations should have been made concerning the article for the inferiority of which the recovery is sought; that the sale in this case was of the stock, and, as the representations were not made concerning the stock, there was no cause of action for false and fraudulent representations; that as to the length of the dock the plaintiffs could see for themselves before they parted with any money, and need not have been misled, and as to the deficiency in the water front the evidence was insufficient to establish the fraudulent character of the representations at the time they were made, as the parties might well have been mistaken as to the boundaries.

We think that, although the interests purchased by the plaintiffs were conveyed to them by means of a transfer of the stock, the contract was in substance for a sale of two-thirds interest in the property; the defendant representing himself as holding the entire interest, in the form of stock. The contract of sale states in terms that the defendant agrees to

sell, and the plaintiffs agree to purchase, one undivided third interest each, in "all that mill, and machinery therein, unfinished tug, real estate, and all other property at Apalachicola, Franklin county, Florida, belonging to said Naylor, on the following terms." A list of the property was furnished and attached to the contract, and one of the conditions was that the property in the list should be found at the mill. The contract recited that this property was represented by stock in the company, which had been formed for the purpose of operating the mill, the sole control of which was in the hands of Naylor, and that the stock of that company was to be equally divided between the three parties. That mode of transferring the interests sold, did not, however, change the substance of the transaction, which was a sale of two-thirds interest in the property described.

It is quite immaterial, however, whether the sale was of the property or of the stock. A false and fraudulent representation, as to the property of a corporation, of material facts which necessarily affect the value of shares of stock therein, constitutes a cause of action against a party inducing another, by means of such fraudulent misrepresentation, to purchase such shares, quite as sufficient as if the purchase had been of the property of the company with regard to which the representation was made; nor is it material, in either case, that the purchase price of the property, or the money advanced on the faith of the representation, be paid to the party making it, for his individual benefit. If known to be false, and made with intent to deceive and defraud the person who is thereby induced to pay out his money, the person guilty of the fraud is liable to respond in damages, on the same principle on which one person is held liable in damages for fraudulently giving a false recommendation by which another is induced to give credit to a third party.

In the present case, however, the money advanced by the plaintiff was proved to have been paid to the defendant, and there is no evidence showing what disposition he made of it; but, even if he did expend it in the improvement of the company's property, he reaped an individual benefit, to the extent of at least one-third of it, as he was the owner of one-third of the stock of the company, and, according to his own statements, the effect of the advance was expected to be to make his stock, which, without the improvements, was worthless, yield a large profit, and he had a strong personal interest in inducing the plaintiffs to make the advance.

The next ground of nonsuit, as to the dock, cannot be sustained. The plaintiff Kilpatrick saw the dock, but it is not correct to say that he could not be misled. According to his testimony he was misled. What he saw was a long dock, running southerly from the mill, with a tramway extending its entire length. To the extent of about 250 feet it was in good repair, but beyond that a part had been carried away, leaving piles still standing, and beyond the 250 feet the defendant pointed out to him a water front of about 800 feet which he represented to belong to the mill property, and to be on the mill side of the city line, while, according to the defendant's own admission to the witness Storking, only

about 50 feet of this wharf and water front belonged to the company, and the rest was claimed by the defendant to belong to him by virtue of a purchase made by him subsequent to the sale to the plaintiffs, and for this property he declared to the plaintiffs, in 1882, that he would compel them to pay \$50,000, and stated to them that he had conveyed it to another party to prevent them getting it.

The representation on which the property was sold was well calculated to mislead, as the 250 feet of wharf was still standing, and the residue of the water front pointed out was marked by physical objects, while, as testified to by Kilpatrick, there was nothing on the land to indicate the city line, and if he had examined the deed from the plaintiff to the company, put in evidence, he could not have discovered from its description anything except that the property was bounded on the south by the city line, of the location of which he knew nothing except what was represented by the defendant; the description in the deed being by section numbers. Kilpatrick was only two days at Apalachicola, and could not be presumed to know the location of the city line. He suggested to the defendant, at that time, that he would like to employ a lawyer to examine the records, but the defendant said that he had all the papers straight, and it was all right, and he had a perfect title; that he had paid his money, and knew what the property was. Under these circumstances, we are of opinion that the plaintiff had the right to rely upon the representation of the defendant as to the extent and boundary of the property. All that, by the terms of the contract, he had undertaken to do was to see that the property was there as represented. He saw it before him, but was not bound then and there to examine the title, especially when the defendant professed to know all about it, and the extent of the property. *Whitney v. Allaire*, 4 Denio, 555; *Allaire v. Whitney*, 1 Hill, 485; *Beardsley v. Duntley*, 69 N. Y. 577.

The last ground of nonsuit was that, as to the deficiency in the water front, the evidence was insufficient to establish the fraudulent character of the representations at the time they were made, that the difficulty arose from the boundary line, and as to that the parties might well be mistaken. We think that, under the evidence, this was eminently a question for the jury. The evidence of the statement of the defendant (which the jury might infer was made for the purpose of deterring Kilpatrick from employing a lawyer) that he had the papers all straight, and had a perfect title, and had paid his money, and knew what the property was, was pertinent to this point; and, coupled with the facts that when, in September, 1881, the property deficient was put up for sale in Florida under the decree of the probate court, he knew enough to buy it; and his admission, testified to by Edward W. Kilpatrick, that he knew that there was a portion of the land which he represented to the plaintiffs as belonging to the property that did not belong to it, without any qualification as to the time when he had such knowledge; his taking the trouble to consult a lawyer when he bought the deficient property as to whether he could hold it against the company, and his resorting to the plan of conveying it away to prevent the company getting it; and his threat to

compel the plaintiff to pay \$50,000 for it,—these circumstances, unexplained, as they are in the case as now presented to us, tend to show bad faith on the part of the defendant, and to make out a strong chain of evidence for submission to the jury on the questions of guilty knowledge and fraudulent intent.

At general term a new and different ground, not assumed by the judge at the trial, was taken for affirming his conclusion. The principal point not already answered was that the plaintiffs had not shown any damage from the false representations; that there was no proof, and the description in the deed from Naylor to the company, unexplained, did not show, that the land in dispute was not contained in the deed; that the company was in possession of the land in dispute, (which fact was not clearly shown;) that there was no substantial testimony that the company did not own the 2,000 feet of water front and the wharf as represented, except the fact of the subsequent purchase by Naylor. These points are sufficiently answered by the testimony of Storking and the admissions of Naylor.

But the main ground taken by the court is that, by the implied warranty in the agreement of purchase of November 11, 1880, and the express warranty in the deed from Naylor to the company, the company became, by estoppel, the owner of the equitable title to the land in dispute, and that the consideration of the last conveyance to Naylor having been paid with the money of the company, or of the plaintiffs, (a fact of which there was no proof,) made him the trustee for the one whose money was paid; that, although he had admitted that he had conveyed away the property, there could be no *bona fide* purchase from him, because the possession of the company was notice of its rights, and the purchaser would take subject to that notice. This seems to us a rather strained argument by which to sustain what, upon the case as presented, in the absence of any explanation, the jury might have pronounced a gross fraud. In the first place, the evidence as to possession by the company of the disputed premises is very indefinite. It does not show what, if any, business was carried on at the mill, or to what extent the company were in possession of or occupied the water front. But whatever possession there was, was through Naylor, who did not leave the property till December, 1881, which was after his purchase of the water front. Up to that time he was the apparent possessor of the property; and there is nothing to show that the rights of the company, or that he was its representative, was generally or at all known in Apalachicola. The company was a private corporation, organized in New York, and it is, to say the least, very doubtful whether, under the circumstances, the possession of Naylor would be notice to the world of any rights but his own, and whether there could not have been a *bona fide* purchase from him. To hold that a disputed and doubtful equitable title, such as is suggested in the opinion of the general term, is equivalent to a clear and undisputed legal title, and that no damage could be sustained by the substitution of the one for the other by means of a fraud, is going further than we are inclined to follow.



The judgment should be reversed, and a new trial ordered; costs to abide the event.

(All concur.)

(102 N. Y. 721)

REMBE v. NEW YORK, O. & W. R. Co.<sup>1</sup>

(Court of Appeals of New York. June 8, 1886.)

**NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—CROSSING RAILROAD WHILE IN PROCESS OF REPAIR.**

Plaintiff, who was deaf, undertook to drive across the railroad where a portion of the track was in process of construction, and, although the foreman at first requested him to wait, on his proceeding he directed a workman to lead the horse over, but, after passing over, the horse starting, the man let loose, and the horse, running against a telegraph pole, was injured. *Held*, that the questions as to whether the railroad exercised proper care and skill in the performance of the work, and as to preventing obstructions to passers by, and as to whether defendant was chargeable with contributory negligence, were for the jury, as was also the cause of the injury. *Held, also*, that plaintiff had reason to believe, from the act of defendant's workman in leading the horse over, that the crossing was safe.

Appeal from judgment general term supreme court, Second department, affecting judgment in favor of plaintiff.

*T. B. McLennan*, for appellant, New York, O. & W. R. Co.

*Abram A. Demarest*, for respondent, Philip Rembe.

**PER CURIAM.** The defendant, at the time of the injury sustained by the plaintiff, to recover damages for which this action is brought, was constructing a portion of its road by laying down a track across a public highway in Rockland county, and in restoring the highway by making a crossing over the tracks. The ground was level at this point, and the ties were being laid upon the ground, and the rails then fastened, and the spaces between the rails filled in with plank. The top of the rails and the surface of the crossing were about 11 inches above the natural level of the ground. The planking was completed between the rails, and two planks had been laid down on the end of each tie on both sides of the track, and then, to allow wagons to pass over, a plank was set aslant against these two planks on each side. A wagon had a short time before passed over in safety. Plaintiff came up with a high baker's wagon, and asked when he could get across. The foreman in charge of the work told him he would let him over as soon as he could. The plaintiff, being somewhat deaf, did not hear the reply. A second request was made to wait for a moment, but he did not heed it. He swears that he saw the planks there, and, as far as he could see, it was all right, and that is the reason he went on. Then the foreman requested one of his men to take the horse by the head, and lead him over, which he did. When he had reached the opposite side, and was passing down the sloping planks, the horse started, and ran against a post, when the man let loose, and then ran across the highway against a telegraph pole, and upset the wagon and

<sup>1</sup> Affirming 82 Hun, 68, *mem.*

injured the plaintiff. The horse had previously run away, and on that day acted wild and skittish.

The defendant had a perfect right to lay down its track across the highway, but was bound to exercise proper care and skill in the performance of the work, and to restore the highway, as far as practicable, to its former condition, so as to render it safe and not impair its usefulness. While engaged in the work, it was also the duty of the defendant to prevent any obstruction to persons passing, so far as that could be done. If chargeable with negligence in this respect, the defendant would be liable therefor if the plaintiff's negligence did not contribute to the result. These were questions for the consideration of the jury. There was evidence upon the trial showing that there were planks upon the opposite side of the railroad from where the plaintiff stood, standing on edge, which might have caused the plaintiff's wheel to drop suddenly, and thus frighten the horse. Whether this or the accelerated motion of the wagon caused the accident was a question for the jury, and also whether the manner in which the plank was located was negligence was for their consideration. At the time of crossing, one of the men at work had hold of the horse, as the testimony shows, and this also was for the jury to consider in determining the question as to the defendant's negligence. In view of the facts presented, and as the jury have found that defendant was chargeable with negligence, their finding in this respect is conclusive against the defendant.

As to the contributory negligence of the plaintiff, it is not entirely clear that he was in fault. Although he proceeded to drive his team across before he heard any response to his question, he had reason to suppose he might pass in safety. In fact, one of the workmen took hold of his horse, and might have stopped him if the passage had not been considered entirely safe, and it is not apparent that the plaintiff could not have passed in safety but for the condition of the plank at the end of the crossing. The question whether he erred in his judgment, or could in any way have avoided the accident by any greater degree of care than he exercised, was one for the jury to determine, and we cannot say that they erred in their finding that the plaintiff was not chargeable with contributory negligence. It may also be remarked that the plaintiff might not have seen the condition of the crossing at the side opposite from where he was, and he had reason to believe, from the act of one of defendant's workmen in leading the horse over, that the crossing was in a condition entirely safe.

The judgment should be affirmed.

(All concur.)

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(102 N. Y. 720)

ENO v. DIEFENDORF.

(Court of Appeals of New York. June 8, 1886.)

1. SETTLEMENT—NOTES GIVEN IN PAYMENT—WHEN A SETTLEMENT OF ACCOUNTS.

After the death of plaintiff's husband, defendant received money, notes, and accounts belonging to said deceased, he having been his former partner, and he also borrowed moneys of plaintiff, and she brought this action for an

accounting. Defendant claimed that certain promissory notes given her by him amounted to a settlement. It did not appear that defendant had rendered any account of the items of moneys in his hands, or moneys due at the time of giving the notes, and it was proven that he owed her much more than the amount of the notes. *Held*, that the referee did not err in failing to find that such notes amounted to a settlement of the accounts, and in allowing such settlement to be opened without charge of fraud.

2. STATUTE OF LIMITATIONS—PLEADING—SETTLEMENT.

The answer set up that defendant had settled and paid plaintiff "for all deal, accounts, matters, and things he has ever had with plaintiff, and denies that he is indebted to her in any sum whatever, and that more than six years have elapsed since the matters and things mentioned in plaintiff's complaint, or any of them, have become due." *Held*, that this was not an averment, in appropriate language, that six years had elapsed since the demands named were due.<sup>1</sup>

Appeal from judgment of general term supreme court, Fourth department, in favor of plaintiff.

*S. N. Doda*, for appellant, Rufus Diefendorf.

*F. A. Lyman*, for respondent, Maria Eno.

PER CURIAM. The complaint in this action alleged that the plaintiff's husband and the appellant were copartners; that plaintiff was sole legatee and devisee of her husband, who died in 1866; that after the death of plaintiff's husband the appellant received moneys, notes, and accounts belonging to the plaintiff and for her use; that she loaned him moneys, and he refused to render an account, and settle for the same, and was indebted to her in the sum of \$5,000 by reason thereof. The complaint also alleged an assignment by the appellant to one J. H. I. Diefendorf, (but as the complaint was dismissed as to this party the allegation in that respect is not material.) The complaint then demanded an accounting between the plaintiff and the defendants, and that the defendants pay her the balance that may be found due on such accounting.

Various answers were interposed to the complaint, and upon the trial before a referee he found in favor of the plaintiff, and against the appellant, for a balance of \$3,189.86, and, upon an appeal from the judgment entered thereupon to the general term, the same was affirmed.

The main point presented upon this appeal to which our attention is directed, is that the referee erred in not giving legal effect to the settlements proven by the uncontradicted testimony of the parties, and in permitting such settlements to be opened without charge of fraud or mistake in the complaint, or proof thereof on the trial. This involved a question of fact before the referee, in regard to which the evidence was conflicting, and it is not apparent that the referee passed upon the same contrary to the weight of the evidence, or that his finding in this respect was without sufficient testimony to sustain it. The alleged settlements mainly related to the giving of certain promissory notes, but in each instance the evidence fully explained the facts and circumstances under which these notes were given, and the most that can be claimed is that

<sup>1</sup> Respecting pleading the statute of limitations, see *Perry Co. v. Railroad Co.*, (Ohio,) 2 N. E. Rep. 857, and note, § 5, pp. 866, 867.

a question of fact was presented as to whether any settlement had taken place. There was no proof that was absolutely conclusive that such was the fact. It does not appear that the appellant rendered an account of the items of moneys in his hands or demands due the plaintiff at the time of the alleged settlements. The proof shows that he admitted, at different times, certain amounts which he owed the plaintiff, and that he gave his promissory notes therefor. There was evidence proving, and it was found by the referee, that the defendant was indebted to the plaintiff for an amount far exceeding the sums named in the notes referred to. We are thus brought to the conclusion that there was no sufficient proof that settlements were made between the parties which precluded the plaintiff from establishing what was actually due her from the defendant.

There is another answer to the point now urged as to settlements being made between the parties. No requests were made to find that any settlement or settlements had been made, or any reference made to any fact or facts relating to either of the alleged settlements. The case, therefore, presented by the requests, is without any findings as to a settlement or settlements which raises any such question for the consideration of the court upon appeal.

There is no merit in the claim that the notes of the defendant to the plaintiff were barred by the statute of limitations. No such defense is properly presented in the defendant's answer. The second and further answer sets up that the defendant has settled and paid plaintiff "for all deal, accounts, matters, and things he has ever had with plaintiff, and denies that he is indebted to her in any sum whatever, and that more than six years have elapsed since the matter and things mentioned in plaintiff's complaint, or any of them, have become due." This allegation contains merely a defense of payment, and is not a sufficient plea that the claims and demands of the plaintiff are barred by the statute of limitations. There is no direct averment that the defendant intends to set up two defenses in one count of the answer. Even if there had been a sufficient statement of more than one defense, it would be in violation of the rule of pleading that defenses must be separately stated. Aside, however, from this view of the subject, it is sufficient to say that there is no averment, in appropriate language, that six years before the commencement of the action have elapsed since the demands named were due, and hence they are not barred by the statute of limitations.

Another answer to the claim is that the case is one where mutual accounts existed between the parties, and that some of the items accrued within six years before the commencement of this action. It may also be remarked that the evidence shows that payments were made by the defendant at different times upon the account of the plaintiff, and thus the statute was prevented from running.

The question as to the right of the plaintiff to maintain the action in her own name is sufficiently answered in the opinion of the general term.

No other point urged demands comment.

The judgment should be affirmed.

(All concur.)

(105 Ind. 336)

CHICAGO & E. I. R. Co. v. HEDGES, Adm'x.<sup>1</sup>

(Supreme Court of Indiana. April 10, 1885.)

## 1. NEGLIGENCE—ACTION FOR DAMAGES—WILLFUL KILLING—NECESSARY ALLEGATIONS.

In actions against a railroad company, to recover damages for killing a person, when the pleading, notwithstanding the frequent use of the words "purposely" and "willfully," does not charge that the defendant purposely or willfully killed the intestate, or purposely or willfully ran the train upon him, or caused it so to be run upon him, the allegations amount to no more than a charge of killing through negligence.

## 2. SAME—LIABILITY OF RAILROAD COMPANY—TRESPASSER.

An instruction to the jury that a railroad company will be responsible for the injury of a person unlawfully upon the railroad track if its employees were guilty of negligence, is erroneous under any issue.

## 3. SAME—TRESPASSER—DAMAGES—WILLFUL INJURY BY RAILWAY COMPANY.

A person unlawfully upon the railway track can recover from the railway company only for willful injury.

## 4. SAME—PLEADING—GROSS NEGLIGENCE.

In pleading, the words "gross negligence" and "recklessness" cannot be substituted for "willfulness."

## 5. SAME—VARIANCE BETWEEN PLEADING AND EVIDENCE—PRACTICE.

Evidence of willfulness cannot be made available under a pleading which does not charge willfulness.

## 6. SAME—WHAT IS CONTRIBUTORY NEGLIGENCE—RAILROAD CROSSING—NECESSARY PRECAUTION.

A person about to cross a railroad track to be free from negligence, must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances, but there may be circumstances which excuse the taking of the usually necessary precaution of looking and listening.

## 7. SAME—DECEPTIVE APPEARANCES.

Negligence cannot be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man.

## 8. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EVIDENCE.

The question of contributory negligence may be submitted to the jury when there is any evidence tending to show that the person injured was thrown off his guard by conduct of the defendant which might have such effect upon an ordinarily prudent man.

## 9. SAME—TRESPASS—RAILWAY TRACK—RIGHTS OF THE PUBLIC.

A person crossing a part of a railway track habitually used by the public in approaching the depot, with the knowledge and consent of the railway company, is not a trespasser.

## 10. TRIAL—INSTRUCTIONS TO JURY—SIGNING—REV. ST. IND. 1881, § 533.

The court may refuse to give instructions to the jury not signed as required by section 533, Rev. St. 1881.

## 11. SAME—HARMLESS ERROR—INTERROGATORIES TO JURY—GENERAL VERDICT.

Where the answers to interrogatories could not have controlled the general verdict, there is no injurious error in the action of the court in refusing to require the jury to answer more fully and definitely such interrogatories.

## 12. SAME—VARIANCE BETWEEN GENERAL VERDICT AND ANSWERS TO INTERROGATORIES.

That the answers to interrogatories may control the general verdict there must be material conflict between them.

## Appeal from Fountain circuit court.

BLACK, C. The appellee, administratrix of the estate of Daniel T. Hedges, deceased, brought her action against the appellant to recover damages for the killing of said Daniel by his being run against and over by a train of cars

<sup>1</sup>Petition for a rehearing overruled April 20, 1886.<sup>2</sup>Rehearing denied.

owned and operated by the appellant upon the track of the Indiana, Bloomington & Western Railway Company, in the town of Covington, on the twenty-eighth of March, 1888. The complaint was in three paragraphs; all charging that the death was caused by the defendant's negligence, without negligence on the part of the intestate.

There has been some discussion as to whether the third paragraph charged a willful killing, concerning which we will speak presently.

The answer was a general denial. A jury returned a verdict for the plaintiff for \$1,200, and answered interrogatories. The defendant objected to the receiving of the verdict and the discharge of the jury, and moved to require the jury to fully answer certain of the interrogatories, and to make their answers thereto definite and responsive. The court received the verdict and discharged the jury. The defendant moved unsuccessfully for a *venire de novo*, for judgment on the answers to interrogatories notwithstanding the general verdict, and for a new trial, and judgment was rendered on the verdict.

It will aid in the decision of the case to state the following facts: The defendant owned and operated a railroad which connected with the track of the Indiana, Bloomington & Western Railway Company, a short distance east of the depot of the latter company at Covington, and, by an arrangement between said companies, used the track of said latter company between said place of intersection and Danville, Illinois. Main street, in Covington, crossed the tracks of said latter company; being one main track, lying east and west, and, parallel therewith, two side tracks or switches. The defendant was moving a train of cars towards the west on said main track. At some distance east of said crossing, the engine was detached from the moving train, and was run with quickened speed across said street to a water-tank 240 feet west of said crossing; the train being left to follow, on a down grade, in charge of a brakeman. The plaintiff's intestate, a man 73 years old, having approached on said street, was struck, run over, and killed by the train.

The jury found, in answer to interrogatories, that the deceased was approaching the railroad crossing from the north; that he was walking; that he was familiar with the locality of the crossing; that he had known of the existence of the railroad at that place for 10 or more years; that he had been in the habit of going to the depot, and crossing the railroad tracks frequently; that his business had taken him to the depot, at or about the same hour as that at which he was killed, on each week-day for two or three months before he was killed; that he was on his way to the depot at the time he was killed; that the street on which he was walking ran nearly north and south, and crossed the railroad nearly at right angles; that the train was approaching the crossing from the east; that there were two side tracks at the crossing, both lying north of the main track, one of them "near twenty feet" and the other "near eight feet" from the main track; that from a point 40 feet north of the main track the deceased could have seen "near one hundred and forty feet" up the main track in the direction of the approaching train; that, had he looked when he reached the north side track, he could have seen "near one hundred and sixty feet" east along the main track; that, when he reached the south side track he could have seen "near two hundred and sixty feet" east along the main track; that the accident happened in the day-time; that the depot was west of the crossing, and south of the main track; that the depot platform approached within five and one-half feet of the west side of the street and sidewalk crossing.

The twenty-third interrogatory was as follows: "Did the train conductor stand on the depot platform, and shout a warning to the deceased?" The jury answered, "He hollowed;" and they answered that this was not done before the deceased had crossed the south side track, and that it was done before he

had stepped on the main track. To the question, "Was the conductor's warning in tone loud enough to be heard at the Craig House, one hundred yards away?" they answered, "We do not know." They answered, further, that there was a brakeman "at the brakes between the second and third cars, they being together;" that he did not shout a warning to the deceased while the latter was on the south side track. The thirtieth interrogatory was: "Did this brakeman shout a warning to the deceased before deceased reached the main track?" The jury answered, "He shouted." They also found that the train was approaching the crossing at the rate of speed of about four miles per hour; that there were 11 cars in the train, all loaded; that for one-half a mile the main track approached the road crossing from the east, on a descending grade of 25 to 30 feet to the mile; that the deceased, if he had looked in the direction of the approaching train, could have seen it in time to stop before stepping on the track in front of it; and that the train could not have been stopped after the deceased stepped on the main track, and before it struck him. The eighteenth, nineteenth, and twenty-second questions, and the answers thereto, were as follows: "(18) Was the deceased struck within the limits of the street and sidewalk?" "We, the jury, are not agreed." "(19) Was the deceased struck west of the crossing, and outside of the limits of the street and sidewalk?" "The jury are unable to agree." "(22) How far west of the east end of the platform was deceased when the train struck him?" "Jury are disagreed."

The allegations of the third paragraph, to which we need to direct attention, were as follows: "Said defendant, by her said servants, did then and there carelessly, negligently, purposely, willfully, and recklessly detach said locomotive engine from said train of cars, they being then in motion, and run and drive said engine, detached as aforesaid, with quickened speed to the water-tank, located about fifty yards west of said depot, near said last-named road's track; negligently, purposely, willfully, and recklessly leaving said train to follow, there being a descending grade from thence to said depot, down which said engine and train of cars were then moving."

After mentioning certain obstructions to the view of one approaching said crossing from the north, the pleading alleged "that on said twenty-eighth day of March, Daniel T. Hedges, in the pursuit of his lawful and then daily avocation, was walking in a southerly direction on said highway to said depot, located in the south-west angle of said crossing, and as he had reached said crossing, and was in the act of passing over said main track, as he then had a lawful right to do, the defendant, by her servants and agents, carelessly, negligently, purposely, willfully, and recklessly caused said train of cars to approach said crossing, and negligently, carelessly, purposely, willfully, and recklessly omitted, by reason of their having detached and driven away the said locomotive engine as aforesaid, while so approaching said crossing, to give any signal by ringing the bell or sounding the steam whistle, or otherwise, by reason whereof the said Daniel T. Hedges was unaware of their approach; that by reason of said careless, negligent, willful, and reckless management of said train of cars, they were thereby driven and run against and upon said Daniel T. Hedges, and thereby caused his instant death, without any negligence or want of ordinary care on his part."

Notwithstanding the frequent use of the words "purposely" and "willfully," the pleading does not charge that the defendant purposely or willfully killed the intestate, or purposely or willfully ran the train upon him, or purposely or willfully caused it to be run upon him. The allegations amount to no more than a charge of killing through negligence. *Ohio, etc., Ry. Co. v. Selby*, 47 Ind. 471; *S. C. 17 Amer. Rep. 719*; *Cincinnati, etc., R. Co. v. Eaton*, 53 Ind. 307; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; *Indianapolis, etc., R. Co. v. McClaren*, 62 Ind. 566

The record shows that the court refused to give to the jury a number of instructions asked by the appellant. It does not appear that these instructions, or any of them, were signed as required by the Code, (Rev. St. 1881, § 533;) therefore the appellant cannot be heard to complain of the refusal, (*Stott v. Smith*, 70 Ind. 298, 308.)

At the request of the appellee, the court instructed the jury as follows: "You are also instructed that, although a person may be improperly or unlawfully upon a railroad track, that fact alone will not discharge the company or its employes from the observance of reasonable care; and if such a person is run over by the train, and killed or injured, the company will be responsible if its employes were guilty of gross or reckless negligence, and could have avoided the accident by the exercise of reasonable and ordinary care and watchfulness." This instruction was clearly erroneous. If a person be unlawfully upon a railroad track, the railroad company, in moving its trains upon the track, does not owe him any duty except to not purposely or willfully injure him. If he be willfully injured, his contributory negligence will not prevent his recovery; but if he, by his own fault, contribute proximately to his own injury, he cannot recover for the negligence of the company. Properly speaking, there are no degrees of negligence. The degree of care devolving on one as a duty depends upon a variety of circumstances, and negligence is a failure to perform such duty; but there can be no responsibility for injury caused by such breach of duty to one whose own fault contributed proximately to his injury. In pleading, the words "gross negligence" and "recklessness" cannot be substituted for willfulness; and if, in evidence, the conduct intended to be represented by those words can amount to willfulness, it cannot be so made available under a pleading which does not charge willfulness. And it would be error to instruct a jury that under a pleading charging a willful injury they might find for the plaintiff by merely finding that the defendant was guilty of negligence, though "gross or reckless negligence," for it would be necessary to find willfulness. The railroad company would not be liable for the negligent injury of a person in the situation supposed of the plaintiff in the instruction above quoted, and that instruction would be erroneous under any issue. *Cincinnati, etc., R. Co. v. Eaton, supra*; *Evansville, etc., R. Co. v. Wolf*, 59 Ind. 89; *Pennsylvania Co. v. Sinclair, supra*.

Some other questions need examination. The court instructed the jury as follows: "It is the duty of one approaching a known railway crossing to look along the line of the railroad track, and see if any train is approaching, and if he fails to take this precaution, and goes on the track, this, under ordinary circumstances, would be negligence. If, however, in this case, you shall find from the evidence that the deceased was thrown off his guard, and induced to refrain from taking this precaution, by seeing the defendant's engine pass the crossing immediately before he stepped upon the railroad track, I will submit to you the question whether or not, under all the circumstances then surrounding the deceased, he was guilty of negligence."

One witness testified that, after the engine had passed "a few moments," he heard the train come down. Another witness testified that it was not more than two minutes after the engine passed the waiting-room of the depot that the cars came down. Another testified that he could not tell how long the interval was; that he reckoned the cars were about 400 yards behind when the engine passed the crossing. This witness testified that he rang the bell of the engine continuously from a point east of the crossing until the engine reached the depot, and that the whistle was blown for the crossing. Another witness, who crossed in advance of the intestate, testified that he crossed after the passing of the engine, and went into the depot, and was inside when he heard a cry; that he jumped up and ran to a window, and saw the cars run over the old man. The engineer testified that the engine was at the water-



tank when the accident occurred, and that it had been standing there about two minutes before he was aware of the accident. The fireman testified that the engine passed the crossing about two minutes before the cars came up. There was evidence of obstruction of the view of the intestate as he approached the crossing, and that the train of 11 cars loaded with coal had been running without an engine something more than half a mile. For one-half a mile there was a descending grade of from 25 to 30 feet per mile. When the train approached the crossing, it was running at the rate of about four miles an hour. The brake of the forward car was then set, and the brakeman was then at the brakes of the second and third cars, and the train, when it struck the intestate, was not more than 240 feet from the engine standing at the water-tank. The train consisted of flat cars, the highest being about six feet high. It was not shown that the deceased knew the time of this train, but there was some evidence tending to show that he had not such knowledge.

A person thus about to cross a railroad, to be free from negligence, must take such precaution as could reasonably be expected of an ordinarily prudent person under like circumstances. It is upon this reason that the requirement to look and listen is based. So far as the precaution would be useless it is not required. Whether reasonable caution was exercised by the intestate in approaching depended upon the nature and extent of his knowledge of facts, and his opportunity for knowledge. He was required to act like an ordinarily prudent man. A prudent man's attention may be diverted so that he will fail to look and listen, and the evidence may be such as to make it proper to leave to the jury the question whether it was negligence for him to so fail. There may be circumstances which excuse the taking of the usually necessary precaution of looking and listening. See *Pennsylvania Co. v. Rudel*, 100 Ill. 603; *Laverenz v. Chicago, etc., R. Co.*, 6 Amer. & Eng. R. Cas. 274; *Philadelphia, etc., R. Co. v. Troutman*, Id. 117; *Smedis v. Brooklyn, etc., R. Co.*, 88 N. Y. 13.

In *Indianapolis, etc., R. Co. v. McLin*, 82 Ind. 435, 452, it was said that while it is true that the failure of a railroad company to give warning does not relieve a person about to cross the track from exercising care to avoid injury, "yet the absence of such warning is a circumstance to be taken into consideration in determining whether he did exercise the degree of care required or not." See *Pennsylvania R. Co. v. Ogier*, 35 Pa. St. 60, 71.

It would be a hard rule to impute to the injured person as his negligence a want of vigilance which could be said to have been produced by the defendant's negligence. Negligence cannot be imputed to one who is deceived by appearances calculated to deceive an ordinarily prudent man.

The interval of time between the passing of the engine and the coming of the train might, under the evidence, have been found by the jury to have been very short; and considering this fact in connection with the evidence that the whistle was sounded as the engine approached; that the bell was rung as the engine passed; that the cars, only six feet in height, came on without signal; that the view was obstructed; and that the intestate had no knowledge of the time of the train,—the jury might conclude that the attention of the intestate was diverted, so that, without negligence on his part, he, for this reason, did not see the train in time to escape; that his conduct was influenced by the defendant's negligent acts, and he was thus thrown off his guard, so that without his having acted otherwise than as might have been excusable in a prudent man, under the circumstances, he was run down. Where the conduct of the defendant was plainly negligent and caused the injury, and there is dispute or doubt as to the negligence of the plaintiff, the conclusion of one man, though learned in the law, should not be forced upon 12 men sworn to try the facts. If there was any evidence tending to show

that the plaintiff's intestate was thrown off his guard by such means as might have such effect upon an ordinarily prudent man,—and we think there was some such evidence,—it was not wrong to submit to the jury the question of contributory negligence.

If, without disagreement, the jury had returned definite and responsive answers to the interrogatories upon which they disagreed, and those which they did not answer fully, and if the answers to such interrogatories, taken in connection with the other answers given, could not have controlled the general verdict and authorized a judgment contrary thereto, whatever might have been the character of the answers to the interrogatories which were not answered satisfactorily, then the appellant was not injured by the action of the court in reference to those answers. *Indianapolis, etc., R. Co. v. Stout*, 53 Ind. 143; *West v. Cavins*, 74 Ind. 265; *Noakes v. Morey*, 30 Ind. 103; *Northwestern Mut. Life Ins. Co. v. Heimann*, 93 Ind. 24.

We may examine whether there was any injurious error in such action of the court, in connection with our examination as to whether the court erred in overruling the motion for judgment on the interrogatories notwithstanding the general verdict. That the answers to interrogatories may control the general verdict, there must be material conflict between the answers and the verdict; the answers must exclude every conclusion that would authorize the general verdict, and there must be a repugnancy that could not have been removed by any additional finding as to other facts which could have been made upon any evidence admissible under the issues. *Indianapolis, etc., R. Co. v. Stout*, *supra*; *Indianapolis, etc., R. Co. v. McCaffrey*, 62 Ind. 552; *Woollen v. Wishmier*, 70 Ind. 108; *West v. Cavins*, *supra*.

The question in issue was whether the deceased was killed through the negligence of the defendant, without his contributory negligence. Suppose that the jury, instead of disagreeing, had answered that the deceased was struck a few feet west of the line of the street: if he was a trespasser, there could have been no recovery, for willfulness was not in issue. But it would not necessarily follow from such an answer that he was a trespasser. Under the issues, there might have been, without variance, evidence showing that the deceased was rightfully at such place outside of the limits of the street as surveyed. The place where he was struck, while not within such limits, may have been used habitually by the public in approaching the depot, with the knowledge and consent of the defendant, as a part of the highway, and may thus have constituted a part of the public crossing. 1 *Thomp. Neg.* 416, 417, and authorities there cited. It might have been that the defendant would be liable for injuring him through negligence, whatever answers had been given by the jury to these interrogatories. Without a finding upon a fact as to which no interrogatory was propounded, no answer which would control the verdict could have been made to the questions upon which the jury disagreed.

The appellant was dissatisfied with the answers to the twenty-third and thirtieth interrogatories. No answer which could have been expected would have shown exactly where the deceased was when the conductor and the brakeman shouted, or that he could have heard them, or that the defendant was not guilty of negligence which caused the intestate's death without his contributory negligence. An affirmative answer could not have rendered the special findings capable of controlling the general verdict.

It is earnestly insisted that the answers to the interrogatories in relation to the distance along the main track towards the east to which the deceased could have seen from certain points north of that track precluded recovery by showing contributory negligence. None of the answers showed that the cars could have been seen by him from such points. The place at which the train was when he was at those points were not found or inquired about.

There was no finding as to the distance from the crossing to the place where the engine was detached, and it was not shown at what speed the intestate approached the crossing. One of the answers indicated that, if the intestate had looked in the direction of the train, he could have seen it in time to stop before stepping upon the track in front of it. This answer was not necessarily inconsistent with the existence of such facts, through the defendant's fault, as were reasonably calculated to distract the attention of the intestate, and throw him off his guard, so that, without his being subject to the imputation of imprudence, he might have failed to look for the train. It has been held that the fact that a person attempting to cross a railroad does not, at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive of want of due care on his part. *Plummer v. Eastern R. Co.*, 73 Me. 591. See, also, *Pennsylvania R. Co. v. Ogier*, *supra*.

Under the motion for judgment, no presumptions can be indulged in this court against the general verdict, but all presumptions must be indulged in its favor. Notwithstanding these answers, there could have been evidence tending to establish facts which, if stated in answers to interrogatories, would have shown the intestate not guilty of contributory negligence. *Terre Haute, etc., R. Co. v. Clark*, 73 Ind. 168.

Certain specifications of causes in the motion for a new trial related to the admission of evidence as shown by a certain special bill of exceptions. The general bill of exceptions, purporting to contain all the evidence, shows the evidence to which objection was made to have been materially different from that shown in the special bill. In view of this discrepancy, we will not further extend this opinion. The judgment should be reversed.

*T. F. Davidson, C. E. Booe, and W. Armstrong*, for appellant.

*R. B. Jones, C. D. Jones, R. C. Gregory, and W. B. Gregory*, for appellee.

PER CURIAM. Upon the foregoing opinion it is ordered that the judgment be reversed, at the costs of the appellee, and the cause is remanded for a new trial.

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(107 Ind. 51)

LOUISVILLE, N. A. & C. RY. CO. v. BRYAN.

(*Supreme Court of Indiana*. June 16, 1886.)

**NEGLIGENCE—PLEADING—WILLFUL INJURY.**

A complaint against a railroad company for an injury at a crossing, to be good without an averment of freedom from contributory negligence, must show that the injury was willfully inflicted; and, where the facts stated do not show that the act was intentional, and done recklessly, with a willingness to inflict the injury, the complaint is bad on demurrer.

Appeal from Clinton circuit court.

*W. H. Russell and Geo. W. Friedley*, for appellant.

*J. B. Sherwood*, for appellee.

MITCHELL, J. This action was brought by Bryan against the railway company, to recover damages for killing one horse and injuring another while both were being driven, in a buggy, by the plaintiff, across the defendant's track, at a street crossing in the northern part of the city of La Fayette. The complaint was in two paragraphs, one of which counted upon the negligence of the defendant, while the other was to recover for an injury alleged to have been purposely or willfully commit-

ted. In the one paragraph suitable averments to the effect that the plaintiff exercised due care, and was without fault, are found. In the other no such averments are contained. By their general verdict the jury found for the plaintiff on the latter paragraph, and for the defendant on the first. Judgment was rendered accordingly.

One of the errors assigned is that the court erred in overruling a demurrer to that paragraph of the complaint upon which the verdict and judgment against the appellant rest. There being no averment that the plaintiff was without fault, an inference arises that he may have been guilty of contributory negligence, and therefore, unless the complaint, by the specific statement of facts, rebuts this inference, or charges that the injury was purposely and willfully committed, it states no cause of action. The charging part of the paragraph is in these words:

"And that said collision was caused by the reckless, negligent, and willful conduct of said employes and servants of said defendant in the management of said locomotive, in this, to-wit: that said locomotive was being propelled at an exceedingly high and dangerous rate of speed, and was being propelled backwards, and that the whistle on said locomotive was not sounded, and the bell was not rung, to give warning of the approach of said locomotive, by the employes and servants of said defendant in charge of said locomotive; that said crossing was made extra dangerous by the track being hidden from view for some distance by intervening buildings,—all of which was well known to said defendant, and its servants and employes, as aforesaid."

The general charge is that the collision was caused by the reckless, negligent, and willful conduct of the defendant's employes and servants. The specific acts of willfulness charged, are that they propelled the locomotive backwards over a crossing which was hidden from view by intervening buildings, at a dangerous rate of speed, without giving warning by ringing the bell or sounding the whistle. That the conduct imputed to the employes of the railway company was negligent cannot be doubted; but negligence, no matter how gross, cannot avail in an action where it is necessary, on account of the plaintiff's contributory negligence, to aver and prove that the injury was inflicted by design, or with an actual or constructive intent. In such a case it is incumbent on the plaintiff to aver and prove that the injury was intentional, or that the act or omission which produced it was willful, and of such a character as that the injury which followed must reasonably have been anticipated as the natural and probable consequence of the act. Where one person negligently comes into a situation of peril, before another can be held liable to an injury to him, it must appear that the latter had knowledge of his situation in time to have prevented the injury; or it must appear that the injurious act or omission was by design, and was such, considering time and place, as that its natural and probable consequence would be to produce serious hurt to some one. To constitute a willful injury the act which produced it must have been intentional, and must have been done under such circumstances as evinced a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. It involves conduct which is *quasi* criminal. *Louisville, etc., Co. v. Murphy,*

9 Bush, 528; *Same v. Fulburn*, 6 Bush, 574; *Peoria Bridge Ass'n v. Loomis*, 20 Ill. 236.

The facts averred fail to bring the case within either of the foregoing conditions, or to indicate an actual or constructive intent on the part of the appellant. It does not appear that its employes knew of the presence of the plaintiff or his team, nor is there anything averred from which it can be inferred that the crossing, and its surroundings, were such as that the natural and probable consequence of running an engine over the highway in the manner described would result in an injury. The facts are in nowise different from those involved in the ordinary case where a locomotive is run over a highway at a high rate of speed without giving the statutory signals. These are merely acts of non-feasance, not of aggressive wrong. The consequences of undenied contributory negligence cannot be avoided, in such a case, by the fact that the track was "hidden from view for some distance by intervening buildings." That the appellant may have been grossly and culpably negligent may be admitted, but until the plaintiff is willing to assert that he was himself without fault he is not, upon the specific facts stated in the paragraph under consideration, entitled to maintain an action. *Louisville, etc., Ry. Co. v. Schmidt*, 5 N. E. Rep. 684; *Ivens v. Cincinnati, W. & M. Ry. Co.*, 103 Ind. 27; S. C. 2 N. E. Rep. 134; *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286; *Pennsylvania Co. v. Sinclair*, 62 Ind. 301; S. C. 30 Amer. Rep. 185; *Indianapolis, etc., Co. v. McClaren*, 62 Ind. 566; *Chicago, etc., Co. v. Hedges*, 105 Ind. 398; S. C. ante, 801.

The words "willful" and "negligent," used in conjunction, have not always been employed with strict regard for accuracy of expression. To say that an injury resulted from the negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions. It is to affirm in one breath that an act was done, through inattention,—thoughtlessly, heedlessly,—and at the same time purposely and by design. It seems to be supposed that, by coupling the words together, a middle ground between negligence and willfulness, between acts of non-feasance and misfeasance, may be arrived at. It is only necessary to say that the distinction between cases falling within the one class or the other is clear and well defined, and cases in neither class are aided by importing into them attributes pertaining to the other. Beach, Neg. 67, 68. What has been said disposes of all other pertinent questions arising on the instructions given and refused.

The demurrer to the paragraph of the complaint under consideration should have been sustained. For the error in overruling it, the judgment is reversed, with costs.

(102 N. Y. 513)

**CORSE v. PECK and another.***(Court of Appeals of New York. June 1, 1886.)***1. EVIDENCE—WRITTEN CONTRACT—MODIFICATION OF, BY PAROL.**

The rule that parol evidence is inadmissible to add to or vary the terms of a written contract<sup>1</sup> precludes evidence of the negotiation which preceded, or conversation which accompanied, the making of it, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument.

**2. SAME—BY NEW AGREEMENT WITH NEW CONSIDERATION.**

A written contract may be modified by a subsequent new and distinct oral agreement upon a new consideration, but in this case the oral evidence of the bargain, and of the explanation accompanying the execution of the written contract, instead of showing a modification of the writing, tends to show simply that the writing never expressed the real agreement of the parties, and plaintiff allowed it to stand unaltered, on the assurance of defendant's agent that a delivery of a certain less number of brick per month would be accepted in lieu of the number called for by its terms. *Held*, that the court erred in refusing to charge that what took place between the parties previous to or at the time of the execution of the written contract was inadmissible to vary or modify it, and that a new agreement must be shown.

**3. SAME—INSTRUCTION.**

The court also refused to charge that if the evidence on which the alleged modification of the written contract depends, is only of what took place contemporaneous with the execution of the written contract, then no modification was shown. *Held* error.

Appeal from general term supreme court, Third department, affirming a verdict in favor of the plaintiff.

*Geo. S. Hamlin*, for appellants.

*P. Cantine*, for respondent.

ANDREWS, J. The rule that parol evidence is inadmissible to add to or vary the terms of a written contract precludes evidence of the negotiation which preceded, or conversation which accompanied, the making of it, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument. We think the trial judge in his refusal to charge failed to properly enforce this familiar principle in the law of evidence.

By the written contract the plaintiff sold to the defendants 2,000,000 hard brick, to be delivered "by barge Relief and sloop Clinton, or other boats of equal capacity, in case Relief or Clinton is withdrawn, beginning about June 1, 1881, and vessels to run steadily thereafter." The complaint sets forth the written contract, and alleges that it was subsequently modified by a verbal agreement between the parties, to the effect that the plaintiff should not be required to deliver more than 500,000 brick per month. It then avers a delivery of 515,366 brick prior to June 30, 1881, pursuant to the modified contract; that the defendants on that day refused to pay the balance of \$945.99, then due for the brick previously delivered, except on the condition that the plaintiff would give security for future deliveries, and alleges performance on the

<sup>1</sup> Respecting the admissibility of parol evidence to vary or add to a written contract, see *Biederman v. O'Connor*, (Ill.) 7 N. E. Rep. 467.

part of the plaintiff, and demands judgment for the sum of \$945.99. The defendants in their answer deny that the contract was modified, or that it had been performed by the plaintiff, and, as a counter-claim, allege a breach of the contract by the plaintiff in not delivering the remainder of the brick contracted for, resulting in damage to the defendants.

It was conceded on the trial that the plaintiff delivered on the contract only the 515,366 brick mentioned, and it was insisted in her behalf that she was excused from making further deliveries by the refusal of the defendants, on the thirtieth of June, 1881, to pay the \$945.99, except on the condition of giving security for future performance,—an obligation not imposed by the contract. The defendants, on their part, denied that they had exacted security as a condition of making the payments required by the contract, and they insisted that under the contract the plaintiff was bound to deliver to them all brick carried by the Relief and Clinton, or any vessel or vessels substituted therefor, until the whole quantity provided for by the contract was supplied; and that the plaintiff, prior to the thirtieth of June, 1881, had broken the contract by delivering to other parties a cargo carried by the Carrie Gurnee, a vessel which had been substituted for the Clinton, withdrawn. In support of their counter-claim the defendants proved that on the thirtieth of June brick had advanced in price, and that up to the last of September the market price in New York was considerably greater than the price fixed in the contract, and that the cargo of the Carrie Gurnee was delivered to other parties. The plaintiff, on the trial, anticipated and sought to avoid the defense that deliveries had not been made as fast as required by the contract, by giving proof upon the issue of modification alleged in the answer. In support of this issue she was permitted to show, under objection, that the oral bargain which immediately preceded the signing of the contract was for the delivery of only 500,000 brick in each month, and that, immediately after the contract had been presented to and signed by the plaintiff, the plaintiff's agent read it over a second time, and called the attention of Martin, who acted in the transaction for the defendants, to the omission of a provision limiting the deliveries to 500,000 brick a month; that they then figured up the capacity of the two vessels at 500,000 a month, and, on Martin's assurance that a delivery of that number each month would be satisfactory to the defendants, nothing further was done, or, to use the language of the witness, "We let it go at that." It does not appear that the written contract had been delivered before this conversation occurred. The oral bargain, the drawing and execution of the written contract, and the conversation alluded to, took place at the same interview; the whole transaction occupying a few moments. The plaintiff's agent further testified that he saw Martin a few days afterwards, and said to him that the contract was not drawn according to the agreement, and that Martin replied, "All you have to do is to send us five hundred thousand brick a month, and we are perfectly satisfied;" to which the plaintiff's agent responded, "All right."

It is clear that the oral evidence of the bargain, and of the conversation accompanying the making of the written contract, was inadmissible to limit the obligation of the plaintiff thereunder to a delivery of 500,000 brick per month. The admission of the evidence for this purpose would be in the very teeth of the settled rule to which we have adverted. The contract made the carrying capacity of the vessels, steadily employed, and not a specified number of brick per month, the measure of the deliveries until the whole number should be furnished. It is the clear import of the contract that the plaintiff should make deliveries as fast as they could be made by the designated vessels, running steadily from the time the deliveries were to commence. To ingraft upon the writing the limitation indicated by the oral bargain would be to add a new term to the written contract, qualifying its plain meaning.

The trial judge, in admitting the evidence, recognized the general principle of the inadmissibility of parol evidence to vary a written contract, but put his ruling upon the ground that the evidence was competent upon the issue of modification. The evidence of what was said when the writing was executed, did not *per se* tend to establish this issue. That a written contract may be modified by a subsequent new and distinct oral agreement upon a new consideration is unquestionable. (Greenl. Ev. § 303;) but the oral evidence of the bargain, and of the explanation accompanying the execution of the written contract, instead of showing a modification of the writing, tends to show simply that the writing never expressed the real agreement of the parties, and that the plaintiff, knowing the contents of the writing, assented to let it stand unaltered on the assurance of Martin that a delivery of 500,000 brick a month would be accepted in lieu of performance according to its terms. The evidence might perhaps be pertinent in an action for the reformation of the written contract, but this relief was not within the scope of the case made by the complaint, and the case was tried by the plaintiff upon the theory that the non-delivery of the cargo of the *Carrie Gurnee* was justified by the verbal agreement. The case was presented to the jury in this aspect.

Assuming that the oral evidence of the bargain, and of the conversation between the parties, contemporaneous with the writing, was competent by way of giving color and support to other evidence tending to show a subsequent modification; the court, we think, erred in refusing to charge certain propositions presented by the counsel for the defendants. He was requested to charge that what took place between the parties previous to or at the time of the execution of the written contract was inadmissible to vary or modify it, and that to establish a modification it must be shown that there was a new agreement made subsequent to the execution and delivery thereof. The court was also requested to charge that if the evidence on which the alleged modification of the written contract depends, is only of what took place contemporaneously with the execution of the written contract, then no modification had been shown. The court refused to charge either of these propositions, and the counsel for the defendants excepted. We think the defendants were entitled to these instructions. The only evidence tending to show a modification



of the written agreement subsequent to its execution is found in the testimony of the plaintiff's agent, that at the interview with Martin, 10 days or more after the contract was executed, Martin consented to accept a monthly delivery of 500,000 brick as a performance of the contract. Such consent, if given, operated, until revoked, as a waiver of strict performance according to the terms of the written contract. But the defendant's agent, Martin, denied that such an interview took place. Upon this state of the evidence it was important for the defendants that the jury should be explicitly instructed as to the effect of the parol evidence of the oral bargain, and the conversation contemporaneous with the writing. That evidence, disconnected with what occurred at the subsequent interview, furnished no excuse for a non-performance of the written contract according to its terms. The trial judge, in his charge, nevertheless seems to have left it to the jury to determine, upon the parol evidence of the bargain and the contemporaneous conversation, whether the contract had been modified. In this posture of the case the defendants made the requests to charge, for the purpose of sharply presenting the point that what occurred on the day and at the time the written contract was executed did not independently constitute a modification.

The claim of the counsel for the plaintiff, that, assuming that the court erred in its refusal to charge, nevertheless the error was harmless for the reason that the proof establishes that in the month of June as many brick were delivered by the Relief and the Carrie Gurnee as would have been delivered by the Relief and Clinton, if the latter vessel had not been withdrawn, and that the contract was satisfied by delivering in the aggregate as many brick as these vessels, steadily running, could have delivered, is not tenable. It does not conclusively appear that as many brick were delivered by the Relief and the Carrie Gurnee as would have been delivered by the Relief and the Clinton during the same time.

For the error in the refusal to charge, the judgment should be reversed, and a new trial granted.

(All concur.)

(102 N. Y. 539)

SONNEBORN v. LIBBEY and others.<sup>1</sup>

(Court of Appeals of New York. June 15, 1886.)

1. BANKRUPTCY — UNITED STATES COURT HAS POWER TO REQUIRE A BOND OF INDEMNITY TO PARTY WHOSE GOODS ARE SEIZED UNDER WARRANT.

Defendants, in 1878, instituted proceedings against plaintiff in the United States district court in Alabama, to have him declared a bankrupt, and, after the issuance of a provisional warrant of bankruptcy against plaintiff's estate, and the seizing of his goods, defendants were required to give a bond to indemnify him from damages from the obtaining of the warrant, \* \* \* and for all damages from the seizure of his goods thereunder. After various proceedings the court gave judgment for Sonneborn, and the goods were restored to him and found to be damaged to the extent of one-half their value, when this action was brought on the indemnity bond, when plaintiff was nonsuited on the grounds that it had been ordered by a court not having authority and without consideration, and that the condition of the bond had not been per-

<sup>1</sup> Reversing judgment general term court of common pleas, New York city. See 19 Wkly. Dig. 449.

formed. *Held*, that the bankrupt court had the power to require the bond to be given as a condition of its granting the warrant, or of refusing to vacate it, and that there was consideration for giving it.

2. SAME—CONDITION OF UNDERTAKING.

The order required the bond to be upon the condition that said bond should be valid if Sonneborn "should prove that he is not bankrupt, *and* the proceedings against him by the said petitioner's creditors shall be dismissed." *Held*, that the word "and" should be read "or," and that it was sufficient if the proceedings were dismissed.

- Appeal from judgment of general term court of common pleas affirming judgment dismissing complaint granted at trial term.

During several years, from 1869 to 1873, and afterwards, the plaintiff was a resident of Eufaula, Alabama, and was a merchant there, having in 1873 a stock of goods worth about \$10,000. In 1869, A. T. Stewart & Co., of New York, claiming that the plaintiff was a member of a firm which was indebted to them in the sum of about \$2,500 for merchandise sold in the spring of 1867, commenced a suit in a state court of Alabama to recover that sum of him. He appeared in that action, and denied that he was a member of the firm at the time the debt was created, or that he was in any way indebted to the plaintiffs therein. That action came on for trial, and resulted in a verdict in his favor. A. T. Stewart & Co. appealed from the judgment entered upon that verdict to the supreme court of that state, and there the judgment was reversed, and a new trial granted. Thereafter, in August, 1873, before the new trial was had, they, claiming to be creditors of Sonneborn on account of the debt above mentioned, filed their petition in the United States district court for the Middle district of Alabama, alleging that he had committed an act of bankruptcy, and praying that he be declared a bankrupt. On the same day an order was issued requiring him to show cause, on August 21, 1873, why the prayer of the petitioners should not be granted. At the same time A. T. Stewart & Co. also filed a separate petition praying that an injunction and provisional warrant of seizure issue forthwith; and such warrant was issued to the marshal requiring him to "take possession of all the estate, real and personal, of said Meyer Sonneborn, debtor, except such as may be by law exempt," etc., "and all of his deeds, books of account, and papers, and to keep the same safely until the issue of said bankruptcy is decided, and until the further order of this court."

These proceedings were all *ex parte*. The marshal executed the warrant on the next day, the sixteenth day of August, by taking possession of Sonneborn's store and stock of goods, and thereafter retained the custody and possession of the same under his warrant. On the return-day of the order to show cause, August 21st, Sonneborn appeared, and denied that he was indebted to the petitioners, that he was insolvent, or that he had committed any act of bankruptcy; and stated that he was then, and always had been, able to pay his debts in full, and would continue to do so unless broken up and ruined by the action of the petitioners, and he demanded a jury trial; and through his counsel he moved the court to recall the provisional warrant, and return to him the property seized thereunder. He also moved the court that the petitioners

be required to give a bond indemnifying him for all damage he might sustain by the seizure of his goods and effects under the warrant. The petitioners at the same time made a motion to amend their petition. The court made one order disposing of all the motions, which allowed the petitioners to amend their petition, denied Sonneborn's motion to recall the provisional warrant of seizure, but granted his other motion, and required the petitioners to give a bond in the sum of \$5,000, indemnifying him for any damage he might sustain by reason of the "obtaining of the provisional warrant, \* \* \* or the restraining order directed to issue herein, and for all damages accruing to him by virtue of the issuance of the same, and for all damages he may sustain by the seizure of his goods and effects under said warrant, if on the final hearing of the said creditors' petition to have the defendant adjudged a bankrupt the said defendant shall prove he is not a bankrupt, and the proceeding against him by the said petitioning creditors shall be dismissed;" and the further consideration of all matters arising upon the order to show cause were adjourned to the fourth day of September.

On the third day of September the petitioners filed the bond required, executed by them as principals, and George B. Butler and John M. Hopkins as sureties; the condition of which is as follows:

"Now, the condition of this obligation is such that if the above-bounden A. T. Stewart & Co. shall well and truly save harmless and indemnify the said Meyer Sonneborn from any damages he may sustain by virtue of the obtaining of the provisional warrant issued in this matter, or of the restraining orders directed to issue herein, and from all damages accruing to him by virtue of the issuing of the same, and from all damages he may sustain by the seizure of his goods and effects under said warrant, if on the final hearing of said creditors' petition to have the defendant adjudicated a bankrupt the said defendant shall prove that he is not bankrupt, and the proceedings against him by the said petitioning creditors shall be dismissed,—in case said proceedings are not dismissed, or if said Meyer Sonneborn shall be adjudicated a bankrupt thereunder, then this obligation to be void; otherwise to remain in full force."

On the fourth day of September the parties again appeared in court, and Sonneborn again filed a special denial that A. T. Stewart & Co. were his creditors; that he had committed any act of bankruptcy; and repeated his demand for a trial by jury; and nothing more was then done. In November, 1873, the new trial in the state court was had upon the merits, and resulted in a verdict and judgment for Sonneborn. The plaintiffs in that action again appealed to the state supreme court, where the judgment was affirmed. After the affirmance of that judgment, Sonneborn claimed that it was conclusive that A. T. Stewart & Co. were not his creditors, and that that question was not open for further litigation between the parties in the bankruptcy court, and this was denied by A. T. Stewart & Co. Thereupon Sonneborn and A. T. Stewart & Co. agreed upon a statement of facts in reference to the adjudication in the state court, and agreed to submit them to the district judge in bankruptcy, and that if he should decide that the judgment in the state court was conclusive, and could be pleaded in bar of any inquiry into the ques-

tion of indebtedness in the bankruptcy court, then the bankruptcy proceedings should be dismissed out of court. Upon the statement of facts thus submitted, and the agreement of the parties, the court gave judgment for Sonneborn. The stock of goods was then restored to Sonneborn, and upon examination were found to be damaged to more than half their value. Thereafter, in 1880, this action was commenced upon the indemnity bond against the surviving principals and the sureties thereon. It was brought to trial, and, after proof of the foregoing facts, the court nonsuited the plaintiff upon the following grounds:

"(1) That the bond sued on was void, having been ordered by a court which had no authority by law to order it, and being without any consideration to support it; (2) that, conceding the bond to have been valid, its conditions were never performed, and the liability of the defendants has never attached because the condition has never been performed."

From the judgment of nonsuit the plaintiff appealed to the general term, and from affirmance there to this court.

*M. W. Divine*, for appellant Meyer Sonneborn.

*Horace Russell*, for respondents, William Libbey and others.

EARL, J. We are of opinion that the bankrupt court had the power to require this bond to be given. Under the bankrupt act of 1867 the United States district court had general jurisdiction in all cases of bankruptcy. The powers conferred upon it were extensive, and were intended to be adequate for all the purposes of the act. Section 39 of the act provides that any person residing in the United States, and owing debts exceeding \$300, who shall commit any of the acts of bankruptcy in that section specified, "shall be adjudged a bankrupt on the petition of one or more of his creditors," etc. Section 40 provides that upon filing the petition, "if it shall appear that sufficient grounds exist therefor, the court shall direct the entry of an order requiring the debtor to appear and show cause \* \* \* why the petition should not be granted." Here the command of the statute is imperative. If the petition is sufficient, the court must grant the order to show cause, and cannot grant or withhold the same in its discretion. Following paragraphs of the same section provide that the court "may by injunction, restrain the debtor, or any other person, in the mean time, from making any transfer or disposition" of the debtor's property, and "from any interference therewith;" that "if it shall appear that there is probable cause for believing that the debtor is about to leave the district, or to remove or sell his goods, \* \* \* the court may issue a warrant to the marshal commanding him to arrest the alleged bankrupt, \* \* \* and forthwith to take possession provisionally of all the property and effects of the debtor, and safely keep the same until the further order of the court."

The powers conferred in these paragraphs are discretionary, to be exercised only when, in view of all the circumstances of a case, the court may conclude that the ends of justice and the purposes of the law require it. The court could, in its discretion, in all cases where it had jurisdiction to grant the provisional remedies, withhold them. The petitioning

creditors could never demand either of them as matter of right. So, too, the court, having granted one of these remedies, could at any time in its discretion recall or set it aside. Its discretionary control over either of these remedies remained until it was fully executed, and had thus become *functus officio*. These powers were very extraordinary, and their exercise might be very destructive. The warrants could be issued *ex parte*, without any notice, and thus great and irreparable mischief could be done. It was certainly very appropriate that the court should possess power to take security against the damage which its process, thus granted, might do. As it was in the discretion of the court to withhold or grant the warrant of seizure, it could specify the terms upon which it would grant it, and it could require compliance with such terms, or else refuse the warrant.

It is a universal rule in the procedure of all courts that when, in the exercise of their discretion, they may grant or withhold a favor asked for, they may impose any reasonable terms or conditions upon which the favor is to be had. What a party cannot demand of a court as matter of right, he must usually take upon such terms, proper and judicial in their nature, adapted to the ends of justice, as the court sees fit to impose. *Decker v. Judson*, 16 N. Y. 439; *In re Bradner*, 87 N. Y. 171. The administration of justice would be greatly impeded, and the courts greatly embarrassed and crippled, if they did not possess the power to impose terms in such cases. This power does not depend upon the common law, nor upon chancery law, nor upon statutory law. It is an inherent power of courts, incident to the exercise of the discretion, and really a part of the discretionary power.

It cannot be said that the discretion was unreasonably exercised in this case, when the warrant was issued upon an *ex parte* application, and the seizure under it broke up the plaintiff's business, and would necessarily greatly damage his property. The requirement of a bond is a usual and almost universal condition in such cases. If the bond could have been required as a condition of issuing the warrant, it could also be required as a condition for refusing to recall or vacate it.

But it is claimed that this bond was arbitrarily required, and not as a condition for the refusal to recall the warrant on the motion of Sonneborn. It is true that it was not in terms ordered to be given upon that condition. On the return-day of the order to show cause there were four motions: one by the petitioners to amend their petition, one by Sonneborn to dismiss the proceedings, another by him to recall the provisional warrant, and still another for the indemnity bond; and these motions were all disposed of by one order. No one familiar with legal proceedings can doubt that Sonneborn's motion to the court was that the warrant be recalled, or that the petitioners be required to give the bond; and the court refused to recall the warrant, but required the bond. Thus, although not so expressed in terms, the bond was required as the condition for the refusal to recall the warrant. If the petitioners did not desire to give it, they should have consented to the recall of the warrant. The bond was required because they insisted upon maintaining the seizure

of the goods, and clearly as a condition of the maintenance of such seizure. There was ample consideration for the bond. The petitioners maintained the seizure of the goods for their benefit, and Sonneborn was deprived of their possession, and subjected to great loss and damage. We therefore see no reason to impeach the validity of the bond, and it only remains to be inquired whether there was such a compliance with its conditions as to impose liability upon the obligors thereof.

They contend that before they could be made liable it was incumbent upon the plaintiff to show that in the bankruptcy proceedings he proved that he was not bankrupt, and they claim that he did not show that. It is by no means clear that he did not show that. He had goods worth about \$10,000. The only debt that appeared or was in any form alleged in the bankrupt proceedings besides that claimed by the petitioners was one for a little less than \$7,000, and when Sonneborn established that he did not owe the petitioners anything, he showed, at least *prima facie*, that he was not bankrupt.

But this view of the case need not be taken. We do not assent to defendant's construction of the bond. We must construe the bond, and the order in pursuance of which it was given, so far as they throw light upon each other, together, and thus arrive at the intention of the court and of the parties. *Elmendorf v. Lansing*, 5 Cow. 468. Evidently what was intended was to protect Sonneborn against the consequences of the seizure of his property in case it should turn out that the petitioning creditors had no cause to seize it. At the time the order was made, Sonneborn had obtained one verdict, upon a trial upon the merits, that he was not indebted to the petitioners, and he was about to proceed to another trial. That he was not a debtor of the petitioners seems to have been his main contention and reliance, and it cannot be supposed that it was the intention of the court that in case the proceedings should be dismissed on the ground that the petitioning creditors had no claim against him, and thus no right to institute them, he was to have no indemnity.

The order required the bond to be upon the condition that Sonneborn "should prove that he is not bankrupt, and the proceedings against him by the said petitioning creditors shall be dismissed." Now, what was meant by this language? We think the purpose to be accomplished by the bond, and the language of the bond given in pursuance of the order, show that the word "and" should be read as "or," so that Sonneborn would have the indemnity in case he proved that he was not a bankrupt or the proceedings were dismissed. That the parties so understood the order and requirement of the court is shown by the language of the bond. The bond follows the language of the order, and then, apparently as explanation of its meaning, has the following language: "In case said proceedings are not dismissed, or if said Meyer Sonneborn shall be adjudged a bankrupt thereunder, then this obligation to be void; otherwise to remain in full force." The last clause, if written out, would be thus: "But in case said proceedings shall be dismissed, or if said Meyer Sonneborn shall not be adjudicated a bankrupt thereunder, then this obligation

to remain in force." Such is the plain meaning of the bond when all its language is considered, and no other construction would harmonize with the surrounding circumstances, and accord with the presumed intention of the court and of all the parties interested. Therefore, when final judgment was rendered for Sonneborn in the bankrupt proceedings, the event had happened upon which the liability of the defendants was conditioned, and the indemnity to Sonneborn should become operative.

We are therefore of opinion that the judgment should be reversed, and a new trial granted; costs to abide event.

(All concur.)

(102 N. Y. 724)

*In re Estate of DEYO, Deceased.*<sup>1</sup>

(*Court of Appeals of New York. June 8, 1886.*)

**EXECUTORS AND ADMINISTRATORS—SURROGATE'S COURT—OPENING FINAL DECREE.**

The surrogate made his decree in final accounting, September 9, 1874, and in September, 1883, refused to grant an order, on application of one of the executors, to vacate his decree and reopen the settlement to correct an alleged error of \$280 in credits allowed said executor. *Held*, no error, as the matter arose through an honest misunderstanding between the executors by reason of their inexperience, and they had each fully accounted for the respective sums received by them.

Appeal from judgment general term supreme court, Third department, affirming order of surrogate, Ulster county.

*A. T. Clearwater*, for appellant.

*Lewis H. Hasbrouck*, for respondent.

RUGER, C. J. Several conclusive reasons exist why the order of the court below should be affirmed, and it would be sufficient to mention but one of them were it not for the conviction entertained by us that the controversy arises out of an honest misunderstanding on the part of the parties, and the hope that a few words of explanation may reconcile a difference which would never have occurred but for the inexperience of the parties in the method of keeping their accounts.

The parties were executors of the will of Jacob H. Deyo, who died in 1871 possessed of property to the amount of about \$13,000. This property was converted into money, and the assets were nearly equally divided between the two executors. In 1874 an accounting was had, before the surrogate, between them, and it was adjudged that about \$7,500 had come to the possession of the petitioner, and about \$5,500 to the hands of the respondent. An inventory of the property of the estate was produced, and the items of receipts and disbursements by each of the executors were stated in detail, and the decree of the surrogate was made, passing the accounts as stated. Nine years thereafter one of the legatees, becoming of age, cited the executors to account before the surrogate, and upon the disclosures made upon that accounting the petitioner conceived

<sup>1</sup> Affirming 36 Hun, 512.

the idea that he had been wronged in the settlement of the account previously made by the surrogate, and filed this petition to vacate and set aside the decree then made, upon the sole ground that he had not been credited in his account for the sum of \$3,635, alleged to have been paid by him to his co-executor from the proceeds of certain government bonds belonging to the estate.

The inventory shows that the estate possessed \$4,500 of such bonds, and the proof shows that these bonds were sold at an advance of about 12 per cent., and netted \$5,040. Some uncertainty exists as to the place of custody of these funds prior to the accounting in question, and as to the method by which they came to the possession of the respective executors, but the accounts presented to the surrogate conclusively show that eventually the respondent received \$3,675 of them, and the petitioner only \$1,365, and that they each fully accounted for the respective sums received by them. It is entirely immaterial whether the respondent received \$3,675 directly from his co-executor, or through a joint check drawn and signed by the two, or by the check of any other temporary custodian of the fund. He did in his account acknowledge the receipt of the money, and was charged with it, and has fully accounted for it.

The petitioner received \$1,365 of such moneys only, and that amount only has been charged to him. There is no dispute but that he received such amount, nor but that such sum is the entire amount which has been charged to him. From these circumstances it is entirely clear that he ought not to be credited in his accounts with any part of the sum of \$3,675. The idea seems to have been for some time mutually, and probably honestly, entertained, by each of the respective parties hereto, that he did not have all the money to which he was justly entitled; but we think this notion grew out of their unfamiliarity with the method of keeping accounts, and the misleading weight which they gave to circumstances which were in fact unimportant. The petitioner believed that some, if not all, of the sum of \$3,675 was paid to his co-executor by his check, or through his agency, and that, therefore, he was entitled to credit therefor; but this, of course, was not so unless he can show that a similar sum was somewhere charged to him in the accounts, and we have seen that this has not been done. The accounting in 1874 was had at a time when the transactions were comparatively fresh in the recollection of the parties, to which they mainly trusted; and we have every reason to believe, after a careful examination of the subsequent evidence, and of the inventory and account presented at that time, that the adjudication then made was substantially correct. It would therefore seem, upon the merits of the controversy, that the prayer of the petitioner was properly denied.

It was also quite within the discretion of the courts below to refuse the relief prayed for upon the ground of laches on the part of the petitioner in prosecuting his remedy, and their determination of that question would require the dismissal of the appeal or the affirmance of their order by us.



Of course, the fact that the existence of the alleged mistake and error in the original accounting was determined against the petitioner upon conflicting evidence would also be quite conclusive against the appellant here.

The order should therefore be affirmed, with costs.

(All concur.)

(102 N. Y. 725)

BELTER v. LYON.

(*Court of Appeals of New York. June 8, 1886.*)

TRUST—MORTGAGE—FORECLOSURE—PURCHASE BY PLAINTIFF—AGREEMENT TO RECONVEY.

An arrangement was made, by the attorney of both parties in an endeavor to perfect a title, by letter, to the effect that a foreclosure sale was to take place in due and lawful form, and that if the plaintiff, or any one for her, became purchaser, she should go into possession as such, but that at any time within one year "after taking title" she should reconvey to defendant upon being paid the mortgage debt, interest, etc. *Held*, that plaintiff was entitled to a deed from the referee, and is not liable to account as mortgagee in possession, since she is in as purchaser.

Appeal from an order of the general term of the court of common pleas for the city and county of New York, affirming an order of the special term of said court granting a motion by the plaintiff that the referee in the foreclosure proceedings herein be ordered to deliver to plaintiff a deed of the premises which are the subject-matter of the action, and denying a motion of defendant, Hannah Lyon, that the plaintiff account for the rents of the said premises, and surrender the premises on payment of the balance due, or that the premises be sold.

*W. J. Marvin*, for appellant, Louisa Belter.

*W. B. Hornblower*, for respondent, Hannah Lyon.

PER CURIAM. Whether the foreclosure sale at which the plaintiff's son was the highest bidder proceeded, by agreement of the parties, upon the basis of a right of repurchase secured to the mortgagor, or was meant to be ineffective and inoperative if the plaintiff, or some one representing her, became the highest bidder, because of the defective title, and the consequent danger of a sacrifice, is a question of fact about which the parties widely disagree, and the affidavits presented are extremely contradictory. A letter, however, written by the attorney who represented both parties in the endeavor to perfect the title, and sent to the defendant, seemed to the general term the most reliable evidence of the agreement actually made, and the only prudent basis on which to solve the dispute. In that conclusion we are disposed to concur. The letter indicates, as the real arrangement made, that the sale was to take place in due and lawful form, and be an effective and real sale, and not a sham; that if plaintiff, or any one for her, became purchaser, she should go into possession as such; but that at any time within one year "after taking title" she should reconvey to the defendant upon being paid the mortgage debt and interest, and subsequent expenditures named. Upon any construction of this letter the plaintiff is entitled to a deed from the

referee, and is not liable to account as mortgagee in possession, since she is in as purchaser. The order made requiring the delivery of the referee's deed, and denying the motion for an account, was therefore correct, and must be affirmed.

But this determination leaves open the question of the rights of Mrs. Lyon under the contract for repurchase. She is at liberty to seek to enforce it; and the inquiries whether, upon a correct construction of the agreement, she will be in time or too late, the extent and nature of the contract, and its validity and obligations, are left open to be determined in such action or proceeding as may be instituted for that purpose.

The order should be affirmed, with costs.

(All concur.)

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(102 N. Y. 729)

UNION TRUST CO. v. ROCHESTER R. CO.

(Court of Appeals of New York. June 15, 1886.)

**MORTGAGE—FORECLOSURE WHERE PART OF PROPERTY OUT OF STATE—JURISDICTION OF SUPREME COURT.**

Where the supreme court has jurisdiction over the cause of action and the parties, its decree in foreclosure is valid, although part of the premises covered by the mortgage is in another state; and the court may require the mortgagor to execute a conveyance to the purchaser of the property in such foreign state.

Appeal from an order of the general term, Fifth department, reversing so much of an order of the Monroe special term as denies a motion of plaintiff and the purchaser at a foreclosure to amend the judgment, and amending the judgment *nunc pro tunc*.

Mr. Olmstead, for appellant.

Mr. Peckham, for respondent.

DANFORTH, J. The plaintiffs sought, by foreclosure and sale, to enforce a mortgage executed by the defendant corporation. The supreme court had jurisdiction over the cause of action and the parties, and its decree is valid, although part of the premises covered by it are in another state. Its writ may not be operative there, nor its judgment capable of execution as against that portion of the property, and for that reason the court might have required the mortgagor to execute a conveyance to the purchaser in order that the whole security offered by the mortgage should, so far as possible, be made effective. *Muller v. Dows*, 94 U. S. 450. This was not done, but the power of the court was not exhausted, and what it might have ordered in the first instance it could still require by amendment. The order appealed from goes no further than to carry out the intention of the parties to the mortgage, as ascertained by the decree. It relates to a matter within the jurisdiction of the court, and its exercise is not the subject of review. The appeal should therefore be dismissed.

(All concur, except MILLER, J., absent.)

(102 N. Y. 552)

## CARPENTER v. OSBORNE.

*(Court of Appeals of New York. June 15, 1886.)*

## 1. HUSBAND AND WIFE—WIFE, CREDITOR OF HUSBAND—CREDITOR'S ACTION BY WIFE—RES ADJUDICATA.

Plaintiff recovered five judgments in county court against John Carpenter, her husband, for installments of income due her on articles of separation, in which she had agreed to support herself, and sign all deeds; he to pay her a stated sum each month. Upon the trial of the several actions the validity of the agreement of separation, and the *status* of plaintiff as a creditor of her husband, was litigated between the parties thereto, and was in each action decided in her favor. In this action to set aside as fraudulent certain conveyances of real estate executed by him to defendants, *held*, that the questions were *res adjudicata*, and defendants were precluded from raising them in this action.

## 2. SAME—EVIDENCE NECESSARY TO MAKE CASE.

That the plaintiff, by putting in evidence the judgment rolls, the executions returned unsatisfied, and the agreement of separation, and proving that the conveyances assailed were voluntarily made with intent to defraud his creditors, with the knowledge of the grantees, made a case which justified the court in rendering judgment for her.

## 3. SAME—SUBSEQUENT DIVORCE—EFFECT OF.

The plaintiff had, subsequent to the separation, procured a decree for an absolute divorce from her husband, with no provision for her support. *Held*, that this did not affect her pecuniary claims on him, if secured by legal obligations, either for dower or to an allowance by way of alimony.

## 4. SAME—LIEN OF JUDGMENT.

The court below declared the judgment to be a lien upon the land in question for the several installments due, but not in judgment when the action was commenced. *Held* error; that the court was limited to the installments in judgment, and that this judgment should be corrected to that extent.

Appeal from judgment general term supreme court, Third department, affirming judgment of Cortland special term.

*J. McGuire*, for appellant, Meranda A. Osborne.

*Frederick Hatch*, for respondent, Sophronia Carpenter.

RUGER, C. J. The plaintiff recovered five successive judgments in justice's court against the defendant John Carpenter, for about \$30 each, on October 14, 1879, January 9, 1880, May 7, 1880, July 14, 1880, and November 13, 1880, respectively. The judgments of January 9th and May 7th were both appealed from to the county court, and on April 26, 1881, were, after a retrial of the actions, affirmed by that court, and judgments of affirmance were regularly entered. Each of the actions were brought to recover an installment of interest alleged to be due to the plaintiff from John Carpenter upon a written instrument dated January 11, 1873, and executed under the hands and seals of the plaintiff and John Carpenter. It recited that theretofore the said John Carpenter had executed a mortgage for \$1,700 to M. J. Robinson; to be applied to the support of Sophronia Carpenter, his wife, and in consideration thereof, and of \$300 in cash then paid to said Robinson, she had agreed to support herself, and live separate and apart from her husband during her natural life, and receive said sum in full discharge of all

<sup>1</sup> See 31 Hun, 536, *mem.*

claims upon John Carpenter, or upon his property, either real or personal, and would execute releases of her dower right in his real estate, and would refrain from incurring debts for which said John Carpenter should be liable; and that, as the said Sophronia preferred that said mortgage should be discharged, and said John's obligation in writing be substituted therefor, it was agreed that, "in consideration of the premises, said John Carpenter hereby agrees to and with said Sophronia Carpenter that he will pay to her \$26.25, January 1, 1873, and \$26.71, April 1, 1873, and \$27.17, July 1, 1873, and \$27.63, October 1, 1873, and like sums on each and every first day of January, April, July, and October for and during the term of her natural life," and pay the said principal sum to her heirs upon her decease. The said Sophronia also renewed the several covenants and agreements hereinbefore recited, and agreed that in case she should refuse, for 10 days after request therefor, to execute releases of her dower right in said Carpenter's real estate, that all her rights to the payment of interest as provided for should be forfeited. Upon the trial of the several actions referred to the validity of this agreement, and the *status* of Sophronia Carpenter as a creditor of John Carpenter, was litigated between the parties thereto, and was in each of said actions determined in her favor.

The judgments rendered in each of these actions were, in the absence of proof of fraud in their procurement, conclusive evidence, not only as against John Carpenter, but also as to all other persons, of the several questions of fact and law material to the issues tried which were thereby determined. *Candee v. Lord*, 2 N. Y. 274; *Hall v. Stryker*, 27 N. Y. 603; *Burgess v. Simonson*, 45 N. Y. 227.

The defendants acquired title to the real estate in question from John Carpenter, and necessarily took it at the risk of any incapacity in him to convey a good title, and, so far as that was affected by the rights of existing creditors, his fraudulent grantees were equally bound by such legal adjudications as might be made against him in respect thereto as John Carpenter himself. *Candee v. Lord*, *supra*; *Rogers v. Rogers*, 3 Paige, 379; *Shufelt v. Shufelt*, 9 Paige, 137; *French v. Shotwell*, 6 Johns. Ch. 234; *Raymond v. Richmond*, 78 N. Y. 354; *Bigelow, Estop.* 102; *Voorhees v. Seymour*, 26 Barb. 585. It did not, therefore, lie open to any of the defendants, upon the trial of this action, to contest the validity of such agreement, or the liability of John Carpenter as a judgment debtor thereon, or the legal competency of husband and wife to contract with each other, for the questions were *res adjudicata*, and placed beyond the power of retrial.

This present action was founded upon the last four judgments described, and was brought for the purpose of setting aside certain transfers of real property made by the defendant John Carpenter to the other defendants, as being fraudulent and void as against his creditors. To entitle the plaintiff to maintain such an action it was essential that she should establish her character as a judgment creditor of the fraudulent grantor, and the fact that the conveyances challenged as fraudulent were so in fact, and stood in the way of the collection of her judgment.

*Adsit v. Butler*, 87 N. Y. 585; section 1891, Code Civil Proc.; 2 Rev. St. § 175, pt. 2, c. 1, tit. 2, § 88. The production and proof of a judgment in her favor for a sum of money against the debtor, rendered by a court of competent jurisdiction, was, if not impeached for fraud, conclusive evidence in such an action of her character as such creditor. To establish the issue on her part in this action the plaintiff put in evidence the respective judgment rolls in the several actions above referred to, and the several executions issued thereon, each of which were severally duly returned unsatisfied. She also proved the written agreement above referred to, and gave evidence tending to show that the several conveyances assailed were voluntarily made by her husband, with intent to defraud his creditors, and that the several grantees therein had knowledge of such intent and participated therein. The evidence, we think, sustained the conclusions of fact found by the trial court, which rendered judgment for the plaintiff, and it does not appear to us that any error of law was committed by that court which requires a reversal of such judgment.

The principal questions presented by the appellant's counsel upon the argument before us related to the invalidity of the separation agreement of January, 1873, and the incompetency of husband and wife to thus contract with each other. Since we have held that the defendants are precluded from raising those questions in this action, the further discussion of them would be unprofitable and unnecessary. It may, however, not be improper for us to say that we should be quite unwilling to yield our assent to the appellant's contention in respect thereto if we considered ourselves at liberty to enter into the consideration of the question.

Some other questions, however, were raised in the case, which will be briefly noticed:

The evidence showed that in December, 1881, the plaintiff procured a decree for an absolute divorce from her husband for adultery, and that the judgment in such action made no provision for her support from his property. It was claimed by the defendants that marriage was the *gravamen* of the separation agreement, and that its annulment by the decree necessarily subverted and destroyed the obligations of the contract. It is quite obvious that this proposition, if generally correct, would not affect the validity of judgments for lawful debts already obtained, and standing unpaid and unreversed when such decree was obtained. But we are also of the opinion that there is nothing in the terms or character of the agreement referred to which authorized John Carpenter to commit adultery, or to violate with impunity the obligations of his marriage contract, without incurring the penalty which the law imposes upon an offending party for such misconduct. There is no express or implied condition in the contract that the plaintiff should continue to remain the wife of John Carpenter, but the obligation to pay interest was to continue unconditionally during her natural life. The contract looked towards a separation, and not to a union, of the parties; and a lawful separation, if produced without the misconduct of the wife, could not af-

fect her pecuniary claims, if secured by legal obligations. The right of the wife to dower in the lands of her husband, or to an allowance by way of alimony out of his estate, could not be impaired by a divorce granted for his misconduct; and the existence of an agreement whereby her future support by him was secured by a lawful obligation would afford a good reason why in equity her claims upon his property should not be provided for in the decree in divorce. The absence of such a provision seems to confirm, rather than destroy, the provisions of the contract, and looks to its expected continuance as a just and proper provision for the wife. *Blaker v. Cooper*, 7 Serg. & R. 500.

It is further claimed that the plaintiff is estopped from questioning the validity of the several conveyances from John Carpenter to the other defendants, because she joined with him in their execution. It was found by the trial court that these conveyances were executed by John Carpenter, and received by the defendants, for the purpose of defrauding the plaintiff, and without knowledge on her part of such fraudulent purpose. The claim made, that Carpenter could, under his contract with his wife, require her to execute deeds releasing her dower in all his lands, under the penalty of forfeiting all of her rights thereunder in case of refusal, and yet require her to execute such conveyances as should forever disable Carpenter from performing the obligations to her, which formed the only consideration for her agreement, is too absurd for serious consideration. The proposition is elementary that fraud vitiates all contracts, and a construction of an agreement which would hold an innocent party to his contract, and still authorize the other to defeat his obligation by his own fraud, is unsupported by any rule with which we are familiar. The only ground for such a claim would be that of estoppel, and that is untenable when all of the parties to the act except the plaintiff were cognizant of all of the facts relating to the transaction, and were not deceived or misled by the plaintiff's action. They were all active participants in the fraud practiced upon the plaintiff, and are not justified in asserting any rights secured thereunder as against the defrauded party.

In our view, the only serious question in the case relates to the additional relief granted by the court below in declaring a lien upon the land in question for the several installments due, but not in judgment, when the action was commenced. We are, however, of the opinion that the court, having acquired jurisdiction to decree such conveyances fraudulent and void as to judgments previously recovered, was authorized to grant such further relief, within the scope and meaning of the issues made, as the parties might be equitably entitled to in connection with the transaction under investigation. No question was raised on the trial but that the proper parties were before the court, or that different causes of action were improperly united in the same complaint which required different modes of trial; but the sole question is whether the court had jurisdiction to render the judgment appealed from. The rule relating to the subject is comprehensively stated by the author of the most recent work on Equity Jurisprudence as follows:

"If the controversy contains any equitable features, or requires any purely equitable relief which would belong to the exclusive jurisdiction, or involves any matter pertaining to the concurrent jurisdiction, by means of which a court of equity would acquire, as it were, a partial cognizance of it, the court may go on to a complete adjudication, and may thus establish purely legal rights, and grant legal remedies, which would otherwise be beyond the scope of its authority." Pomeroy, Eq. Jur. § 181. *Rathbone v. Warren*, 10 Johns. 596; *Hawley v. Cramer*, 4 Cow. 717; *Crane v. Bunnell*, 10 Paige, 833; *Bradley v. Bosley*, 1 Barb. Ch. 152.

This principle has been applied in many cases in awarding judgment for pecuniary damages, even when the party had an adequate remedy at law, if the damages were connected with a transaction over which the courts had jurisdiction for any purpose, although for the purpose of collecting damages merely they would not have had jurisdiction. *Bradley v. Bosley*, *supra*; *Clarke v. White*, 12 Pet. 188; *Franklin Ins. Co. v. McCrea*, 4 Greene, (Iowa,) 229; *Brooks v. Stolley*, 3 McLean, 523.

The court below had unquestionable jurisdiction to award relief against the conveyances in question as to the judgments recovered; and, although not entitled to award such relief as to claims not in judgment, it still had power to grant any other relief to which the party was legally entitled, although it might result in consequences similar to those afforded by a decree declaring a lien. The legal effect of the decree setting aside the conveyances was to vacate and annul the title conveyed by John Carpenter to the several grantees named in his deeds, so far as it stood in the way of the collection of the plaintiff's judgment, and, as against the parties to this action, of any other claim arising out of the same transaction which should be thereafter lawfully put in judgment. The plaintiff's complaint alleged that several installments aside from those in judgment were then due and unpaid upon the separation agreement, and asked that the same be declared a lien upon the said real estate, and that the property be sold, and such installments be paid from the proceeds of such sale. The fair import of this demand was to entitle the plaintiff to so much of the relief demanded as was within the power of the court to grant; and, if a rendition of a money judgment for such installments was necessary to confer the relief sought, the court had undoubted authority, under the prayer for relief, to order such a judgment. The proof of the separation agreement, and the recovery of previous judgments thereon, constituted conclusive evidence of the rights of the plaintiff, as a creditor of John Carpenter, under such agreement, for the amount appearing to be due and unpaid thereon, and authorized the court to render judgment against John Carpenter, for such amounts as were not already in judgment.

The rule which precludes a court of equity from entertaining jurisdiction of an action to set aside a fraudulent conveyance at the suit of a simple contract creditor would seem to render the judgment appealed from erroneous, so far as it declares such a debt a lien upon the property in question; yet the rendition of a pecuniary judgment in this action is authorized, and would seem, so far as the parties to this action were concerned, to place the plaintiff in a position to enforce it hereafter

against such real estate by appropriate proceedings therefor. These views lead to a modification of the judgment by striking out so much thereof as declared it a lien upon the real estate for the installments not previously in judgment, and to an affirmance of its other provisions.

The judgment is therefore modified in that respect, and, as modified, is affirmed, with costs to the plaintiff.

(All concur.)

(102 N. Y. 563)

GREISMER v. LAKE SHORE & M. S. R. Co.

(*Court of Appeals of New York. June 22, 1886.*)

1. CARRIER—OF GOODS—RAILROAD—WHEN NOT LIABLE FOR DELAY OCCASIONED BY STRIKES.

A railroad may excuse delay in the delivery of goods caused by accident or misfortune, not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay and the fact that the originators of a strike by which plaintiff's freight was delayed, had been employes of defendant, does not make it liable for failure to forward such freight, where it had other employes who were ready and willing to manage its trains and carry the stock, but who were prevented from so doing by mob violence, which defendant could not by reasonable efforts overcome.

2. SAME—LIABILITY FOR ACTS OF STRIKERS.

Such strikers cease to be in the service of the railroad, or in any sense its agents, for whose conduct it was responsible, when they struck.

Appeal from the judgment of the general term, Fifth department, in favor of plaintiff, and from an order denying a motion for a new trial.

Upon the trial of this action there was evidence proving, or tending to prove, these facts:

On the twenty-first day of July, 1877, the plaintiff delivered to the defendant, at Toledo, in the state of Ohio, a large number of cattle and hogs, to be transported, within a reasonable time, over its railroad, to Buffalo, in this state, there to be delivered to him. The usual and ordinary time for the transportation of such freight between the two places named was about 25 hours. The plaintiff's cattle and hogs were started on a train of defendant's cars for their destination, and were carried with reasonable dispatch, and without delay, so far as Collinwood, in the state of Ohio, where they arrived on the twenty-second day of July. Collinwood was a place where it was usual and customary for the defendant to stop all its stock trains for the purpose of changing engines, engineers, firemen, and crews employed on such trains; and the train on which plaintiff's stock was shipped, stopped there for the purpose of making such usual changes.

When plaintiff's stock arrived there, the defendant was willing and desirous to proceed and continue the carrying of the stock to Buffalo, and had all the necessary cars, locomotives, and employes to make up and manage the train; but it was prevented from proceeding immediately, and accomplishing in the usual time the carriage of the stock to its destination, in consequence of a portion of its employes striking, and refusing to run the train, or to permit others so to do. A few weeks prior to the arrival of the plaintiff's stock at Collinwood, the defendant made an order reducing the pay of its employes engaged on its trains, and at their stations and shops, 10 per cent., and by reason of such reduction many of the employes refused to work on the defendant's trains, or to permit others to work who were willing to; and many of the firemen and brakemen who had been in the defendant's employ



took forcible possession of some of the defendant's engines, and some of the fixtures of the engines, and detached engine hose, let the water out of the engine boilers, uncoupled cars, carried away and hid some coupling pins and links, placed the engines in the round-house, and barricaded the same. The persons who took such forcible possession of the property of the defendant were a great number,—over 200 persons,—the greater portion of whom were firemen and brakemen who had been in the employ of the defendant up to the time of the strike on the twenty-second day of July, and were the controlling element of the force which prevented the moving of defendant's trains at Collinwood. Such persons boldly and defiantly refused to obey any of the orders of the defendant's officers, and refused to permit any of the defendant's trains to be moved, and threatened persons who should attempt to move any of the trains or cars until the demands of the strikers should first be complied with. The officers of the defendant made various attempts to move trains from Collinwood, and placed on the trains employees who were willing to work and operate the same; but they were prevented from moving the trains by threats, and were compelled to desist from all attempts to move them from Collinwood.

During all the time from the day the stock arrived at Collinwood until it was finally reshipped, the officers of the defendant exerted themselves with great diligence to move the trains, and to induce and persuade those who up to that time had been in the employ of the defendant to return to their places on the trains, and to permit the defendant to have the use and control of its property, the railroad, and its fixtures; but they openly declared and announced that they would do so only upon the condition that the order of the defendant reducing the wages of the employees should be annulled, and the wages restored as they were before the reduction. They also demanded the annulling of the rule requiring certain qualifications of engineers, and the removal of the general master mechanic, and that no one should be discharged for having taken part in the riot. And the strikers would have disbanded, and the late employees of the defendant would have promptly resumed their employment with the defendant, and would have ceased all force and violence to the defendant, its officers and employees, and would have allowed and restored to the defendant the full and complete control of all its property and its railroad, had their demands been acceded to; but the defendant refused to accede to the demands. There was a sufficient number of other competent workmen willing and ready to take the places of the strikers at such reduced wages, who could at any time have been so employed, and who would have moved defendant's train, except for the violent opposition of the strikers. After the strike had continued for a period of 11 days it ceased, and all the late employees of the defendant who were engaged in the strike resumed work on the defendant's cars, and the defendant was restored to the possession of all its property and railroad and fixtures so taken possession of by the strikers; but the wages were not restored, nor other concessions made by the defendant.

If it had not been for those who had been in the employ of the defendant up to the time of the commencement of the strike, the defendant could have overcome the resistance, and transported plaintiff's stock in due and ordinary time. As soon as the strike ceased, the defendant transported the plaintiff's stock to Buffalo, and there delivered it to the plaintiff, who took possession of it. The plaintiff suffered great damage from the delay, to recover which this action was commenced.

The trial judge, among other things, charged the jury—

"That if the strike had its origin in the minds of the defendant's employees, that it begun with them, and terminated when they were ready to end it,

and that strangers—outside parties—joined them through sympathy or other cause, the defendant is not exempt, and the plaintiff may recover damages;" "that whether the delay in bringing forward this train arose because the defendant's engineers, brakemen, and firemen were on a strike, declining to work, and the company had not men to carry on its business, or that they would not do it, or suffer others to do it, even though they were active in their resistance, although they committed violence, if they were the servants or employees of the defendant, nevertheless it is imputable to the defendant in this case;" "that if the defendant's employees were willing to carry on the business, and other men, which have been mentioned, sought to prevent those who were willing to work from carrying on its business, and continuing their labor, and that it was effective and sufficient to prevent those who were willing from going into the employ of the company, and this combination was strong and powerful,—strong in its moral position, strong in its physical power to overmaster and control the situation, and prevent the company from bringing out its engines and starting out the trains,—and so extended from Cleveland to Buffalo, embracing Erie, it is no excuse for the delay, because, if the strikers were the defendant's employees, they represented the defendant; they were its servants and agents, and their acts were the acts of the corporation."

To all these portions of the charge defendant's counsel excepted; and he requested the judge to charge—

"That, if the jury believe from the evidence that the cattle were delivered in Buffalo at as early a day as was possible under all the circumstances in the case, they will find for the defendant;" "that if the jury believe from the evidence that on and after the twenty-first day of July, 1877, the railroad tracks, depots, and rolling stock of the defendant were taken forcible possession of by a body or bodies of armed men, among whom were some of its employees, and that they continued to hold possession thereof by force of arms for several days, by reason of which the delivery of the plaintiff's stock at Buffalo was delayed until August 4, 1877, the plaintiff cannot recover;" "that if the jury believe from the evidence that, under the circumstances, the defendant could not have moved the plaintiff's stock from Collinwood to Buffalo previous to the time it did without endangering life and property, then that the defendant was justified in delaying the delivery of the stock until it was actually delivered;" "that if the cause of the detention of the plaintiff's stock arose from forcible resistance of the late employees of the defendant, the defendant having at all times a sufficient force of faithful employees to have operated and run the defendant's road had it not been for such forcible resistance, then the plaintiff cannot recover;" "that, if any of the employees of the defendant joined the strikers, they ceased from that time to be employees of the company, and the defendant is not in any way responsible for their acts."

The judge declined to charge each of these requests, and the defendant's counsel duly excepted. The jury rendered a verdict for the plaintiff. The defendant appealed to the general term, and, from affirmance there, to this court.

*D. H. McMillan*, for appellant, Lake Shore & M. S. R. Co.  
*Adelbert Moot*, for respondent, Meyer Greismer.

EARL, J. We are of opinion that the learned trial judge fell into error as to rules of law of vital and controlling importance in the disposition of this case. A railroad carrier stands upon the same footing

as other carriers, and may excuse delay in the delivery of goods by accident or misfortune not inevitable or produced by the act of God. All that can be required of it in any emergency is that it shall exercise due care and diligence to guard against delay, and to forward the goods to their destination; and so it has been uniformly decided. *Wibert v. New York & E. R. Co.*, 12 N. Y. 245; *Blackstock v. New York & E. R. Co.*, 20 N. Y. 48. In the absence of special contract, there is no absolute duty resting upon a railroad carrier to deliver the goods intrusted to it within what, under ordinary circumstances, would be a reasonable time. Not only storms and floods and other natural causes may excuse delay, but the conduct of men may also do so. An incendiary may burn down a bridge, a mob may tear up the tracks, or disable the rolling stock, or interpose irresistible force or overpowering intimidation, and the only duty resting upon the carrier, not otherwise in fault, is to use reasonable efforts and due diligence to overcome the obstacles thus interposed, and to forward the goods to their destination.

While the court below conceded this to be the general rule, it did not give the defendant the benefit of it because it held that the men engaged in the violent and riotous resistance to the defendant were its employes, for whose conduct it was responsible; and in that holding was the fundamental error committed by it. It is true that these men had been in the employment of the defendant. But they left and abandoned that employment. They ceased to be in its service, or in any sense its agents for whose conduct it was responsible. They not only refused to obey its orders, or to render it any service, but they willfully arrayed themselves in positive hostility against it, and intimidated and defeated the efforts of employes who were willing to serve it. They became a mob of vicious law-breakers, to be dealt with by the government, whose duty it was, by the use of adequate force, to restore order, enforce proper respect for private property and private rights, and obedience to law. If they had burned down bridges, torn up tracks, or gone into passenger cars and assaulted passengers, upon what principle could it be held that, as to such acts, they were the employes of the defendant, for whom it was responsible? If they had sued the defendant for wages for the 11 days when they were thus engaged in blocking its business, no one will claim that they could have recovered.

It matters not if it be true that the strike was conceived and organized while the strikers were in the employment of the defendant. In doing that, they were not in its service, or seeking to promote its interests, or to discharge any duty they owed it, but they were engaged in a matter entirely outside of their employment, and seeking their own end, and not the interests of the defendant. The mischief did not come from the strike,—from the refusal of the employes to work,—but from their violent and unlawful conduct after they had abandoned the service of the defendant.

Here, upon the facts which we must assume to be true, there was no default on the part of the defendant. It had employes who were ready and willing to manage its train, and carry forward the stock, and thus

perform its contract and discharge its duty; but they were prevented by mob violence, which the defendant could not by reasonable efforts overcome. That under such circumstances the delay was excused, has been held in several cases quite analogous to this, which are entitled to much respect as authorities. *Pittsburgh, etc., R. Co. v. Hazen*, 84 Ill. 36; *Pittsburgh, C. & St. L. Ry. Co. v. Hollowell*, 65 Ind. 188; *Lake Shore & M. S. R. Co. v. Bennett*, 89 Ind. 457; S. C. 6 Amer. & Eng. R. Cas. 391; *Indianapolis & St. L. R. Co. v. Junigen*, 10 Bradw. 295.

The cases of *Weed v. Panama R. Co.*, 17 N. Y. 362, and *Blackstock v. New York & E. R. Co.*, 1 Bosw. 77, S. C. affirmed, 20 N. Y. 48, do not sustain the plaintiff's contention here. If, in this case, the employes of the defendant had simply refused to discharge their duties or to work, or had suddenly abandoned its service, offering no violence, and causing no forcible obstruction to its business, those authorities could have been cited for the maintenance of an action upon principles stated in the opinions in those cases.

We are therefore of opinion that the judgment should be reversed, and a new trial granted; costs to abide the event.

(All concur.)

(142 Mass. 161)

**DOLE and others v. WOOLDREDGE and others.**

(*Supreme Judicial Court of Massachusetts. Suffolk. June 30, 1886.*)

**1. JURY—TRIAL BY JURY IN EQUITY—WHEN DEMAND MUST BE MADE—POLICY OF LEGISLATION.**

It is the policy of legislation in Massachusetts that cases at law, as well as in equity, should be tried before a court without a jury, unless an early demand for a jury is made; and, where the defendant in a suit in equity has himself set down a cause for a hearing before a single justice, he is not entitled to have issues framed for a jury, where the application is not made until 29 months after the filing of the bill, which is 12 months after the parties are at issue, and 9 months after the cause has been set down for hearing by the defendant.

**2. EQUITY—AMENDMENT TO BILL IN EQUITY—EFFECT OF; ON DEFENDANT'S RIGHTS.**

Where a defendant in a suit in equity has lost his right to a trial by jury by lapse of time after setting the cause down for a hearing before a single judge, he is not restored to his original right to trial by jury by the plaintiff's filing an amendment to the bill, making another party defendant, where no new matter of substance is charged against the first-named defendant.

**3. JURY—TRIAL IN EQUITY—DEPOSITION—CROSS-EXAMINATION.**

The right of a defendant in a suit in equity to trial by jury is not affected by the fact that, by an amendment to the bill, another person has been made a co-defendant, and signed a deposition which could not be used in evidence against the first-named defendant because the latter had had no opportunity to cross-examine the former when the deposition was taken.

**4. SAME—POSTPONEMENT—EFFECT OF.**

Where the defendant, in a suit in equity, had set down the cause for a hearing before a single justice, and by lapse of time has lost his right to have issues framed for a jury, and afterwards agreed with the plaintiff for a postponement of the case, he is not entitled thereby to a trial by jury unless it was so stipulated by him in his agreement with plaintiff as a condition of postponement.

**5. CONSPIRACY—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR—ADMISSIBILITY—ORDER OF PROOF.**

In a suit charging the defendant with conspiring with one R. to cheat and defraud the plaintiffs, where there has been some evidence of a conspiracy, evidence of declarations of R. in furtherance of the object of the alleged conspiracy, before there has been evidence to establish a conspiracy, is admissible, being mere question of the order of proof.

**6. WITNESS—CROSS-EXAMINATION OF WITNESS—REDIRECT EXAMINATION, EXTENT OF.**

In an action against W., charging him with conspiring with one R. to cheat and defraud the plaintiffs, where the defendant's counsel, on cross-examination of D., one of the plaintiffs, asked him certain questions regarding an interview between D. another of the plaintiffs, and R. relating to the alleged conspiracy, the plaintiffs' counsel is entitled, on redirect examination, to ask D. any questions connected with the statements elicited on cross-examination, and with matters having a natural and close connection with the subject of inquiry, and investigation on the part of the defendant on cross-examination.

**7. SAME—RE-EXAMINATION.**

Where a witness, on cross-examination, was asked certain questions regarding an interview between himself, one of the plaintiffs, and a person whom the bill charged had engaged with the defendant to cheat and defraud the plaintiffs, *held*, that the plaintiffs' counsel was rightly allowed to ask him, on re-examination, questions relating to the subject of inquiry upon the part of the defendant's counsel.

**8. EQUITY—EVIDENCE—INTERROGATORIES—OBJECTION TO, BY DEFENDANT.**

Where the defendant in an action objects to each and every one of certain interrogatories filed to a witness, and has filed no cross-interrogatories, he cannot afterwards be heard to object that the interrogatories were not answered.

**9. SAME—FRAUD—CONSPIRACY—DEFENSE—FINDINGS OF SINGLE JUSTICE.**

In a writ charging the defendant with arranging and conspiring to cheat and defraud the plaintiffs in the purchase of a mine, the defendant contended that the whole scheme of the enterprise, as alleged in the bill, (a scheme to organize a mining company,) was a fraud upon the public, illegal and against public policy, and that the plaintiffs were not entitled to relief in equity even if they were defrauded, but no averments in the bill showed that any fraud on the public was contemplated. *Held*, that the court would not set aside the finding of the justice before whom the case was tried, that there was not proof of any illegal purpose in the purchase such as would prevent the plaintiffs recovering from the defendant the money obtained from them by fraud.

**10. FRAUD—SALE OF MINE—PRETENDED AGENT MAKING SALE FOR HIMSELF.**

Where the defendant assumed to act for plaintiffs as their agent in the purchase of a mine, which he represented as belonging to a third person, but which really belonged to him, and which he sold to the plaintiffs, who believed him to be their agent, the relation of vendor and vendee between the defendant and plaintiffs does not exist, and the plaintiffs will be relieved by a court of equity from the fraud of the defendant.

This was a bill in equity to recover from the defendants a certain sum alleged to have been obtained from the plaintiffs by fraud and conspiracy. The bill alleges that the complainants, induced by the defendant Wooldredge, negotiated for the purchase of a mine in California owned by one Robinson. Wooldredge, Robinson, Purkitt, and Bishop, the latter being agent of Robinson, represented the price to be \$195,000; three-fourths of which the complainants agreed with Wooldredge to pay, and he agreed to pay the remaining fourth. In fact, Wooldredge had agreed with Robinson and Purkitt, without the knowledge of the complainants, to buy the mine for \$100,000, and this was the price eventually paid to Robinson. The complainants, believing in the honesty of Wooldredge,

paid to the agents of Robinson, in San Francisco, one-half of the entire purchase money, (\$195,000;) that is to say, they paid there the sum of \$97,500. This was a larger amount than they had expected to furnish when they left home. They had not then at hand any other funds, and of this they informed Wooldredge. He thereupon undertook to arrange temporarily for the payment of the half of the purchase money still to be provided, and subsequently represented that he had made such an arrangement, and had deposited securities of his own with one Bill Wood in San Francisco, to be disposed of in order to make this payment. Robinson confirmed to the complainants the statement that Wooldredge had arranged for the payment of the remaining half. Upon their return east, the complainants paid in money to Wooldredge their third quarter of the purchase money, to-wit, \$48,750; making in all \$146,250 paid by them. Wooldredge paid \$2,500, and this sum, together with the \$97,500 paid by the complainants in California, amounting in all to \$100,000, was all that Robinson received. The sum of \$48,750 paid by the complainants to Wooldredge he appropriated to his own use, and he received also a quarter of the mine. It appeared by the testimony of Mr. Wood that Wooldredge deposited no securities with him; and Mrs. Griswold, a sister of Robinson, deposed that she overheard a conversation between Wooldredge and Robinson in which the latter told Wooldredge that it was "an outrage to swindle partners in such a manner." Hearing in the supreme court before W. ALLEN, J., who found for the plaintiffs, and the defendants appealed.

*F. A. Dearborn*, for defendants.

*N. Morse* and *S. Lincoln*, for plaintiffs.

C. ALLEN, J. The defendants' counsel has made an excellent argument in this case, which has received our full consideration; but we have come to the conclusion that the decision of the justice before whom the case was heard must stand.

Assuming, without deciding, that the defendant might have insisted upon a trial by jury as a matter of constitutional right if his demand therefor had been seasonably made, we are of opinion that he waived this right. That such right may be waived is clear. *Parker v. Nickerson*, 137 Mass. 487, 492. The cause was at issue October 2, 1883, and, under the twenty-seventh chancery rule then in force, (New Rules No. 28,) it was to be considered as ready for a hearing one month later. By the rules prescribing the order of business in Suffolk county, a weekly list of matters to be heard in equity before a single justice was made up for Tuesday of each week, on which cases might be set down, either by motion to the justice at his first coming in on any previous day, or by agreement of counsel and notice to the clerk of the court. These rules were made in pursuance of the provision of Gen. St. c. 113, § 26, (Pub. St. c. 151, § 33,) allowing the court to make rules regulating the practice and proceedings of the court in matters of equity, so as to discourage delays and expedite the decision of causes. The cause being thus ready for a hearing, two courses were open to either party wishing to move in

the matter. One was to proceed in the usual manner in equity causes, and apply for a hearing before a single justice, unless it was desired to send the case to a master. The other course was, under Pub. St. c. 151, § 27, to request the court to frame issues of fact to be tried by a jury. In order to avail himself of the right of a trial by jury, if he had such right, it was necessary for the defendant to make an application to the court under this statute. Having the election of methods of trial, the defendant, in December, 1883, had the cause set down for a hearing before a single justice. This, under the rule, was no doubt done on a day previous to the day fixed for the hearing. It was necessary to notify the other side that the cause had been thus set down. Parties are to have time to make needful preparations for trial. This cause of action was inconsistent with an intention or expectation on the part of the defendant to have a jury trial. It was a formal and significant act showing an election by him to have the cause tried before a single justice, without a jury. It was not done through any misleading or surprise or misapprehension or inadvertence. Indeed, the testimony of the clerk submitted to us shows that the cause was set down for a hearing twice in December, 1883, and again on February 20, 1884; though he does not testify, and the record does not show, that at either of these times it was so set down by the defendant. The report of the justice is that in December, 1883, the defendant had the cause set down for a hearing upon the merits before a single justice of this court. We cannot regard this otherwise than as showing an intention on the part of the defendant at that time not to ask for a trial by jury. He himself elected the other method.

It is then to be considered whether this state of things was changed by anything that occurred afterwards. The report finds that the defendant insisted upon a hearing, unless some agreement could be made whereby the attachment of real property made under the writ should be postponed to certain conveyances which he wished to make; that an agreement was ultimately made to this effect, and the defendant did not then insist upon the hearing. In other words, the hearing was then postponed by agreement. But such postponement, under such agreement, did not of itself vary the legal effect of the defendant's act in setting the cause down for a hearing. Cases are always liable to be postponed by agreement, or by order of the justice for good cause shown. If the defendant wished to restore himself to the right of having a trial by jury, which he had waived, he should have made that a part of the stipulation. He did not do so. There is nothing to show that he then understood or wished that the case should be tried before a jury, or that he should be reinstated in his right to such trial.

Nor did the subsequent amendment to the bill have that effect. This was filed and allowed on the twenty-first of February, 1884. No new matter of substance is charged against the sole defendant now before us, in the amended bill. The original bill alleged that the defendant, conspiring and arranging with Robinson to cheat and defraud the plaintiffs, agreed with Robinson that they should call the price of the mine \$200,-

000, and that the statements made to the plaintiffs by Robinson were made in pursuance of such arrangement and conspiracy; that the price was much less, and the defendant paid and Robinson received much less. The answer to the bill is very general, but it denies that the defendant made any false statements or representations to the plaintiffs, or that he conspired and arranged with Robinson to cheat and defraud the plaintiffs. The main object of the amendment was to make Robinson a party to the suit, and to charge him also with conspiracy and fraud. He never was served with process or appeared, and is not before us. The defendant filed a new answer to the amended bill, but not till after he had filed a separate request for a jury trial. The new answer is in the same words as the original answer, except in referring to the bill as "the amended bill," and in adding a demand for a trial by jury. It is not contended by the defendant that his situation was changed by the amendment in any respect, except by its making Robinson a party. He says that, before the amendment, Robinson's testimony could be obtained only by deposition, or by his voluntary appearance as a witness; whereas, if Robinson should voluntarily submit himself to the jurisdiction of the court,—an act over which the defendant Wooldredge had no control,—his testimony could be readily taken by interrogatories; and, with this contingency in view, the defendant might well say that he desired such testimony to be presented to a jury. The answer to this is twofold. In the first place, Robinson never in fact appeared as a party, and so the position of the defendant Wooldredge remained unchanged. And, besides, if Robinson had appeared, answers made by him to interrogatories propounded under the statute would not be competent to affect Wooldredge; the latter having no opportunity to cross-examine him. The decision in *Stetson v. Wolcott*, 15 Gray, 545, only held that interrogatories may be addressed to one of several defendants, without including all the defendants, in an action of contract, and that his answers thereto are admissible in evidence for the plaintiff. The objection then raised was that the questions should have been proposed to all of the defendants, and their joint answers taken. Statements made by a conspirator long after the completion of the fraudulent enterprise, which are merely narratives of past occurrences, are not competent to affect others, (1 Greenl. Ev. § 111;) and the fact that such statements might be obtained by means of interrogatories under the practice act would not change the general rule of law.

The question remains whether, as a matter of judicial discretion, the judge erred in refusing to frame issues for a jury. An important element in the determination of this is the time when the application to the court was first made. This was on the twenty-third of September, 1884; 29 months after the filing of the bill; almost 12 months after the parties were at issue; more than 9 months after the defendant had set down the cause for a hearing before a single justice. No time has been fixed by any rule or general order of court within which a party must request the court to frame issues for a jury in an equity cause; but the recent policy of the legislation in this commonwealth has been that



cases at law, as well as in equity, should be tried before the court without a jury unless an early demand for a trial by jury is made. By St. 1874, c. 248, a party desiring a trial by jury in a civil action in this court or in the superior court must file a notice to that effect within such time after the parties are at issue as the court may by general or special orders direct. By St. 1875, c. 212, such notice might be filed before the parties were at issue, as well as after. Such is the law now. Pub. St. c. 167, § 69. Ten days after the filing of the answer or plea in this court, and after the parties are, and are required to be, at issue in the superior court, is the latest time allowed by the rules for the filing of such notice, unless there is a special order extending the time. See Rule 8 of this Court; Rule 16 of the Superior Court. After the defendant's long delay in the present case, and after his own act of setting the case down for a hearing before a single justice, we cannot say that, as a matter of judicial discretion, issues for a jury ought to have been framed.

We have examined all the cases cited for the defendant, and find none which, in our opinion, should lead us to a different result. The decision in New York rested upon a particular provision of the constitution of that state, prescribing how the right of trial by jury may be waived; those in Louisiana upon a particular provision in the Code of that state; and that in Tennessee upon an express statute. Decisions upon such points made in jurisdictions where the systems and methods of procedure may be different from our own cannot be of controlling weight with us.

The defendant took various exceptions to the admission of evidence at the hearing.

In the first place, he insists that the court erred in admitting evidence of declarations of Robinson, before there had been evidence to establish a conspiracy. These declarations were in furtherance of the object of the alleged conspiracy. The justice before whom the trial was had stated that there was some evidence of a conspiracy already, and an offer to produce further evidence; and that it was a mere question of the order of proof. In this there was no error. *Burke v. Miller*, 7 Cush. 547; 1 Greenl. Ev. § 111.

The defendant then objects that the court went too far in allowing Dole, on his re-examination as a witness for the plaintiffs, to testify to what was said in a certain interview between himself and Sinclair, two of the plaintiffs, and Robinson, at the Astor House, in New York. The situation was as follows: Robinson gave two depositions to be used in the case. The first was given to the defendant; the second, to the plaintiffs. In the first he testified that he received \$195,000 for the mine; in the second, that he received \$100,000. The interview in question was after the first deposition, and before the second, had been given. On his cross-examination by the defendant, Dole was asked if he had an interview with Robinson, when and where and how long it was, if they met by appointment, who were present, if he brought a deposition home from New York, if he knew who went out to Palmyra to take the last deposition of Robinson, if he employed any one to go there, or if he knew who did. The cross-examination then proceeded as follows:

"*Question.* You were present at another interview? *Answer.* A few days afterwards. *Q.* When you and Robinson were present, and Sinclair? *A.* Yes, sir. *Q.* At which time Robinson told you and Sinclair that he had given his deposition? *A.* Yes, sir. *Q.* State all he said about it on that point. *A.* I asked him if he was willing to come to Boston and testify in this case, and state the facts,—if he was willing to give a deposition if we wanted it. He said, 'I have already given an affidavit,' was the way he expressed it, 'and it has been sent to my counsel in Boston, or has been filed in court there.' I said, 'I don't think that is so. I have never heard of any deposition, I have never seen any, and I don't think it can be possible that your deposition has been filed in court in Boston up to this time.' He said it certainly had, and I insisted that it certainly had not to my knowledge. *Q.* And Mr. Sinclair was there? *A.* Yes, sir. *Q.* And heard that? *A.* I think he heard it; it was said in his presence and mine. *Q.* What did Sinclair say? *A.* He said, as I did, that the deposition had not been filed,—at least he hadn't access to it; and I think he told Mr. Robinson that his counsel was not obliged to file it, and probably never would."

This fairly opened all that was said in that interview with Robinson on the subject of the deposition he had given, or which he was asked to give; whether Robinson said he would testify for the plaintiff or not; what testimony he said he would or could give for the plaintiff; and what requests he said had been made to him not to testify further, or not to come to Massachusetts. These, in general, were the subjects of the re-examination. They were not matters new in themselves, or unconnected with the statements elicited on cross-examination, or remote and distinct from that which was the subject of inquiry and investigation on the part of the defendant in cross-examination, but they have a natural and close connection with it. *Com. v. Keyes*, 11 Gray, 323; *Straw v. Greene*, 14 Allen, 206; *Prince v. Samo*, 7 Adol. & E. 627; 1 Greenl. Ev. § 467.

The defendant's objection that the witness Chester should not have been allowed, on his re-examination, to testify to the conversation in an interview between himself and Robinson and the plaintiff Sinclair at the Windsor Hotel, in New York, rests on the same grounds as that which we have just considered. Sinclair had already testified to the whole conversation. Chester, on his cross-examination by the defendant, was asked as to certain portions of this conversation, including various things said to Robinson by himself and by Sinclair. All the matters to which he was allowed to testify in his redirect examination were admitted as portions of the same conversation, and not upon remote or distinct subjects.

The defendant objected to the admission of Robinson's second deposition, on the ground that several important and material interrogatories were omitted by mistake of the commissioners, and were not put to the witness at all. It appears that the plaintiffs filed a list of interrogatories to Robinson, to be annexed to the commission; that the defendant objected to each and every one, both for form and substance, and also waived the cross-examination; that the plaintiffs then filed certain additional interrogatories; that the defendant objected to each and every one of these, both for form and substance; and that no cross-interrogatories were put. In taking the deposition, no answers were given to any of the

additional interrogatories. Under these circumstances, the defendant, having thus specially objected to all of these interrogatories, cannot now be heard to object that they were not answered.

The defendant further contends that the whole scheme of the enterprise, as alleged in the bill, was a fraud upon the public, illegal, and against public policy, and that the plaintiffs are entitled to no relief in equity, even if they were defrauded in such an undertaking. We do not, however, find any averments in the bill showing that any fraud upon the public was contemplated, nor do we see any occasion to set aside the finding that there was not proof of any illegal purpose in the purchase, such as would prevent the plaintiffs from recovering from the defendant the money obtained from them by his fraud.

The objection that certain other persons and corporations ought to have been joined as defendants is untenable.

The defendant objects that in respect to one-quarter part of the mine, which it was originally contemplated that Robinson should retain, but which was finally included in the purchase from him, and for which the plaintiffs paid \$48,750 to the defendant, the relation between himself and the plaintiffs was that of vendor and vendee, and that false representations made by a vendor as to the price which he paid for property do not constitute such a fraud as a court of equity will relieve against. But on the evidence we do not think this relation existed between the parties. On the other hand, the evidence is satisfactory to show that he assumed to act for the plaintiffs in the matter, and treated the supposed purchase and payment by him as having been made for them, and gave them the option so to consider it until their return to Boston. The whole dealing between the parties was on this basis; and when the plaintiffs finally paid the money to the defendant it was as an adoption of his supposed act as an act of agency for them, and not as a purchase from a vendor.

The defendant finally contends that the evidence did not warrant the findings of the justice in relation to the alleged conspiracy between the defendant and Robinson, and to the amount of money paid for the mine. But an examination of the evidence shows that the findings were well supported.

Decree for the plaintiffs affirmed.

(142 Mass. 130)

JONES v. BOSTON & M. V. R. Co. and others.

(*Supreme Judicial Court of Massachusetts. Suffolk. June 30, 1886.*)

1. PROMISSORY NOTE—GUARANTY—HOLDER FOR VALUE—EVIDENCE.

Where a promissory note, issued by a railroad company, was made payable to the order of P., its treasurer, and signed by him under authority of the directors, and had written upon the back, signed by the defendants, the words, "We hereby guaranty the payment of the within note," the contract of guaranty is with the first holder for value of the note, and evidence that the plaintiff paid to the treasurer, P., who indorsed the note to him, certain sums of money, is admissible, and sufficient to justify the jury in finding that the promise of the defendants was to the plaintiff.<sup>1</sup>

<sup>1</sup>See note at end of case.

2. STATUTE OF FRAUDS—MEMORANDUM—ACTION ON NOTE—PAROL EVIDENCE, WHEN ADMISSIBLE.

In an action upon a promissory note issued by a railroad company, payable to the order of its treasurer, and guarantied by the defendants, it is sufficient to satisfy the statute of frauds if the memorandum shows who are the parties to the contract by description, instead of name; and if the promisor or promisee is described, instead of named, parol evidence is admissible to apply the description, and identify the person who is meant by it.

8. PLEADING—VARIANCE—ACTION ON NOTE.

Where a declaration alleged that a railroad company, by its treasurer, P., made a promissory note payable to the order of P., for the purpose of being sold on the market in order to raise money to meet the liabilities of the said company; that said note was at the same time approved by the directors, and was indorsed by P.; and that defendants entered into a contract, which was indorsed on the note as follows: "We hereby guaranty the payment of the within note, waiving demand, notice, and protest;" that said note was delivered to plaintiff for a valuable consideration by P., as treasurer of said company; that plaintiff received the same before it was due and payable; and that said note was not paid,—there is not a fatal variance between said declaration and proof that notes similar to the one in suit had been authorized by the directors of the company, and similar guaranties had been indorsed upon them by the defendants; that the plaintiff loaned to P. certain sums of money soon after the date of the notes, taking the note in suit as collateral to secure another note signed by P.,—P. stating that the money borrowed was for the use of the company

Contract upon a guaranty upon the back of a promissory note, as follows:

"\$5,000.

BOSTON, MASS., October 15, 1878.

"Four months after date, for value received, the Boston & Mystic Valley Railroad Company promises to pay to the order of Sidney P. Pratt five thousand dollars, with interest at the rate of five per cent. per annum.

[Signed]

"THE BOSTON & MYSTIC VALLEY R. R. COMPANY.

"By SIDNEY P. PRATT, Treasurer.

"Due February 15-18, 1879.

"Authorized and approved by vote of company, passed October 3, 1878.

[Signed]

"S. W. TWOMBLEY,

"J. P. THOMPSON,

"P. WEBSTER LOCKE,

"Three of the Directors of the Boston & Mystic Valley Railroad Company."

On back of note:

"Waiving demand, notice, and protest.

SIDNEY P. PRATT."

"We hereby guaranty the payment of the within note, waiving demand, notice, and protest.

[Signed]

"STEPHEN DOW.

"NATHAN P. PRATT.

"J. P. THOMPSON.

"P. WEBSTER LOCKE."

The answer was a general denial; that the date of the note had been changed without the consent of the defendants; and a special denial of the genuineness of the signatures. The trial, which was in the superior court, before GARDNER, J., proceeded against Dow and Thompson; and the plaintiff testified that on December 13, 1878, he met S. P. Pratt, and loaned at that time \$1,000, taking a note signed by Pratt; and received the note in suit and certain railroad ties as collateral. He sub-

sequently loaned an additional sum of \$500, taking two notes, each signed by Sidney P. Pratt. The plaintiff was asked by his counsel to state all that was said and done at the interview between him and Pratt when the plaintiff purchased the note in suit, to which defendants objected, but the court allowed the question to be answered. Plaintiff then testified that he made the transaction with Pratt as treasurer of the company, and had the note from him as treasurer of the company; that he (Pratt) asked him (witness) to discount the note, saying that the transaction was to raise money on behalf of the company; that there was a verbal agreement that he (witness) should give Pratt 10 days' notice if he wanted the money, and, if Pratt wanted to pay it, he was to give witness 10 days' notice, so that he might loan the money again; that if he (witness) was not paid after 10 days' notice everything was to be his. On cross-examination witness testified that he made no inquiry about the authority under which the note purported to be issued.

The plaintiff offered in evidence the writing declared on, to which defendant objected that the guaranty was an agreement to pay the debt of another, within the meaning of the statute of frauds; that the name of the plaintiff did not appear in the writing, and no written evidence was offered that it was intended for the plaintiff; that no consideration has been shown to support an action by the plaintiff against the defendants; that the evidence disclosed a transaction between Pratt, personally, and the plaintiff,—both parties treating the writing as Pratt's own property; and that the guaranty was not negotiable. The objections were severally overruled.

It appeared, on behalf of the defendants, that in 1878 they were directors of the Boston & Mystic Valley Railroad Company, of which Dow was president, and that S. W. Twombly, Nathan P. Pratt, and P. Webster Locke were the remaining directors. On October 3, 1878, the directors passed a vote authorizing the treasurer to borrow a sum not exceeding \$30,000, and to give the notes of the company therefor in such sums, and on such time, not less than three months, and at such rates of interest not in excess of 8 per cent. per annum, as should be necessary to enable him to obtain the funds; but no note to be issued by him that was not approved by at least three of the directors of said railroad company; that upon October 5th all the directors and the treasurer, S. P. Pratt, met at the office of the company, and, upon Pratt's promises, six notes, for \$5,000 each, each dated October 5, 1878, and payable four months after date to the order of Sidney P. Pratt, with interest at the rate of 5 per cent. per annum, were drawn and signed by the company, approved by Twombly, Thompson, and Locke, as three of the directors, indorsed by Sidney P. Pratt, and the following writing upon the back of each note, signed by Dow, Nathan P. Pratt, Thompson, and Locke: "We hereby guaranty payment of the within note, waiving demand, notice, and protest;" and these notes and guaranties were delivered to S. P. Pratt. At the trial there were produced six notes, the dates of four of which had been changed to October 15th, which were identified by Dow, Thompson, Twombly, and Locke as the notes signed October 5th,

were admitted by the plaintiff to be genuine, and were used by both parties as standards of handwriting for comparison. There was evidence by Dow, Thompson, Twombly, and Locke that no other notes were ever signed by them, or either of them; and that no other notes were ever issued by the company, except one payable to Stephen Dow, and one payable to Nathan P. Pratt. There was other evidence tending to show that the note in suit was a forgery; that S. P. Pratt urged the defendants (guarantors) to guaranty the notes, stating that he had a party who was ready to take them and furnish money at once; that with this money they could so far complete the road that the mortgage bonds could be placed; that bonds would be taken in payment for the notes when they became due; and that he (Pratt) would see that the guarantors were never called upon to pay anything upon them; that upon these promises the guaranty was signed. The defendants asked the court to rule that there was no evidence of any consideration for a guaranty by the defendant to the plaintiff; that there was no evidence that the plaintiff was the first holder for value of the note in suit; that there was no evidence of a contract between the plaintiff and defendants; and that there was a fatal variance between the evidence and the declaration,—which rulings the court refused to give. The jury found that the names of the defendants Dow and Thompson were not forged, found for the plaintiff, and the defendant alleged exceptions.

*Gray & Cogswell*, for defendants.

*S. H. Phillips*, for plaintiff.

MORTON, C. J. Most of the questions presented by the bill of exceptions have been previously decided by this court. The case of *Baldwin v. Dow*, 130 Mass. 416, was a suit upon a promissory note and guaranty, which was one of the same series of notes with the note in suit, in the same form, and issued under like circumstances. It was there held that the contract of the defendants was not with the payee of the note; but with the first holder for value who took the note with the guaranty upon it; and that the contract is to be interpreted as if, when the plaintiff paid the money to the corporation, all the parties were present, and there signed and delivered the note and guaranty in the present form. When the case at bar was before us upon demurrer, the same principle of interpretation was reaffirmed, and it was held that the declaration sufficiently set out a guaranty of the note, for a sufficient consideration, to the plaintiff as the first holder for value. *Jones v. Dow*, 137 Mass. 119.

At the trial in the superior court the evidence tended to show the consideration alleged in the declaration, and was sufficient to justify the jury in finding that the promise of the defendants was to the plaintiff. The defendants contend that the guaranty is insufficient to satisfy the statute of frauds, because it does not contain the name of the plaintiff as the promisee. It is true that, in order to satisfy the statute of frauds, it is necessary that the memorandum should show who are the parties to the contract; but it is sufficient if this appears by description, instead of name; and if the promisor or promisee is described, instead of named,

parol evidence is admissible to apply the description, and identify the person who is meant by it. *Benj. Sales*, § 237, and cases cited; *Gowen v. Klous*, 101 Mass. 449.

The evidence of the circumstances under which the plaintiff took the note in suit, objected to by the defendants, was competent to identify the plaintiff as the first holder for value, and the promisee in the guaranty, and also to show the consideration. *Baldwin v. Dow*, *ubi supra*.

The evidence in this case justified the jury in finding that the plaintiff was the first holder for value, and that there was a valid promise made to him by the defendants.

We are of opinion that none of the defendants' exceptions can be sustained. Exceptions overruled.

#### NOTE.

Where a contract of guaranty is entered into contemporaneously with the principal contract, and is either incorporated in the latter, or so distinctly refers to it as to show that both agreements are parts of an entire transaction, the statute of frauds does not require a consideration to be expressed in the guaranty distinct from that expressed in the principal contract. This principle applied to a guaranty embodied in a written lease. *Highland v. Dresser*, (Minn.) 29 N. W. Rep. 55.

It was held in *Jones v. Kuhn*, (Kan.) 8 Pac. Rep. 777, that, where the guaranty is made contemporaneously with the certificate of deposit on which it is indorsed, it is not necessary that there should be a separate and distinct consideration to uphold the guaranty. The consideration upon which the certificate of deposit was executed, is sufficient to sustain such guaranty. The court say: "The guaranty being made contemporaneously with the making of the certificate, it was not necessary that there should be a separate and distinct consideration, as would be the case if the contract of guaranty was subsequent to the principal transaction, and not for the benefit of the guarantor. The consideration upon which the certificate of deposit was executed, is sufficient to sustain the written promise of guaranty which was indorsed upon the certificate before its delivery. In such a case the indorsement of guaranty is deemed to be given for the benefit of the maker of the instrument, and it is also considered that the promisee gave credit to the maker upon the strength of the liability of those whose promise of guaranty was written upon the back of the instrument. *Gilligan v. Boardman*, 29 Me. 79; *Campbell v. Knapp*, 15 Pa. St. 27; *Bickford v. Gibbs*, 8 Cush. 164; *Colburn v. Averill*, 30 Me. 310; *Manrow v. Durham*, 3 Hill, 584; *Purdy v. Peters*, 35 Barb. 239."

A written guaranty upon a negotiable promissory note, though referring to the note, and made at the same time with it, and constituting a ground of the credit given to the maker, is void by the statute of frauds, if it fails to express the consideration. *Taylor v. Pratt*, 3 Wis. 674, adhered to on the principle of *stare decisis*, and *Houghton v. Ely*, 26 Wis. 181, distinguished. *Parry v. Spikes*, (Wis.) 5 N. W. Rep. 794.

A written guaranty "for all goods A. & B. may buy from O.," held to sufficiently express, by implication, its consideration, and to be a valid continuing guaranty for goods sold to either, as well as to both jointly. *Young v. Brown*, (Wis.) 10 N. W. Rep. 394.

Commissions allowed to an agent for the sale of property are a sufficient consideration for his guaranty of promissory notes taken by him in part payment. *Newton Wagon Co. v. Dier*, (Neb.) 4 N. W. Rep. 995.

A guaranty is without consideration where founded on an alleged agreement executed by officers of a corporation, when they have no authority to execute it. *Granger v. Bourn*, (Cal.) 7 Pac. Rep. 760.

Defendant, of New York city, addressed a letter to B. Bros. of Evansville, Indiana, which was as follows: "Any drafts you may draw on Mr. A. Feigelstock, of our city, we guaranty to be paid at maturity." This guaranty was without consideration between any of the parties. The plaintiff, an Indiana bank, discounted drafts drawn by B. Bros. on Feigelstock on the sole security of the letter. One of the drafts appeared to be accommodation paper. The court held that the bank acquired no right of action on the guaranty for the non-payment of the draft. *Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273.

(142 Mass. 224)

**ELSEY v. ODD FELLOWS MUT. RELIEF ASS'N and others.**

(Supreme Judicial Court of Massachusetts. Hampden. July 8, 1896.)

**LIFE INSURANCE—MUTUAL BENEFIT ASSOCIATION—BENEFITS, TO WHOM PAYABLE—HEIRS—WIFE—MOTHER—PUB. ST. CH. 115.**

Under Pub. St. c. 115, which provides that an association organized under said chapter may, "for the purpose of assisting the widow, orphans, or other dependents of deceased members, provide in the by-laws for the payment, by each member, of a fixed sum, to be held by such association until the death of the member occurs, then to be forthwith paid to the person or persons entitled thereto." A member of such association who has set aside such sum loses the absolute control over it which he has over his other property; and where the by-laws provided that the balance of the fund so set apart should be paid "to the person designated by the member in his application for membership or last legal assignment, provided such person or persons are heirs or members of the decedent's family," and that, "if the designator leave no widow or children or assignee, then it shall be payable to his heirs," the word "heirs" is used in its limited sense, to designate such persons as would be the legal heirs or distributees of the deceased member at the time of his application or designation; and where W., in his application for membership, designated his wife, A., as the person to whom the benefit was to be paid upon his death, and later attempted to change the designation from his wife to his mother, who was not living with him as a member of his family, and was not dependent upon him, *held* that, as the mother was not one of those who would be one of the decedent's heirs, the attempted designation to the mother was illegal and invalid, and the original designation to the wife remained in force.

Bill in equity by George Elsey, a member of the Odd Fellows Mutual Relief Association of the Connecticut River Valley, against said association, Henry S. Lee, its treasurer, Addie E. Wetmore, and Abigail C. Wetmore, for an injunction enjoining the said Lee from paying to the said Abigail C. Wetmore a certain order drawn in her favor by the secretary of the association, by authority of its directors, for a certain sum of money payable upon the death of Davis L. Wetmore. Hearing in the supreme court before W. ALLEN, J., who dismissed the bill. The facts appear in the opinion.

*A. M. Copeland*, for plaintiff.

*E. H. Lathrop*, for defendants.

**MORTON, C. J.** The defendant is an association organized under St. 1874, c. 375. This statute was amended by St. 1877, c. 204, and the two statutes have been continued and re-enacted in chapter 115, Pub. St. The statute provides that such associations may, "for the purpose of assisting the widows, orphans, or other dependents of deceased members, provide in their by-laws for the payment, by each member, of a fixed sum, to be held by such association until the death of a member occurs, then to be forthwith paid to the person or persons entitled thereto, and such funds, so held, shall not be liable to attachment by trustee or other process." It authorizes an association of a peculiar character. Its object is to enable a man to lay aside a portion of his income or property in the nature of an insurance upon his life, to be applied at his death to the use of his widow, orphans, or other persons dependent upon him. But the provisions of the general laws relating to life insurance companies do not apply to this association. The fund held by it is not



attachable by the creditors of the member, and, by clear implication of the statute, after he has set it aside, he loses the absolute control over it which he has over his other property. He cannot assign it, and divest it from the class of beneficiaries described in the statute, and direct its disposition to other persons outside of that class.

It was clearly the intention of the defendant corporation to conduct its business under the authority of these statutes, though the agreement of association and the by-laws do not follow the exact words of the statutes. The corporation is formed "for the purpose of defraying the expenses of the sickness and burial of its members, and rendering pecuniary aid to the families of deceased members, or to their heirs," and the by-laws provide the benefit a member is entitled to at his death shall be applied to the payment of the expenses of his last sickness and funeral, if not otherwise paid, and "the balance shall be paid to the person or persons designated by the member in his application for membership, or last legal assignment, provided such person or persons are heirs or members of the decedent's family."

But the by-laws should be construed with reference to the statute, and, if practicable, such a meaning should be given to them as will make the two consistent, for it is not to be assumed that the by-laws are intended to go beyond the scope of the statute, and thus violate its provisions. The two descriptions of the class of beneficiaries in the statute and in the by-laws would ordinarily include the same persons if the word "heirs" in the by-laws is construed in its natural sense, as meaning those who, at the time of the designation, would be the heirs or distributees of the member. But if the word "heirs" is given a broader construction, and held to mean any one who might, under any circumstances, be or become an heir of the member, it would greatly enlarge his power to dispose of the fund, and enable him to assign it to persons not within the contemplation of the statute as beneficiaries. Without deciding whether the word "heirs," as it applies only to personal estate, may not be held to mean distributees, we are of opinion that it is used in the by-laws in its limited sense, to designate such persons as would be the legal heirs or distributees of the member at the time of his application or designation. This view is strengthened by the fact that in the fourth clause of the same section the same words are used in this sense; it being provided that, "if the designator leave no widow or children or assignee, then it shall be payable to his heirs."

In the case at bar, Davis L. Wetmore, in his application for membership, designated his wife, Addie E. Wetmore, as the person to whom the benefit was to be paid upon his death. At a later day he attempted to change the designation from his wife to his mother, Abigail Wetmore. It is agreed that his mother was not living with him, but was living with her husband in another town and county. It is not suggested that she was dependent upon him. She was not one of those who would be his heirs, and she was not one of the members of the decedent's family, within the meaning of the by-law. To give the word "family" the broad construction claimed by the respondent would make

the by-law overreach the scope of the statute, and violate its spirit and purpose. It follows that the attempted designation to the mother of the deceased member was illegal and invalid, and we need not discuss the question whether it was sufficiently assented to by the directors of the defendant corporation.

As the assignment to the mother was invalid, we think the original designation to the wife remained in force. We can see no reason to suppose that the later assignment was intended to operate as a revocation of the designation to the wife, unless it took effect as a designation to the mother. The scheme of the by-laws is that the beneficiary shall be designated by the member in his application for membership, and the benefit shall be paid to such beneficiary unless there is a subsequent legal assignment. They make no provision for revoking a designation except by a legal assignment to some other person, assented to by the directors. We cannot presume that the deceased member intended his assignment to operate as a revocation of the previous designation in the event of its invalidity as an assignment to his mother, and there is no assent of the directors to any such revocation. We are therefore of opinion that the plaintiff Addie E. Wetmore is entitled to a decree that the fund in question shall be paid to her. The plaintiff Elsey has no interest in the fund, and cannot maintain this bill. As to him the bill must be dismissed. Decree accordingly.

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(142 Mass. 232)

HASTINGS v. WEBER and others.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 2, 1896.*)

1. STATUTE OF FRAUDS—MEMORANDUM—LEASE—AGENT—TELEGRAM.

In an action of contract for breach of an agreement to take a lease, it appeared that the defendants' agent wrote to the defendants a letter containing a description of the premises, and stating the annual rent for a term of five years; the questions of the letter being whether the premises and amount of rent were satisfactory to the defendant, but the letter did not state or refer to the particular terms or conditions of a lease. The defendants, in answer, sent the following telegram: "If basement included at four thousand, secure five years' lease." A letter sent by the agent to the defendants on the day the telegram was received by him stated that the lease at \$4,000 included the basement, and that he would close the matter the next day. The agent had no authority to accept a lease. *Held*, that there was not a sufficient memorandum in writing to satisfy the statute of frauds; *also held*, that letters written by the defendants subsequently, referring to an incomplete lease, had no bearing on the question.<sup>1</sup>

2. SAME—INSTRUCTIONS TO AGENT—DISCLOSURE TO THIRD PERSON.

Where a principal gives instructions in writing to his agent relating to the leasing of real estate, and the instructions do not include an authority to contract, the disclosure of the instructions to the other party cannot convert them into a memorandum of contract sufficient to satisfy the statute of frauds.

This was an action of contract for breach of an agreement to take a lease. The defense relied on was the statute of frauds. Hearing in the superior court, before BACON, J., upon facts which appear in the opinion, who ruled that there was not sufficient evidence of any written memo-

<sup>1</sup>See note at end of case.

random of the contract to satisfy the statute of frauds, and directed a verdict for the defendants. The letter of January 3d, referred to in the opinion, was written by the defendants' agent to the defendants after the receipt of the telegram mentioned, and stated that the lease at \$4,000 per annum included the basement, and that he, the agent, would close the matter the next day.

*A. E. Pillsbury*, for plaintiff.

*C. J. Noyes*, for defendant.

W. ALLEN, J. The declaration alleges a contract with the defendants by which the plaintiff agreed to let to them certain premises for the term of five years from the first day of February, 1888, at the yearly rent of \$4,000, and the defendants agreed that they would hire the premises, and execute and accept thereof for such term at said rent, and would pay the rent of \$4,000 a year during said term.

There was no written contract, and the plaintiff relied upon a verbal contract between herself and the agent of the defendants; and the only question presented by the exceptions is whether there is a sufficient memorandum, in writing, of the contract to satisfy the statute of frauds. The memorandum must be found, if anywhere, in the letters of the defendants' agent to them of January 2d and 3d, and in the telegram of the defendants to their agent of January 3d. There is no evidence that the agent had any authority to sign a memorandum, and the only paper signed by the defendants is the telegram. This was sent in answer to the letter of January 2d, and before the letter of January 3d was received by the defendants. It is contended that it is so connected with the letter of January 2d as to incorporate that into itself, and make the letter and telegram together a memorandum signed by the defendant. Assuming, without deciding, that such is the correct construction of the two papers, we think they do not constitute a memorandum of the contract declared on, or of any contract. It is clearly not a memorandum of a completed contract, and the most that can be claimed is that it constitutes an offer by the defendants to the plaintiff, the subsequent verbal acceptance of which by the plaintiff gave it effect as the contract of the defendants. If we could adopt the assumption upon which this argument must rest, and hold that the telegram must be taken to include the letter of January 2d, and that the presentation of this telegram to the plaintiff on January 3d was in legal effect the exhibition of the letter and telegram to the plaintiff by the defendant through their agent, the principal question, and the only one we need consider, would be presented: Does the telegram import a promise by the defendant to the plaintiff to accept a lease described in it and the letter?

The correspondence is not between the parties to the supposed contract, but between one of the parties and his own agent, and it is to be construed accordingly. The agent was directed to look for a store for the defendants, and to negotiate for a lease of it. He had no authority, unless from the telegram, to accept a lease, or to make a contract, or to determine any of the terms of a lease or of a contract. His letter in-

formed the defendants that he had been looking at the store of the plaintiff, contained a description of the premises, and stated the annual rent asked for a term of five years, as information to the defendants as the basis of further instructions. The question of the letter was whether the premises and the amount of rent were satisfactory to the defendants. It did not refer to the particular terms or conditions of a lease; such as, when the term should commence; when the rent should be payable; what alterations should be made in the premises, or what condition they should be put in by the owner; what alterations might be allowed to be made by the defendants; what rights the defendants should have as to underletting, and other particulars which might enter into the lease. The answer was, with brevity of correspondence, by telegraph: "If basement included at four thousand, secure five years' lease." This was obviously intended only as instructions to the agent that, if the rent would be of the amount stated, he should continue his negotiations, and procure a lease, the only contract contemplated, to be submitted to the defendants for their acceptance and execution.

The instructions in the telegram do not exclude, but accord with, other instructions, as to the contents of the lease that may have been given by the defendants to their agent; and, as between the parties to the correspondence, they contain in legal effect the additional words, "according to instructions which have been or may be given." Instructions to the agent referring only to the particulars mentioned in the letter to which they were in reply cannot be construed as including a promise or offer to the plaintiff to accept a lease containing only those particulars. The plaintiff had no right to so treat it; and that she did not in fact so regard it appears from her declaration, which alleges that the term was to commence on February 1st, and not immediately, as would be implied from the writings; and also from the evidence that she understood that the defendants were not to have the power of underleasing, which could not have been inferred from the writings.

Whether a correspondence between one party to a verbal contract, and his agent, before the completion of the contract, can, under any circumstances, constitute a memorandum of the contract, we need not consider. The correspondence in this case shows only instructions for an agent, not including authority to contract, and the disclosure of the instructions to the other party cannot convert them into a memorandum of contract.

The letters subsequent to January 3d, and the lease signed by some of the defendants, but not accepted or delivered, refer to the incomplete contract of a lease, and have no bearing upon the question whether the defendants had agreed to execute the lease, unless as showing that they did not consider themselves under any contract to do so, and cannot go to make up a memorandum of such a contract.

Judgment on the verdict.

#### NOTE.

A memorandum made by the agent of the vendor of real estate, made and signed by him for the vendor alone, after the sale is made by the auctioneer, and not in any way assented to by the purchaser, is not a sufficient memorandum within the statute of frauds. *Bamber v. Savage*, (Wis.) 8 N. W. Rep. 609.

A mere receipt for money on account of a purchase of land, and a letter from the purchaser referring only generally to an existing contract, do not constitute a valid memorandum within the meaning of the statute of frauds. *Smith v. Jones*, 66 Ga. 338.

In *McGuire v. Stevens*, 42 Miss. 724, A. contracted with B. for the sale of a lot of land; the only written evidence of the contract being several receipts, signed by A. and his agent, acknowledging the receipt of certain sums of money from B. "in part payment for a house and lot," without describing the premises, or furnishing any data for ascertaining their locality. The court held that said writings were insufficient to take the case out of the statute of frauds.

In *Holmes v. Evans*, 48 Miss. 247, the memorandum sued on was as follows: "Received of [plaintiff] \$100, as part payment on a piece of property on the corner of," giving street, city, county, and state, and signed by the defendant. The court held that it was not a sufficient memorandum within the statute of frauds.

A draft for the purchase money of lands, drawn by an agent without disclosing his principal's name, is a sufficient memorandum under the statute. *Neaves v. North State Min. Co.*, 90 N. C. 412.

Under the statute of frauds a memorandum of a contract for the sale of lands need be signed only by the vendor. *Gartrell v. Stafford*, (Neb.) 11 N. W. Rep. 732.

The memorandum may consist of several writings, as letters between the parties; but their connection and relations to each other must appear by the writings themselves, and cannot be shown by parol evidence of what the parties intended. *Tice v. Freeman*, (Minn.) 15 N. W. Rep. 674.

In *Banks v. Chas. P. Harris Manufg Co.*, 20 Fed. Rep. 667, the traveling agent of the defendant company addressed to his principals an order: "Send to C. W. S. Banks; terms, net 30 days; freight allowed,"—signed by him as agent, and followed by a list of the merchandise desired, with prices and directions for shipping, signed by Banks, the plaintiff. The court held that the paper was upon its face merely an order, and not a memorandum of the sale signed by the defendant or his agent within the terms of the statute of frauds.

In *Justice v. Lang*, 42 N. Y. 493, the plaintiff brought action for the non-performance of an agreement contained in the following memorandum, signed by the defendants: "New York, May 13, 1861. We agree to deliver P. S. Justice one thousand Enfield pattern rifles, with bayonets, no other extras, in New York, at \$18 each, cash upon such delivery; said rifles to be shipped from Liverpool not later than first July, and before if possible. W. BAILEY, LANG & Co." The court held that this memorandum was a sufficient compliance with the requirements of the statute of frauds to bind the defendants; that there was a good and sufficient consideration for their obligation; and that the plaintiff was entitled to recover.

(142 Mass. 264)

### COBURN, Trustee, v. MIDDLESEX CO.

(*Supreme Judicial Court of Massachusetts. Middlesex. July 3, 1886.*)

#### WATERS AND WATER-COURSES—MILL—WATER-WHEELS—USE OF—RESERVATION.

A grant of a right to build a mill, and the privilege to draw and use the water from a mill-pond "for the purpose of carrying said mill,"—the grantor reserving the right "to the use of sufficient water from said pond to carry a fulling-mill and three breast-wheels," with the machinery connected with the same,—does not restrict the grantor to the use of breast-wheels, but limits him to "the quantity of water sufficient to carry three breast-wheels."

This was a bill in equity to restrain the defendant company from removing certain breast-wheels from its mill, and substituting therefor turbine wheels. Hearing in the supreme court, before HOLMES, J., who reserved the case for the consideration of the questions of law involved. The facts appear in the opinion.

*E. M. Johnson*, for plaintiff.

*P. Webster*, for defendant.

FIELD, J. By the indenture of May 31, 1821, between Hurd and How, Hurd granted to How, his heirs and assigns, the right to build a mill or mills, and the "privilege to draw and use the water from the

mill-pond above said dam for the purpose of carrying said mill or mills;" and he reserved to himself, his heirs and assigns, "the first and exclusive right to the use of sufficient water from said pond to carry a fulling-mill and three breast-wheels, each twelve feet in diameter, and fifteen feet in length, with the machinery and works that may be attached to or connected with same." Hurd, for himself, his heirs and assigns, covenanted that he would maintain and keep the mill-dam in good repair, would erect a flume near the east end of the dam, and keep it in repair, and that he, and his heirs and assigns, "will not draw or use any of the water from the aforesaid mill-pond when there is not sufficient head of water in said pond to carry a fulling-mill and three breast-wheels as aforesaid."

The respondent company claims under Hurd, and has his rights as reserved in this indenture. The complainant claims under How, and has the right to use one twenty-fourth part of the water privilege conveyed to said How by said Hurd, "and subject to the reservations and conditions as contained in said indenture." The complainant avers that the motive power of the respondent has heretofore been furnished by these breast-wheels, but that the respondent threatens to remove the breast-wheels, and put in place of them turbine wheels, and he prays that the respondent may be restrained from making "the aforesaid changes or alteration of its said wheels." The respondent admits that it does intend to remove its breast-wheels, and to substitute others therefor of a different kind, and claims that "it has the right to make any change in its wheels, providing that by so doing it does not use more water than is sufficient to carry a fulling-mill and three breast-wheels of the dimensions as given in said indenture," etc.

We think it clear that the indenture does not restrict Hurd, and those claiming under him, to the use of breast-wheels, but that the terms of the reservation, so far as they refer to breast-wheels, are intended to describe the quantity of water the use of which is reserved. It is not agreed as a fact, and we do not judicially know, that it is impossible to measure the quantity of water and the head of water sufficient "to carry" "three breast-wheels, each twelve feet in diameter, and fifteen feet in length, with machinery and works that may be attached or connected with the same." There may be more difficulty in measuring the quantity or head of water sufficient to "carry a fulling-mill," but all the facts are not before us which might be competent in determining the construction that should be given to this part of the reservation. On the case as it stands, we cannot attempt to regulate the use of the water by the respondent, or to determine the effect of the acts and usages of the parties upon the quantity of water each is entitled to use. We can find nothing in the facts, as expressly agreed, or as admitted by the pleadings, that prevents the respondent from substituting turbine or other wheels for breast-wheels, and this is all that we are now called upon to decide. The fact that the city of Boston took part of the waters of Sudbury river, which is a "feeder to the Concord river," is immaterial upon this question. Bill dismissed.

(142 Mass. 248)

ATTORNEY GENERAL, by Information, v. BRIGHAM, Ex'r, and others.

*(Supreme Judicial Court of Massachusetts. Middlesex. July 8, 1886.)***EXECUTORS AND ADMINISTRATORS—TRUST FUNDS—MISAPPROPRIATION BY TESTATOR—WHEN EXECUTOR IS LIABLE—STATUTE OF LIMITATIONS—PUB. ST. CH. 136, § 26.**

A. was treasurer of the M. Association, and a member of a committee appointed to take charge of the funds of the association. He deposited funds in the savings bank in his name as treasurer, but subsequently withdrew the larger part of the deposit, and appropriated it to his own use. *Held*, upon an information brought by the committee of the M. Association, after A.'s death, against his executor, more than two years after the latter's appointment and the filing of his bond, that the committee was a general creditor of A.'s estate, so far as regarded the sum drawn from the bank by A., and appropriated to his own use, and that the claim against the estate was barred by the special statute of limitations, not having been commenced within two years from the time of the executor's giving bond for the discharge of his trust.

This was an information in equity by the attorney general at the relation of a voluntary committee residing in the town of Hudson. Hearing in the supreme court before MORTON, C. J., who reported the case to the full court to make therein such decree as it should adjudge the law and facts to require. The facts appear in the opinion.

*Geo. A. King*, for plaintiff.

*J. G. Abbott and W. H. Andrews*, for defendants.

MORTON, C. J. If we assume that the funds in question were given to a public charity, and that the attorney general may, by information in equity, enforce the due application of them, we are of opinion that this information cannot be maintained against the executor or the heirs of Francis Brigham, or the town of Hudson. It does not allege any facts which would render the heirs liable under Pub. St. c. 136, § 26; and it is clear that the town of Hudson has no interest whatever in the subject-matter of the suit.

The principal question is whether the claim against Francis Brigham, which it is the object of the information to enforce, is barred by the special statute of limitations, which provides that "no executor or administrator, after having given due notice of his appointment, shall be held to answer to the suit of a creditor of the deceased, unless such suit is commenced within two years from the time of his giving bond for the discharge of his trust." The material facts in the case are as follows: In the years 1865 and 1866 a large number of individuals contributed money to create a fund for the erection of a monument to the soldiers who had died in the late war. A committee was appointed to have charge of the fund, and to erect a monument whenever it should by accumulation be sufficient therefor. Francis Brigham was one of the committee, and the treasurer thereof. He deposited the funds in the Hudson Savings Bank, in his name, as "treasurer of Monument Association." On July 11, 1877, the deposit amounted to about \$2,300, and on that day said Brigham drew from the savings bank the sum of \$1,500, and appropri-

ated it to his own use. Said Brigham died December 7, 1880. His will was duly proved. The defendant Rufus H. Brigham was duly appointed executor on November 1, 1881, and on the same day gave bond and due notice of his appointment. Upon the death of said Francis Brigham, Luman T. Jeffs, one of the relators, was appointed, in his place, treasurer of the committee or association, and on March 1, 1884, said Jeffs demanded of the said executor the payment of said sum of \$1,500 and interest, which was refused.

Upon these facts we are of opinion that the relators, so far as regards this sum of \$1,500, cannot be regarded in any other light than as general creditor of the estate of the testator. This sum did not come into the hands of the executor as a separate sum held by the deceased as a trust. The money drawn from the bank was spent by the deceased, and did not come into the hands of the executor at all. He was bound to administer the assets which came to his possession according to law, and had no right to set apart a portion of the general assets and clothe it with a trust. If any specific property or fund held by the testator in trust came into the hands of the executor, he would be required to hold it for the use of the *cestuis que trustent*. Such property would not be assets of the estate to be administered by him as executor. Of this character is the fund of about \$800, now in the savings bank. It is not a part of the assets of Francis Brigham, but belongs to the relators in trust.

Mr. Justice STORY states the rule of law with great clearness. He says:

"Executors are charged with no more in virtue of their office than the administration of the assets of the testator. If, at the time of his death, there is any specific personal property in his hands, belonging to others, which he holds in trust or otherwise, and it can be clearly traced and distinguished from the testator's own, such property, whether it be goods, securities, stocks, or other things, is not assets to be applied in payment of his debts, or to be distributed among his heirs, but is to be held by the executor as the testator himself held it. But if the testator has money or other property in his hands belonging to others, whether in trust or otherwise, and it has no earmark, and is not distinguishable from the mass of his own property, the party must come in as a general creditor, and it falls within the description of assets of the testator." *Trecothick v. Austin*, 4 Mason, 16.

This rule has been adopted and recognized in several cases by this court. *Johnson v. Ames*, 11 Pick. 173; *Harlow v. Dehon*, 111 Mass. 195; *Burgess v. Keyes*, 108 Mass. 43.

It may be that Francis Brigham, if he were living, could not avail himself of the general statutes of limitations, as a defense, because of the rule that statutes of limitations do not run in favor of a trustee until there has been an unequivocal repudiation and termination of the trust. But upon his death the relators became merely creditors of his estate, and fall within the provisions of the special statute limiting suits against executors to two years after the time of giving bond.

For these reasons the information must be dismissed as to the executor and heirs, and as to the town of Hudson; but, as all parties agree, there is no objection to the plaintiff's taking a decree that the balance



in the hands of the Hudson Savings Bank be paid to the relators, or to said Jefts, their treasurer, to be held for the purposes for which the money was contributed. Decree accordingly.

(142 Mass. 227)

FULLER, Judge, etc., v. CONNELLY and others.

(*Supreme Judicial Court of Massachusetts. Bristol. July 8, 1886.*)

1. EXECUTORS AND ADMINISTRATORS—BOND—ACTION AGAINST ESTATE—WHERE ADMINISTRATOR IS DEFAULTED—LIABILITY, WHEN ESTATE INSOLVENT.

An administrator of the estate of a deceased person, who is defaulted in an action brought by a creditor of the deceased, is not to be conclusively presumed to admit assets by failure to make a defense, where the estate afterwards proves to be insolvent, and the creditor does not gain any priority over other creditors, and does not gain the right to call upon the administrator or his sureties to pay the judgment.

SAME—OBLIGATION, EXTENT OF—WHEN BROKEN—SURETIES—DEFENSE—PREFERRED CLAIMS.

Where the principal obligation in an administration bond is that the administrator shall faithfully administer all the assets which come to his hands, it is open to the sureties, in an action upon the bond to recover on a judgment obtained against the estate of the intestate in an action in which the administrator made no defense, to defend the action on the ground that the administrator has applied all the assets of the estate to the payment of preferred charges and claims, and by showing the settlement of an account with the probate court; and, where such account has been filed, the administrator is not liable on *scire facias* upon a judgment against him in his representative capacity if he shows that since the judgment was rendered an account showing that all the assets have been exhausted in paying preferred claims and charges had been settled with the probate court.

The facts appear in the opinion.

*Braley & Swift*, for plaintiff.

*Morton & Jennings*, for defendant.

MORTON, C. J. This is a suit upon an administration bond. The only breach alleged is that the plaintiff recovered judgment against the administratrix which she refused to pay upon demand. It is agreed that all the property left by the intestate has been expended by the administratrix in the payment of the necessary expenses of the funeral, last sickness, and administration, and that the administratrix is to have the same benefit of these payments as if allowed by the probate court on an account duly filed by her since the date of the plaintiff's suit.

Our statutes provide that "if it appears, upon the settlement of an account of an executor or administrator in the probate court, that the whole estate and effects which have come to his hands have been exhausted in paying the charges of administration and debts or claims entitled by law to a preference over the common creditors of the deceased, such settlement shall be a sufficient bar to any action brought against such executor or administrator by a creditor who is not entitled to such preference, although the estate has not been represented insolvent." Pub. St. c. 136, § 5. If all the assets are exhausted in paying charges of administration and preferred claims, there is no occasion for setting in motion the machinery of insolvent proceedings, and the purpose of the

statute was to give to the settlement of an account showing this fact the same effect, so far as the rights of creditors are concerned, as a representation and adjudication of insolvency. It cannot be doubted that a settlement of such an account, or a representation of insolvency before a creditor has obtained judgment in a suit, would be a defense to the suit. *Cushing v. Field*, 9 Metc. 180.

But the plaintiff contends that such defense is not open after a judgment is obtained; that, by allowing such judgment to be rendered, the administratrix conclusively admits credits sufficient to pay the judgment, and the sureties in a suit upon the bond are bound by this admission. It may be assumed that a judgment against the administratrix is conclusive as to any defense which was or could have been pleaded in the action, except the defense of the special statute of limitations, which stands upon grounds peculiar to itself. *Robinson v. Hodge*, 117 Mass. 222, and cases cited. But the defense relied upon was not, and could not have been, pleaded in the original suit in this case. No account had been settled showing that all the assets were exhausted. The defendant does not now attempt to impeach the judgment, but he proves that since the judgment was rendered facts have occurred which show that there are no assets of the estate with which to pay it. Under our system, where a creditor sues an administrator for a debt due from the estate, the question of the amount of assets is not ordinarily involved in the suit, and it is difficult to see why an administrator who is defaulted in such a suit should be held to admit assets so as to bind himself and his sureties personally if the estate afterwards turns out to be insolvent. A creditor may sue at any time after the expiration of a year from the filing of the bond, but an administrator is not obliged, at his peril, to ascertain within the year whether the estate is solvent. The amount of the property and of the debts may both or either be thus unascertained and uncertain; and if, after the year has expired, he ascertains that the property is not sufficient to pay the debts, it is his duty to represent the estate insolvent. If, in the mean time, any creditor has obtained a judgment, he can prove the amount of it in the insolvency proceedings. By obtaining judgment he does not obtain any priority over other creditors, and we can see no good reason why he should gain the right to call upon the administrator or his sureties to pay the judgment, although the estate is insolvent. The principal obligation of the bond is that the administratrix shall faithfully administer all the assets which come to her hands, and we are of opinion that it is open to the sureties in this suit to show that she has applied all the assets to the payment of preferred charges and claims, by showing the settlement of an account under the statute. It seems to us that this conclusion is supported by reason and by the weight of the authorities.

There are two modes in which the personal liability of an administrator, upon a judgment against him in his representative capacity, can be established and enforced by the judgment creditor: by *scire facias* upon the judgment, and by a suit upon the bond.

Pub. St. c. 166, § 10, provide that, "when an execution against an

executor or administrator for a debt due from the estate of the deceased is returned unsatisfied, the creditor may, upon a suggestion of waste, sue out a *scire facias* against the executor or administrator. If the defendant does not appear and show sufficient cause to the contrary, he shall be deemed guilty of waste, and shall be personally liable for the amount thereof, where it can be ascertained; otherwise for the amount due on the original judgment, with interest from the time when it was rendered." This provision, in substance, has been in force since St. 1783, c. 22, § 9, was enacted. The policy has always been to make an executor or administrator liable *de bonis propriis* to a judgment creditor only upon the ground of waste. It may be that the burden is put upon the executor of proving that there has been no waste; but, if he can show this, it is the clear implication of the statute that he shall not be liable on *scire facias*. If, then, he can show that since the judgment was rendered there has been an adjudication of insolvency, on the settlement of an account showing that all the assets have been exhausted in paying preferred charges and claims, he shows that there has been no waste, and therefore that he is not liable for the judgment. It was held in the early and well-considered case of *Coleman v. Hall*, 12 Mass. 570, that in *scire facias* on a judgment recovered against an administrator, it was a defense to show that, after the judgment, a representation and adjudication of the insolvency of the estate was made. This was approved in *Shillaber v. Wyman*, 15 Mass. 322, and extended to a case where the estate was represented insolvent after the *scire facias* was brought. It was also approved in *Walker v. Hill*, 17 Mass. 380.

The other remedy of a judgment creditor is by a suit upon the bond, under Pub. St. c. 143, § 10. This statute merely gives the judgment creditor the right to put the bond in suit for his own benefit, but does not define his rights, or the liability of the executor or his sureties. It cannot reasonably be contended that the liability of the executor or his sureties is greater in a suit upon the bond than it is in *scire facias* upon the judgment, and therefore the cases we have referred to are applicable to the case at bar, and show that the defense is maintained.

The case of *Newcomb v. Goss*, 1 Metc. 333, is opposed to this view. It was there held that a representation of insolvency, made after the suit upon the bond was commenced, was not a defense, and that the administrator and his sureties were personally liable for the full amount of the judgment, without regard to the question whether there was in fact any waste. It is noticeable that the cases which have been cited were not referred to by the court or the counsel in the case of *Newcomb v. Goss*, but it is irreconcilable with these earlier decisions, which seem to us to be founded upon better reasons.

We must treat the case at bar as if the administratrix had duly settled an account in the probate court, since this suit was commenced, showing that she had applied all the assets of the estate to the payment of charges of administration, funeral expenses, and preferred claims, and we are of opinion that upon principle, and according to the decided weight of the authorities, such a settlement shows that there has been no waste; that

the administratrix would not be personally liable on a *scire facias* upon the judgment; and that she and her sureties are not liable on the bond in suit.

Judgment for defendants.

(142 Mass. 301)

COLLINS, *Prochein Ami*, v. SOUTH BOSTON H. R. Co.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 8, 1886.*)

NEGLIGENCE—QUESTION FOR JURY—INFANT—CUSTODIAN OF—NEGLIGENCE OF PARENTS.

In an action of tort for personal injuries to a child of four years of age, who went upon the street with his sister, aged eleven years, and was run over by a street car, there was evidence that the children were crossing the street, and were upon the tracks of the street-car company, when the sister, upon the near approach of a car, left her brother and ran across the street, and that the child, in attempting to follow, was knocked down and run over; that the driver of the car was looking in a direction opposite to that in which the car was going; and that the sister who had charge of the plaintiff was a girl of ordinary intelligence. *Held*, that there was evidence for the jury of negligence on the part of the driver of the car, and that it could not be said, as a matter of law, that there was no evidence for the jury that the girl who had charge of the plaintiff was exercising the care over him which might reasonably be expected of a child of her age, although the weight of evidence might be strongly against it; nor that the parents of the child were negligent in permitting him to go upon the streets with his sister, or that she had not sufficient intelligence or discretion to be intrusted with the care of him.

This was an action of tort for personal injuries, brought by Patrick Collins, the father and next friend of Daniel Edward Collins, against the South Boston Railroad Company, a corporation operating lines of street railway in Boston. The plaintiff, a boy four years and twenty-three days old, lived with his parents, and on the afternoon of July 29, 1882, the date of the accident, left home in company with his sister Nellie, a girl nearly eleven years of age, to go to a store near by, and while on their way home, in crossing Broadway, the plaintiff was knocked or fell down, and was run over on the inward track of the defendant corporation, on Broadway, by one of the defendant's cars, driven and controlled by its agents, sustaining injuries which made it necessary to amputate one arm near the shoulder, and the great toe of one foot. At the trial in the superior court before GARDNER, J., there was evidence, on the part of the plaintiff, that the child Nellie was in the habit of taking care of the children, including the plaintiff, and was the only one in the family to do it; that she had often taken them across Broadway; that she had attended the public schools, always passed class examinations, and went from one room to another when the other scholars did. There was also other evidence tending to show that the girl was possessed of the degree of intelligence usually found in girls of her age. One McDermott testified that he was on Broadway at the time of the accident, and saw the driver of the car leaning on the dasher in a listless attitude, looking down the street; that some one shouted, and then the driver put down the brakes, but the plaintiff was knocked down and dragged some distance by the car. One McCue, a witness for the plaintiff, testified that he saw the accident; that

he saw plaintiff and his sister about to go onto the street crossing, plaintiff having hold of his sister's hand; that the two children walked together before reaching the car tracks, but when they reached the crossing the car was coming down the street at a trot, and the girl, being frightened and evidently afraid that the pole would strike her, let go plaintiff's hand and ran off. The car or the horses then struck plaintiff, knocking him down, and dragging him some distance. When the girl let go of plaintiff's hand, the pole was almost right up side of her. Other witnesses gave testimony regarding the accident substantially like that of the previous witnesses. Nellie M. Collins, sister of the plaintiff, testified that she took the best of care of the plaintiff on the day of the accident; that, when about to go over the crossing, her attention was attracted to a band car down the street, and that she did not see the car which struck plaintiff until it was very near her; that she did not hear anybody shout; that she left her brother, and went over the crossing; that she left her brother because she thought she was going to be knocked down herself. She further testified:

"I left him and ran across. I did not turn back. After I got across I turned around to catch him, [plaintiff,] and he was under the car, and I ran up and told my mother. The horse's heads, when I let go of him, were pretty close to us. We were then between the four rails. I do not know who it was I heard shout, or the direction it came from. I let go of Eddie just as soon as I heard it. I was not playing with Eddie, or fooling or playing with the other children, running around, or doing anything of that kind. I was on the cross-walk when I let go of Eddie. I cannot tell whether Eddie was knocked down by the horses or by the car."

On cross-examination she testified that she was dragging plaintiff along, and stopped between the tracks; that she thought he could get across before the car came; that plaintiff pulled away from her, and she ran away and left him between the tracks. Counsel for defendant then asked, "Now, Nellie, let me ask you whether it was not this way: Didn't you take your little brother right along in front of the horses, and then, when you found the horses right on you, drop him?" to which witness answered in the affirmative. There was other evidence by witness tending to show negligence on her part in caring for her brother. Another witness for plaintiff testified that the plaintiff and his sister were between the tracks, when the girl left her brother, on the near approach of the car, and ran across; that plaintiff started to follow, and got nearly across, when he was knocked down and run over; that the cars were going at a trot, about as fast as they usually went on that thoroughfare; and that the driver did not put on the brakes until after witness heard some one shout. A witness who was a school-teacher testified that the girl Nellie was a child of ordinary intelligence; that she had found her bright and quick about doing errands. There was evidence for the defendant tending to show negligence upon the part of the plaintiff, and on the part of the custodian of the plaintiff, the girl Nellie. The defendant asked the court to rule that on all the evidence the plaintiff was not entitled to recover, but the court declined so to rule, and submitted the case to the

jury, which found for the plaintiff, and, at the request of the defendant, the case was reported to the full court.

*R. D. Smith* and *Paul West*, for defendant.

*H. E. Bolles* and *George E. Sawyer*, for plaintiff.

FIELD, J. We cannot say, as matter of law, that the parents of the plaintiff were negligent in permitting him to go upon the streets with his sister, who was then nearly 11 years old, or that the sister had not sufficient intelligence or discretion to be intrusted with the care of him. *Mulligan v. Curtis*, 100 Mass. 572; *Lynch v. Smith*, 104 Mass. 52; *O'Connor v. Boston & L. R. Co.*, 135 Mass. 352. Neither can we say that there was not evidence for the jury of negligence on the part of the driver of the car. *Com. v. Metropolitan R. Co.*, 107 Mass. 236. The driver of a horse car in a street where there are children may well be required to manage his car with reference to all the risks that may reasonably be expected; and among these may be reckoned risks arising from the heedlessness and indiscretion of children. All the evidence in favor of the defendant may be disregarded in considering the questions of law before us, and the evidence of *Nellie Collins* is not necessarily to be taken as true against the plaintiff if there is other evidence in his favor which contradicts it.

It must be taken, on any view of the case, that the plaintiff ran across the track in front of the horses, and was either hit by the off fore leg or off hind leg of the off horse, or by the right-hand side of the dasher of the car, or of the body of the car, and thus thrown down and under the car, or that he fell upon or near the right-hand rail, and was drawn under the car. His sister left him just before they reached the track on which the car was crossing, and when the horses were dangerously near to them, and either ran across in front of the horses, or ran back, leaving him to run across alone, while she afterwards followed him, going either in front or behind the car. It was said in *Lynch v. Smith*, *ubi supra*, page 57, that "it does not necessarily follow, because a parent negligently suffers a child of tender age to cross a street, that therefore the child cannot recover. If the child, without being able to exercise any judgment in regard to the matter, yet does no act which prudence would forbid, and omits no act that prudence would dictate, there has been no negligence which was directly contributory to the injury." But if the child does act in a manner which would be careless in a prudent person of mature years and ordinary intelligence, and this carelessness contributes to the injury, what is the test by which the conduct of a child is to be tried in determining whether it has exercised due care?

Courts have held that up to a certain age, not very accurately defined, it must be conclusively presumed that a child has not sufficient intelligence and discretion to exercise due care under the circumstances and in the place in which he is found, and that it is negligence on the part of the persons who have charge of him to permit him to go there unattended. If such a child has not acted as reasonable care would dictate,

judged by the ordinary standards for adult persons, and thus has contributed to the injury, and if the persons having the charge of such a child have negligently permitted him to go there alone, both these facts constitute negligence which will prevent him from maintaining an action. There is also an age within which courts have held that one child is conclusively presumed not to have sufficient intelligence and discretion to take charge of another who is younger, and that it is negligence on the part of the parents or guardians of such children to permit them to go together to places of danger; and if they do, and the children do not use reasonable care, and thus have contributed to the injury, they cannot recover. Beyond these ages, courts have left it to the jury to determine whether the parents or guardians were negligent in permitting a child to go alone to a place of danger, or in permitting him to go there in charge of another child; and, if it was found that they were not negligent, then it has been left to the jury to determine whether the child or children reasonably exercised that degree of care of which they were capable, and it has been said that it is only necessary for them "to exercise such capacity as they have."

The care which an adult person is bound to exercise is said to be the care which a person of ordinary intelligence and prudence would exercise, and is not determined by the amount which he actually possesses, unless he is *non compos mentis*; and as the law, as far as is practicable, endeavors to establish general rules of conduct, it is probable that the more accurate statement of the law for children is the one usually made; namely, that a child is to be held to the exercise of that degree of care which may reasonably be expected of children of his age, or which children of his age ordinarily exercise. The court, with more or less hesitation, in what it deems plain cases, according to common experience, has declared that the acts or conduct of an adult, under the circumstances, constitute, as matter of law, contributory negligence; and the question arises whether the court can make the same declaration concerning the acts or conduct of a child of tender age, who yet is so old that they cannot say as matter of law that he has not sufficient discretion to be permitted to act on his own judgment. We think that it has been in effect decided that the same general principles govern courts in either case, although the degrees of care required are different. In *Mattey v. Whittier Mach. Co.*, 140 Mass. 337, S. C. 4 N. E. Rep. 575, the plaintiff was six years and seven months old at the time of the accident, and the opinion implies that there might be cases in which the court would hold as matter of law that a girl of that age was guilty of contributory negligence. See *O'Connor v. Boston & L. R. Co.*, 135 Mass. 352. In *Messenger v. Dennie*, 137 Mass. 197, S. C. 141 Mass. 335, and 5 N. E. Rep. 283, the plaintiff was eight years and nine months old, and the court held that there was negligence on his part, and that he could not recover; saying that "his injury was the natural consequence of his careless act."

Take the case of boys in the street suddenly and intentionally running across in front of trotting horses for the purpose of showing who dares

run the nearest or take the most risk. Suppose the driver's testimony is true, that the plaintiff, after having crossed safely, turned round and ran under the side of the car, would not that be contributory negligence if the child were old enough to act alone? In instructing juries that the question for them to decide is whether the plaintiff or the plaintiff's custodian has exercised that degree of care which might reasonably be expected of a child of his age, or which is ordinarily shown by children of the same age, is it intended that they may make allowance for any spirit of recklessness or of mischief which they may think is commonly found in such children, or must they consider only their intelligence or ability to understand the danger, and the consequences which may reasonably be expected to follow from their conduct, and their capacity for self-control? It would seem that if children unreasonably, intelligently, and intentionally run into danger, they should take the risks, and that children, as well as adults, should use the prudence and discretion which persons of their years ordinarily have, and that they cannot be permitted with impunity to indulge in conduct which they know, or ought to know, to be careless, because children are often reckless and mischievous. If all this be true, however,—and certainly it is as favorable a view of the law for the defendant as our decisions admit of,—and if we assume that the plaintiff was too young to go upon the street alone, and that his conduct was such that if he had been alone he could not recover, yet we cannot say, as matter of law, that there was no evidence for the jury that his sister, who had the charge of him, was exercising the care over her brother which might reasonably be expected of a child of her age, although the weight of evidence is strongly against it. The jury must have found that she did not willfully and deliberately expose her brother to the risk, but only that when the danger became imminent she did not act with that coolness, prudence, and self-control which might reasonably have been expected of an older person. Her conduct up to the time the danger became imminent, the rate of speed of the car, its distance off when she first saw it, and the other persons and objects in the street, which might have influenced her conduct, are differently described by different witnesses. There is the same difficulty in this case which the court found in *Mattey v. Whittier Mach. Co.*, *ubi supra*.

All the facts which ought to be considered are not made sufficiently certain by the testimony to enable us to decide that there was any error of law in submitting the case to the jury. By the terms of the report, the verdict is to stand.

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(142 Mass. 206)

WEIL v. RAYMOND and others.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 1, 1896.*)

1. EQUITY—ANSWER—ST. MASS. 1883, CH. 228—DISCOVERY—INTERROGATORIES.

The answer to a bill in equity filed since the passage of St. Mass. 1883, c. 228, praying for relief, shall not be sworn to, and the plaintiff is entitled to discovery from defendant only upon interrogatories, in the same manner as in an action at law.



**2. SAME—CREDITORS' BILL—MARRIED WOMAN—CERTIFICATE—BUSINESS ON SEPARATE ACCOUNT—ACTION.**

Where A. bought goods of C. for the firm of A. & Co., representing himself to be the sole proprietor, and the business in fact was owned by B., A.'s wife, who had filed a certificate in the statutory form in the office of the city clerk announcing her intention to carry on business on her separate account in the name of A. & Co., *held*, that C., who had so sold the goods, had a complete and adequate remedy at law against A. or B., and could not maintain a bill in equity to reach the goods which B. had transferred to D., her creditor.

**3. SAME—LEASEHOLD ESTATE A LEGAL ESTATE—INTEREST OF LESSEE—EQUITY JURISDICTION.**

A leasehold estate which can be taken by a creditor of the owner of the lease in satisfaction of a debt is a legal estate which can be attached in an action at law against the latter; and, if judgment is obtained, execution may be levied upon it; and, where the terms of a lease provide that the interest of the lessee shall cease if it shall be attached or taken on execution, this is effect of the contract, and is not a ground of equity jurisdiction.

**4. SAME—SALE—DEBT FOR MERCHANDISE—COURT OF EQUITY—POWERS—JUDGMENT AT COMMON LAW—EXECUTION.**

In a suit to recover a debt for merchandise sold, it is not within the power of a court of equity to subject property, on which an execution at common law cannot be levied, to the satisfaction of a judgment obtained at law, until such debt is reduced to a judgment.

**5. HUSBAND AND WIFE—MARRIED WOMAN—BUSINESS ON SEPARATE ACCOUNT—FIRM NAME.**

A married woman may carry on business on her separate account under a firm name which contains the name of her husband, and under which he had previously done business.

**6. PRINCIPAL AND AGENT—UNDISCLOSED PRINCIPAL—LIABILITY—SALE—ACTION.**

Where C. sold merchandise to A., under the name of A. & Co., he can maintain an action against A. for the price; and if, in buying the merchandise, A. acted as agent of B., his wife, an undisclosed principal, C. can also sue her, or he may proceed against each separately, though not to judgment against both.

**7. EQUITY—DETERMINING OWNERSHIP OF CHATTELS.**

Where one is ignorant as to who owns chattels which he wishes to attach, he cannot maintain a bill in equity to determine the ownership of them.

**8. ATTACHMENT—ATTACHMENT BY CREDITOR OF PLEDGEOR OR MORTGAGOR.**

Personal property which has been pledged or mortgaged, where the general property is in the pledgeor or mortgagor, may be attached in an action at law by a creditor of the latter.

**9. HUSBAND AND WIFE—CERTIFICATE OF BUSINESS—EFFECT OF—PROOF.**

Where A. was carrying on business under the style of A. & Co., and the business was transferred to B., A.'s wife, who filed a certificate announcing her intention to carry on business on her separate account under the firm name of A. & Co., the filing of the certificate does not prevent one who has sold goods to A., under the belief, induced by A.'s statements, that the latter was still proprietor of the business, from proving that the change in the form of doing business is a pretense, and that A. is in fact carrying on the business.

**10. SAME—SALE—SUIT AGAINST HUSBAND AND WIFE—PRINCIPAL DEFENDANTS.**

Where C. sold goods to A., believing, in consequence of A.'s statements, that A. was sole owner of the business of A. & Co., and it proved afterwards that A.'s wife was the owner of the business, *held*, that in prosecuting a suit C. must elect whether he would take A. or his wife as his debtor, and that he could not make both principal defendants in one suit, whether he charges them conjunctively or alternatively.

Bill in equity by Henry J. Weil against George J. Raymond, Hattie D. Raymond, his wife, Horace Partridge, Benjamin F. Hunt, Frank P. Partridge, and Adolph Erlebach; said Partridge, Hunt, Partridge, and Erlebach being copartners under the firm name of Horace Partridge &

Co. The bill alleged that the plaintiff for a long time theretofore, and before December 4, 1883, sold merchandise and loaned money from time to time to said George J. Raymond, who gave plaintiff to understand that he (Raymond) was carrying on business in Boston, on his sole account, under the name and style of George J. Raymond & Co., at No. 5 Tremont row, in said Boston, and that on September 15, 1884, said Raymond was indebted to plaintiff to a large amount; that on said September 15th all the stock of goods in said store No. 5 Tremont row was removed to a certain store numbered 50, on Winter street, in said Boston, and on September 23d the plaintiff, in a writ sued out by him against said George J. Raymond for the collection of the amount due him, put a keeper in said store No. 50 Winter street, in process of attachment of the goods therein contained to satisfy any judgment which plaintiff might recover in said suit, and that immediately thereafterwards, and on the same day, this plaintiff was sued in an action denominated contract or tort, by said Hattie D. Raymond, and a keeper was placed in plaintiff's store, in said suit, at the instigation, as the plaintiff was informed and believes, of George J. Raymond, and also on the same day plaintiff was served with notice by the said firm of Horace Partridge & Co. to withdraw said keeper from said store No. 50 Winter street, said firm claiming to be absolute owners of the contents of said store; that on said December 4, 1883, said Hattie D. Raymond filed, or caused to be filed, in the city clerk's office of said Boston, a certificate to the effect that she intended to carry on business on her separate account at No. 5 Tremont row, in said Boston, under the firm name and style of George J. Raymond & Co., but plaintiff was not informed of the fact of the filing of any such certificate as aforesaid until after the bringing of said suit by him against said Raymond as aforesaid, and that he was ignorant of any circumstances of the making and filing of said certificate, and of any facts whereby the business at that time carried on at No. 5 Tremont row, and the goods then and thereafter therein contained and removed to No. 50 Winter street, as aforesaid, were transferred to said Hattie D. Raymond.

The bill then further alleged that the filing of the certificate was procured to be done by said George J. Raymond, was a fraudulent evasion of the statute, and intended to enable said George J. Raymond to substitute a liability upon the part of his wife, instead of upon himself, and with the intent, on said George J. Raymond's part, of effecting a fraudulent conveyance of all the property and stock of goods pertaining to the business in respect to which said certificate purported to be filed. The bill further alleged that plaintiff was ignorant as to the nature of the title, if any, under which said Horace Partridge & Co. claimed to own the goods in said store No. 50 Winter street, but believed that all title, if any, which said Partridge & Co. had in or to the greater part of said goods in said store was conditional, and not absolute, and derived and received by said firm from said Hattie D. Raymond acting under color and in pursuance of a title and authority which she pretended was vested in her by the filing of said certificate, and that said Partridge & Co. were

informed of these facts; that said George J. Raymond was the owner of a lease of certain buildings, Nos. 5 to 8 Tremont row, for a term of 10 years, which lease was unassignable by the lessee without the written consent of said lessor, and was terminable at the election of said lessor if said lessee should be declared insolvent, or an assignment of his property should be made for the benefit of his creditors; that this leasehold interest was valuable, but the net income therefrom could only be come at, in satisfaction of the indebtedness of said Raymond, by a receiver thereof.

The bill then set forth that whereas, said George J. Raymond and his wife could not do business as copartners, and could not be held jointly liable, if said certificate was filed, or procured to be filed, for the fraudulent purposes named, and said Hattie D. Raymond consciously participated therein, the plaintiff had a right to hold either or both of said parties, because of said fraud, primarily liable to him on the indebtedness incurred in the name of George J. Raymond & Co.; and that should such participation appear, though said Horace Partridge & Co. be innocent of all knowledge of or participation in said fraudulent purposes, all goods, effects, or credits which they may have in their possession as aforesaid of said Hattie D. Raymond, as well as of said George J. Raymond, might be applied in satisfaction of this plaintiff's said claim; and if said Horace Partridge & Co., in acquiring such goods, effects, or credits, consciously aided or participated in said fraudulent proceedings or purposes of said George J. Raymond, they are chargeable for the payment of this complainant's said claim in full value thereof, whether required or received by them from said George J. and Hattie D. Raymond, or either of them, and whether they have paid for or on account of the same or not; and that if said Hattie D. Raymond was innocent of all knowledge of or participation in said fraudulent purposes, but received any goods or other property which had been sold, loaned, or intrusted to her husband by plaintiff or other persons in ignorance of her connection with said business as aforesaid, then no title thereto passed to her, and the proceeds thereof in her hands, or any indebtedness on the part of said Partridge & Co. to her for the same, or a proportional part of said proceeds or of said indebtedness, if such goods or loans were mingled with other property to which she may have had a good title, to be herein ascertained, are all applicable to and chargeable for the payment of said plaintiff's claim.

The prayer of the bill was for an account of the transactions between the said George J. Raymond and Hattie D. Raymond, and either of them, with said Partridge & Co., whereby the nature and liability on account thereof might be ascertained, and for a receiver to take charge of all and singular the said leasehold estate of said George J. Raymond, to collect the rents and profits thereof and out of the same, to pay the charges thereof, and the remaining net proceeds into court, to be applied in satisfaction of any judgment which this complainant may obtain; that said Partridge & Co. be enjoined from disposing of any goods, effects, or credits in their hands belonging to said George J. Raymond and Hat-

tie D. Raymond, or either of them, and the said George J. Raymond from making any assignments of the rents or income to be derived from the subletting of said leasehold estate, and said Hattie D. Raymond from making any disposition of any assets in her possession or control acquired in the name of George J. Raymond & Co. The defendants filed demurrers to the bill, which were sustained, and the plaintiff appealed.

*John C. Coombs* and *Frank Burke*, for plaintiff.

*R. Lund* and *W. C. Cogswell*, for defendants.

FIELD, J. As the bill was filed since the passage of St. 1883, c. 223, and prays for relief, the answer, by the tenth section of that statute, "shall not be sworn to," and the plaintiff is entitled to discovery from the defendants only upon interrogatories, in the same manner as in an action at law. Pub. St. c. 167, §§ 49-60; Id. c. 151, § 8.

If George J. Raymond has any interest in the leasehold estate which can be taken by a creditor in satisfaction of his debt, it is a legal estate, which can be attached in an action at law against him, and, if judgment is obtained, execution may be levied upon it. Pub. St. c. 171, § 51; Id. c. 161, § 61 *et seq.*; *McNeil v. Ames*, 120 Mass. 481. As was said in *Schlesinger v. Sherman*, 127 Mass. 206: This is the "entire remedy which the legislature intended to give for applying to the payment of a debt any title in real estate, or the rents and profits thereof, which is of such a nature as to be capable of being taken on execution at law." The bill does not set out a copy of the lease or its terms further than to state that it "is unassignable by the lessee without the written consent of the said lessor, and is terminable, at the election of the said lessor, if said lessee shall be declared insolvent, or any assignment of his property shall be made for the benefit of his creditors." An assignment by operation of law is not a breach of a covenant not to assign, (*Smith v. Putnam*, 3 Pick. 220;) and if, on inspecting a copy of the lease, it should appear that by its terms the interest of the lessee ceases if it were attached or taken on execution, this is the effect of the contract, and is not a ground for equity jurisdiction. There is indeed no averment that George J. Raymond has sublet the property, or is in the receipt of any rent therefrom.

The plaintiff sues to recover a debt for merchandise sold, and this debt has not been reduced to a judgment, and therefore the case is not within the general equity powers of the court to subject property, on which an execution at common law cannot be levied, to the satisfaction of a judgment obtained at law. *Carver v. Peck*, 131 Mass. 291.

The chattels which the plaintiff seeks to have applied to the payment of his debt are property which, from its nature, can be come at to be attached and taken on execution in a suit at law, if the property of the debtor and the case stated is not within Pub. St. c. 151, § 1, cl. 11. The case discloses no equitable interest of either George J. Raymond or his wife in the chattels which cannot be attached at law.

If the plaintiff sold the merchandise to George J. Raymond under the name of George J. Raymond & Co., he can sue him therefor. If, in

buying the property, George J. Raymond acted as the agent of his wife, an undisclosed principal, the plaintiff can also sue her. He cannot sue both jointly; but it is said that he can proceed against each separately, although not to judgment against both; for a judgment obtained against one, although unsatisfied, is a bar to an action against the other. *Raymond v. Crown & Eagle Mills*, 2 Metc. 319; *Kingsley v. Davis*, 104 Mass. 178; *Curtis v. Williamson*, L. R. 10 Q. B. 57; *Priestly v. Fernie*, 3 Hurl. & C. 977.

The plaintiff's difficulty is not so much in determining whom to sue as determining beforehand who owns the chattels which he wishes to attach in the suit; but the statutes have not made this a ground of jurisdiction in equity. If the chattels have been mortgaged or pledged to Partridge & Co. by the plaintiff's debtor, or if Partridge & Co. have a lien upon them, and the general property is in the plaintiff's debtor, they can be attached in an action at law. Pub. St. c. 161, § 74 *et seq.*

The plaintiff contends that the certificate of Hattie D. Raymond that she proposes to do business on her separate account, under the style of George J. Raymond & Co., was filed by her in fraud of the statute and of his rights. The legislature has not forbidden a married woman from doing business under a firm name which contains the name of her husband, and under which he had previously done business. If the certificate is not such as Pub. St. c. 147, § 11, requires, the effect is that the property employed in the business is liable to be attached as the property of the husband, and he is liable upon all contracts lawfully made in the prosecution of the business. The deceit practiced under such a certificate is not greater than if any man or unmarried woman had taken the business of George J. Raymond, carried on by him under the name of George J. Raymond & Co., and had continued to carry on the same kind of business, under the same name, at the same place, with George J. Raymond as agent. If George J. Raymond has attempted to convey his property directly to his wife, the conveyance is void, and it can still be attached as his property. If the conveyance has been made through a third person, whether it is fraudulent and void as against his creditors is to be determined upon much the same principles as if the conveyance had been made to any other person. If the change in the form of doing business is a pretense, and George J. Raymond is in fact carrying on the business, the filing of the certificate does not prevent the plaintiff from proving what the fact really is. It is only on the ground that the property of the plaintiff's debtor has been conveyed in fraud of creditors that the plaintiff can bring his case within Pub. St. c. 151, § 3. This section gives jurisdiction in equity, in the cases specified in it, concurrently with that of courts of law. *Powers v. Raymond*, 137 Mass. 483.

The plaintiff, before filing this bill, brought an action at law in the courts of this commonwealth against George J. Raymond for the same cause of action as that alleged against him in this bill, and this action apparently is now pending, and it may be that the pendency of this action would be a good ground for dismissing the bill as to him. See *Buffum v. Tilton*, 17 Pick. 510. If the bill had been brought against  
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Hattie D. Raymond as the sole debtor of the plaintiff, with an allegation that she had transferred her property to Partridge & Co. to defraud her creditors, it may be that it would state a case within Pub. St. c. 151, § 3, and that the pendency of the action against George J. Raymond would not be a bar to the suit against her as the undisclosed principal for whom he contracted the debt. But the plaintiff cannot, upon the facts shown, maintain a suit against both jointly as his debtors either at law or equity. In bringing or in prosecuting a suit he must elect whether he will take George J. Raymond or his wife as his debtor, and he cannot make both principal defendants in one suit, whether he charges them conjunctively or alternatively. The uncertainty, if there be any, as to the person liable for the indebtedness, and the risk attending an attachment and levy of execution upon the property if the plaintiff obtain judgment against either George J. Raymond or his wife, does not give the court jurisdiction in equity. But the bill does not distinctly allege that the property has been conveyed to Partridge & Co., by either George J. Raymond or his wife, in fraud of the creditors of either. Indeed, the bill does not distinctly and unequivocally allege that the property has been conveyed by George J. Raymond to his wife with intent to defeat, delay, or defraud his creditors. See *Clark v. Jones*, 5 Allen, 380.

Decree affirmed.

(142 Mass. 296)

· WRIGHT v. BOSTON & A. R. Co.

(*Supreme Judicial Court of Massachusetts. Middlesex. July 8, 1886.*)

1. NEGLIGENCE—RAILROAD—RIGHT OF WAY OVER TRACKS—PERSONAL INJURIES.

In an action of tort against a railroad company for injuries sustained by plaintiff, who went upon the tracks of the defendant from a path leading to said tracks, which was not shown to be a defined pathway extending from one public road or place to another; which had not been used by the public for twenty years, was not a right of way appurtenant to the estate occupied by the plaintiff, and was not laid out by the railroad company, or used for its convenience; *held*, that the plaintiff was a trespasser,—the facts stated not amounting to an invitation, express or implied, by the railroad company to the public to use the path for the purpose of crossing its tracks; and that she could not maintain an action against the company for injuries sustained in consequence of being hit by a train of freight cars while crossing said tracks, in the absence of evidence that there was reckless or willful misconduct on the part of the defendant.

2. WAY—PRIVATE RIGHT OF WAY—RAILROAD TRACKS.

The fact that a person living on a street has acquired a private right of way from said street over a railroad cannot avail another person, living on the same street, who desires to make use of the way.

3. NEGLIGENCE—INVITATION TO CROSS TRACKS.

The fact that a railroad company permits a path leading from a public street to its tracks to remain open, over which persons walk from the street to the tracks, and then go in various directions, the path not being a defined pathway extending from one public street or place to another, does not constitute an invitation, express or implied, to the public to use the path for the purpose of crossing its tracks, and the company is not liable for injuries to persons so using the path, if they are afterwards struck by cars upon the track, in the absence of recklessness or willful misconduct on the part of the company.

Action of tort for personal injuries. Trial in the superior court, before BRIGHAM, C. J., where it appeared that on October 13, 1882, plain-

tiff, being then between six and seven years of age, while going to school and crossing the track of defendant's railroad in Natick, received certain injuries for which she sought to recover damages; that at the time of said injury plaintiff had entered upon said track from a path by which she had come from her father's house on the north side of said track, and was intending to cross the northerly part of said track, a switch track, then to walk to the westward, between said switch track and the north main track, where the same was planked between the rails, to a path on the south side by the end of the depot platform, and leading diagonally over open ground to Washington street leading to a school-house; that plaintiff had been accustomed, in summer and winter, to go from her father's house to school as she was going at the time of her said injury, and over the same places, in a reverse direction, in going from school to her father's house; that at the time of her injury plaintiff and her sister were going along said path, and had entered on the north side of the track, when they were struck by defendant's freight cars, moving on said track, the approach of which plaintiff did not see, hear, or understand. Plaintiff was injured, and her sister instantly killed. Said path from said track easterly for about half the distance to North street had existed and been used for 25 years, and the residue of said path had existed and been used from 15 to 16 years, and was indicated on a plan by one Wright, a civil engineer, who in April, 1884, had made a survey of the track, and of land adjacent thereto; that said path had been used and traveled by persons in going to and from a factory and residences on the north side of said track, and by children in going to and from school over and across said railroad track, on ordinary occasions to the number of as many as 100 persons per day, and in much larger numbers at other times; that persons used the path for the purpose of going in different directions across the tracks according to their convenience; that said path was from three to five feet in width, well beaten, hard, worn, and smooth, declining about two feet in six feet as it approached the track; that on both sides of said path was a ridge from two to three feet in height, caused by dirt thrown up in clearing ditches on the side of said track; that there was a clear passage by said path, through said ridge, to said track; that there was no fence or obstruction to passing across and over said track to and from said path; that no objection had been made by the officers or servants of defendant to the crossing of said track to and from said path, or public notices put up forbidding the same; that said path was not used by defendant's servants, or for the convenience of defendant. Upon the facts the court ruled that the action could not be maintained, and directed a verdict for the defendant. The jury found for the defendant, and, at the request of the plaintiff, the case was reported for the consideration of the full court.

*B. Wadleigh and C. Q. Tirrell*, for plaintiff.

*A. L. Soule*, for defendant.

FIELD, J. We assume, in favor of the plaintiff, that a private or public right of way across a railroad may be acquired by prescription since

the passage of Pub. St. c. 112, § 195, and the acts of the legislature of which this section is a re-enactment. St. 1874, c. 372, § 148; Gen. St. c. 63, § 102; St. 1853, c. 414, § 4. See *Gay v. Boston & A. R. Co.*, 141 Mass. 407; S. C. 6 N. E. Rep. 236. We assume, too, that, if the plaintiff was invited to cross the track where she crossed it, she cannot be said to have been upon the track without right, within the meaning of St. 1874, c. 372, § 148, and that there was evidence for the jury that the plaintiff was in the exercise of due care.

It is doubtful from the report whether the path had ever been used all the way to North street or North avenue from the railroad tracks; but, if it had been, the north-easterly portion had been used only for 15 or 16 years. There was no evidence of any defined pathway extending from one public road or place to another, which had been used by the public generally for 20 years. The plaintiff was going from her father's house, on the North-avenue side of the tracks, to a school-house on the south side, as she had been accustomed to do, but there is no evidence of a public right of way over the railroad, appurtenant to the estate, occupied by the plaintiff's father, or that the owners and occupants of that estate had used the particular way over which the plaintiff was going, continuously, adversely, and as of right, for 20 years. If any other persons residing on the north side of the railroad had acquired a private right of way over the railroad, that cannot avail the plaintiff. The evidence was insufficient to warrant the jury in finding that there was a public way, or a private way, which the plaintiff had a right to use.

The plaintiff contends that the evidence showed that the defendant held out to the public an inducement and invitation to use that path by the peculiar construction and adaptation of the premises, as well as by the acts or declarations of its agents. There was no express invitation by the defendant or its agents. The plaintiff was not using the way for the purpose of transacting any business with the defendant or its agents, or of crossing upon the property of the defendant for the purpose of doing anything except to cross its road-bed to go to school. The way across the switch tracks was not planked or prepared for use in any manner except that a clear passage had been left through the ridge formed by throwing up dirt from the ditches on the side of the track. A mere permission or license from the defendant to cross the track is not an invitation. Whether the construction of a crossing over a railroad is such as of itself to amount to an invitation, or evidence for the jury of an invitation, by the railroad company to the public to use the crossing for the convenience of the public, must be determined by considering whether the construction was such as reasonably to induce the public to believe that the crossing was a public way. *Murphy v. Boston & A. R. Co.*, 133 Mass. 121. The want of a planking over the switch track, the absence of public ways or public places on each side of the track with which the crossing was immediately connected, the different directions taken by persons using the path, and the irregular course of the path used by the plaintiff after it crossed the switch track from the north, all tend to show that it was not prepared by the defendant cor-



poration with the intention that it should be used as a public way. As the plaintiff was on the track without right, and as there is no evidence of willful or reckless misconduct on the part of the defendant or its agents, the court properly ruled that the action could not be maintained. *Johnson v. Boston & M. R. R.*, 125 Mass. 75; *Wright v. Boston & M. R. R.*, 129 Mass. 440; *Morissey v. Eastern R. Co.*, 126 Mass. 377.

Judgment on the verdict.

(142 Mass. 342)

CUMNOCK v. INSTITUTION FOR SAVINGS IN NEWBURYPORT.

(*Supreme Judicial Court of Massachusetts.* Suffolk. July 8, 1886.)

1. TROVER AND CONVERSION—PLEDGE—TENDER OF PAYMENT.

A tender of payment of a debt is necessary to enable a pledgeor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged.

2. SAME—VALUE OF STOCK—COLLATERAL SECURITY—DECLARATION.

In an action of trover to recover the value of certain stock deposited with the defendant as collateral security, a declaration which does not allege a conversion of the stock by the defendant is bad.

Action of contract, with count in tort. The first count of the plaintiff's declaration alleged that plaintiff was executor of the will of Charles W. Freeland, late of Boston, deceased; that on June 15, 1883, said Freeland borrowed of said defendant corporation \$24,000, and pledged and intrusted to it, as collateral security for his note for said amount, 14 shares of the capital stock of the Amoskeag Manufacturing Company, a corporation organized under the laws of the state of New Hampshire; that said note matured on July 15, 1884; that before the maturity of said note the plaintiff had effected a valid contract for the sale of said stock at \$2,000 per share, payable upon the delivery and assignment by him of the certificates of said stock, on or after the maturity of said note, and was ready and willing, on maturity of said note, to pay the same to the defendant, with interest; and that he offered so to do, and demanded of said defendant corporation the said certificates, but that said defendant corporation wrongfully refused and declined to redeliver said certificates of stock, and continued so to refuse for a long space of time, in consequence of which said plaintiff lost his said sale; that subsequently, after a long lapse of time, to-wit, 15 months, said certificates were by said defendant returned to said plaintiff, and said debt to said defendant corporation by him paid and discharged, but that during the said wrongful detention by said defendant corporation of said certificates the market for said stock had declined; that the plaintiff, as executor as aforesaid, was, by reason of said wrongful detention and refusal to deliver said certificates on the part of said defendant, unable to obtain the sum of \$2,000 per share for said 14 shares of stock, but was obliged to sell and did sell the same for the price of \$1,950 per share; wherefore the plaintiff says the defendant owes him the sum of \$700, and interest thereon from October 24, 1885.

The second count, after alleging the delivery of the stock as alleged in the first count, alleged that said Freeland did also give to said defend-

ant corporation, at their request, full and special authority to sell said collateral, and apply the proceeds towards payment of said note in case of default in the payment thereof by him, and that said defendant corporation did then and there, in consideration of such pledge and delivery by said Freeland, promise and undertake faithfully to hold and keep said stock, and redeliver the same to the plaintiff on the satisfaction and payment of said note; that, on or before the maturity of said note, said plaintiff, in order to provide for the payment of said note at maturity, had effected a valid contract for the sale of the said stock at the rate of \$2,000 per share,—said stock to be delivered and assigned on or after maturity of said note, to-wit, June 15, 1884; that before the maturity of said note said defendant corporation notified the plaintiff of the loss by them of said note, requesting a new acknowledgment of indebtedness, which the said plaintiff gave. And the plaintiff further alleged that afterwards, to-wit, on the fifteenth day of June, 1884, he was ready and willing to pay the said indebtedness, and receive back the stock aforesaid, and offered to redeem the same, and demanded the same of the defendant corporation, but was then informed by said defendant that said certificates also had been by them lost, and that it was out of their power so to return either said note or said certificates of stock, and said defendant refused and neglected, and for a long time continued to refuse and neglect, to return said certificates of stock to said plaintiff, or permit him to redeem the same; that by reason of said loss, refusal, and neglect, said plaintiff lost his said sale, etc.; that since said date of maturity, to-wit, on or about September, 1885, said stock was found by said defendant corporation, and said debt to said defendant discharged, and said stock received back by said plaintiff, and sold by him at a greatly diminished figure. Wherefore, etc. To the first and second counts the defendant demurred for the reason that the plaintiff in the said counts did not set forth any legal cause of action against the defendant. After a hearing the demurrer was sustained, and plaintiff appealed.

*Felix Rackemann*, for plaintiff.

*D. L. Withington* and *N. W. Jones*, for defendant.

FIELD, J. It was conceded at the assignment that the first count was bad, on the ground, as was said, that it did not allege either a payment of the note, or a tender of payment. Both counts apparently proceed upon the theory that the payment of the note and the return of the stock were to be concurrent acts; but the contract of the defendant was to keep the certificate of stock with due care, and to return it to the plaintiff if the note was paid at maturity, or when, after maturity, the note was paid, unless the stock was meanwhile lawfully sold to pay the debt. The contract of pledge is collateral to the contract to pay the debt. The promise is to return the property pledged when the debt is paid. The pledgee can maintain an action to recover the debt without an offer to restore the property pledged, (*Taylor v. Cheever*, 6 Gray, 146,) and he can maintain an action for money lent after he has converted the property pledged, by an unlawful sale, and can recover the amount of

the debt, less the amount realized by the sale, if the defendant pleads this in set-off. *Fay v. Gray*, 124 Mass. 500.

Notwithstanding what was said in *Cortelyou v. Lansing*, 2 Caine, Cas. 200, we think that the assumption is false that a contract of pledge, as a security for the payment of money, is analogous to a bilateral executory contract in which the two parties mutually promise to do concurrent acts, and the promise of one is the consideration of the promise of the other. The modern authorities therefore require a tender of payment of the debt to enable the pledgeor to maintain trover for a conversion of property pledged, unless the lien created by the pledge has been otherwise discharged. The distinction between a tender of payment of a debt due, and an offer to perform one of two mutual promises to do concurrent acts, is well known. *Cook v. Doggett*, 2 Allen, 439. Neither count in this case alleges a good tender at common law. *Dunham v. Jackson*, 6 Wend. 22; *Bakeman v. Pooler*, 15 Wend. 637.

*Talty v. Freedman's Sav. & Trust Co.*, 93 U. S. 321, was replevin of a certificate of indebtedness, brought by the pledgeor against a purchaser from the pledgee, who bought *bona fide*, and without notice or knowledge of the plaintiff's claim, and it was held that a previous tender was necessary, and that an offer to pay was not equivalent to a tender.

In *Lewis v. Mott*, 36 N. Y. 395, the action was brought by the assignee of the pledgeor against the vendee of the pledgee. The court held that there "was no ground upon which the defendant could be liable to an account, or upon which the plaintiff's right to redeem could be enforced against the defendant;" but the chief justice proceeded to consider the action as if it were tort for alleged conversion. The pledgeor had offered in writing to pay the defendant the debt for which the securities were pledged, and had demanded the securities, and the defendant had refused to comply with the demand. The chief justice says:

"Clearly, on no theory was he [the pledgeor] entitled to them, [the securities,] except upon the payment of the amount of the lien, or a tender and refusal. Such tender has not been made. An offer to pay is not the equivalent for an actual tender."

*Donald v. Suckling*, L. R. 1 Q. B. 585, was detinue by the pledgeor against a sub-pledgee of the pledgee, to whom the pledgee had delivered the debentures pledged as security for a loan to him larger than the debt for which the debentures were originally pledged. Both debts remained unpaid, and it was held that the plaintiff could not maintain the action, because there had been no tender of the sum originally secured by the pledge.

*Halliday v. Holgate*, L. R. 3 Exch. 299, was trover, by the assignee in bankruptcy of the pledgeor against the pledgee, for a wrongful sale of the property pledged. There had been no payment or tender of payment of the debt, and the court refused to sustain the action even for nominal damages, on the ground that, to maintain trover, the plaintiff must have the right of immediate possession, which he did not have until the debt was paid.

The Massachusetts cases declare that a tender is necessary to enable the pledgeor to maintain trover against the pledgee, for a conversion of securities, when the lien created by the pledge has not been otherwise discharged. *Jarvis v. Rogers*, 15 Mass. 389; *Jarvis v. Rogers*, 13 Mass. 105; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. See *Hathaway v. Fall River Nat. Bank*, 131 Mass. 14. Neither the English nor the Massachusetts cases, however, determine what amounts to a sufficient tender, although there are expressions which indicate that a tender good at common law is required.

When replevin or detinue is brought, there may be a substantial reason why there should be an actual tender, because the plaintiff, if he recover judgment, recovers, or may recover, the possession of the property, and the court might well order the money tendered paid into court before entering such a judgment. There is a technical reason why a formal tender may be held necessary in trover: because, if the lien created by the pledge has not been otherwise discharged, it may be held that it can be discharged only by the payment of the debt, or, if the defendant will not receive payment, by a tender of payment, which is the only thing the common law considered as in any respect an equivalent of payment, and trover can only be maintained when the lien has been discharged, and the plaintiff is entitled to the immediate possession of the property. But as the damages in trover are the value of the property, less the amount of the debt, except for this technical reason, a want of a formal tender would not be a greater objection against maintaining trover than against maintaining an action for a breach of the contract to keep the property safely, and to deliver it to the pledgeor on payment of the debt. Perhaps in contract, strictly speaking, no breach is shown by a failure to return the security unless the debt is paid, or there has been a good common-law tender of payment; but there are cases which hold that a formal tender is unnecessary. *Cortelyou v. Lansing*, 2 Caine, Cas. 200; *Fletcher v. Dickinson*, 7 Allen, 23; and *Wilson v. Little*, 2 N. Y. 443, which was an action on the case for wrongfully selling stock, but whether trover or not is uncertain. In each of these cases, however, the property pledged had been wrongfully sold to the pledgee, which was in itself a conversion and a breach of the contract. In *Fletcher v. Dickinson*, *ubi supra*, the action was contract. The defendant, by the sale and assignment of the mortgages, had received sufficient money to pay the plaintiff's debt to him. There had been in fact an offer in writing to pay the debt, and, although the plaintiff "did not tender or exhibit any money, his counsel was prepared to pay the notes, and so informed the defendant." The court held that the sale was illegal, and say that "a formal tender of the amount of the notes would have been a useless ceremony such as the law never requires," citing *Cortelyou v. Lansing*, *ubi supra*.

The distinction between an unconditional offer to pay a debt, accompanied with a present ability and intention to pay, and a formal tender, is certainly technical, and the tendency of the law undoubtedly is to ignore technicalities, which serve no useful purpose, and to administer

the same substantive law in one form of action as in another, where different forms of actions are permitted. Such an offer to pay would undoubtedly be sufficient to maintain a bill in equity to redeem the property pledged, and we do not deem it necessary to decide whether such an offer would not be sufficient to enable the pledgeor to maintain either tort or contract against a pledgee who refused to accept the offer and return the property pledged, or whether any offer or tender at all is necessary to maintain tort or contract against a pledgee who has converted the property pledged by a wrongful sale of it, and applied the proceeds of the sale to the payment of the debt.

In the present case no conversion of the stock is alleged in either count, and for that reason alone they are not good counts in trover. Neither count alleges a refusal of the defendant to receive payment of the debt, or any offer to pay the debt except on condition that the stock be returned. It is doubtful if the second count alleges that the plaintiff had the money to pay the note when he alleges that he offered to redeem the stock. The gist of the plaintiff's complaint under the second count is that the plaintiff, by the neglect of the defendant to keep the stock safely until the maturity of the note, was prevented from redeeming the stock at the maturity of the note, as he otherwise would have done, whereby the plaintiff lost the benefit of a sale of the stock which he had made, and this implies that the lien created by the pledge continued until the debt was finally paid. If the defendant had, by the want of due care, suffered the property pledged, while in his possession, to be damaged, he undoubtedly would be liable to the plaintiff. But the property pledged was, on payment of the debt, restored to the plaintiff uninjured and entire.

The construction we put upon the second count is that the plaintiff, even if he had the right to do so, did not elect to treat as a conversion or a breach of contract the defendant's refusal to restore the stock when he offered, at the maturity of the note, to redeem it, but permitted the defendant to retain it as security for the debt while the debt remained unpaid. The plaintiff could have stood upon his rights, have paid or tendered payment of the debt at maturity, then demanded the stock, and, on the defendant's refusal to deliver it, have brought his action for the value. Whether trover could have been maintained for stock lost need not be decided. See *Bowlin v. Nye*, 10 Cush. 416. The plaintiff forebore to insist upon his rights. In consideration of this forbearance the defendant made no promise to the plaintiff to pay him anything, and committed no tort and no breach of contract in retaining the stock until the plaintiff paid his note, and the property pledged was returned uninjured. Judgment affirmed.

All the justices sitting concur in the result, and a majority of them in the reasons given in this opinion.

(142 Mass. 251)

**KEEFE v. BOSTON & A. R. Co.***(Supreme Judicial Court of Massachusetts. Suffolk. July 3, 1886.)***1. CARRIERS—OF PASSENGERS—RAILROAD COMPANY—STATIONS AND PLATFORMS—CONDITION—RIGHTS OF PASSENGERS.**

A railroad company is bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers are expressly or impliedly invited to go, and is bound, by its servants and agents, to exercise due care towards passengers using its stations and platforms by its invitation.

**2. SAME—USES OF PLATFORM—RAILROAD CROSSINGS—DUE CARE.**

Where a passenger upon a railroad train, upon leaving the train, was walking upon the platform of the station to a point where there was no crossing, for the purpose of crossing the tracks where she had no right to go, and either backed against or was struck by a truck standing on the platform, *held*, that as the intention in her mind to cross had not become an act, and as she might never have acted in accordance with that intention, that she was still a passenger leaving the station of the railroad, and entitled to protection as such. Also *held*, that the question of due care on the part of the passenger or the agents of the railroad was a question for the jury.

**3. SAME—DUTY OF PASSENGER LEAVING TRAIN—SHORTEST ROUTE TO HIGHWAY.**

It cannot be held, as a matter of law, that it is the duty of a passenger, on leaving a railroad train, to take the shortest practicable course to the nearest highway, and that if he does not he becomes a trespasser or licensee only.

Action of tort to recover damages for personal injuries. At the trial in the superior court before KNOWLTON, J., it appeared in evidence that the plaintiff, on October 23, 1883, purchased a ticket at the station of the Boston & Albany Railroad Company in Boston for passage over said road to Newton. She took the train for Newton, and on her arrival at said Newton she left the train in company with her two daughters, walked onto the platform of the station, and proceeded directly over and along said platform in a westerly direction for the purpose of reaching her house; that while so walking along said platform she was suddenly struck, thrown from said platform upon the track of said railroad, and injured; that upon her arrival at said Newton it was dark; that she saw no lights upon said platform, and heard no sign of warning before being struck; and that her eyesight and hearing were at that time ordinarily good. One Downs testified that he was an express-man, and at the Newton station the night of the accident; that the baggage master of the defendant company was pulling a baggage truck laden with baggage, which had arrived on the same train with plaintiff, over said platform; that he (Downs) was walking behind said truck; that there was on said platform a covered shed, and that, when said truck arrived at said shed, it came to a stop, and he saw plaintiff on the track beside the truck; that it was dark at the time; that there was no light on said truck. One Cox, the baggage master at the station, testified that, while hauling the baggage truck of said company laden with baggage over said platform from the baggage car to the baggage room, he stopped the truck, and the plaintiff came along backwards, and hit a trunk on the truck, and was thrown onto the track. One Emerson testified that he saw the plaintiff near the truck, moving backwards; that said truck was station-

ary; and that, when plaintiff reached it, she staggered and fell on it. Other witnesses testified that the truck was stationary at the time of the accident; that passengers were passing between the truck and the outer edge of the platform; and that, at the point of collision, there was light enough to enable a person to walk without running into any obstacle. One Edmand testified that he was a civil engineer in the defendant's employ; that said platform extended 260 feet westerly from said station; that said platform, being on the southerly side of said railroad track, did not connect with any public street southerly of said track; and that there was no way for passengers going along this platform to get out on the south side of said track without crossing said track and the grounds of said railroad; that said platform was designed for the accommodation of all the public who land at this station.

It was in evidence that the plaintiff lived on School street, which lies north of Washington street, the nearest street north of and parallel with the railroad; that the only way from the station to her house, by public way, was from the station to Center street easterly, northerly along Center street to Washington, westerly along Washington street to School street, and northerly along School street, which leads from Washington street, at a point westerly of where an alley-way from the north side of the railroad reaches Washington street. It appeared that the plaintiff was moving, when hurt, westerly along the platform from the place where she alighted from the train, intending to cross the railroad at a point opposite the alley-way leading to Washington street, where there was no planking or prepared crossing on the railroad, and there being no steps for obtaining access to said alley-way from the north side of the railroad. Upon the testimony, of which the foregoing is the substance, the court, at the request of the defendant, instructed the jury that there was no evidence on which the plaintiff was entitled to go to the jury, and directed them to return a verdict for the defendant, and the verdict was so returned, and the plaintiff alleged exceptions.

*Thomas J. Gargan*, for plaintiff.

*A. L. Soule*, for defendant.

FIELD, J. The principal contention of the counsel for the defendant is that, "as soon as the plaintiff began her progress towards the west for the purpose of crossing the railroad at a place not intended nor prepared for such use, she ceased to have any right to protection as a passenger, because the safe and proper way of egress for passengers was in the opposite direction." There was evidence that the construction of the platform on the south side of the railroad, and the use made of it, were such that it was intended by the railroad company to be used by passengers so far as was necessary or convenient for them in entering or leaving trains. The defendant's engineer testified that the platform was designed for "the accommodation of all the public who land at the station." The plaintiff cannot be considered as a trespasser or a mere licensee if, immediately on leaving the train, she chose to walk over the platform, in the direction she was walking, for the purpose of leaving the

platform to go home, if the place where she was walking was fitted up and intended for the use of passengers. If the defendant was under no obligation to furnish such a platform, yet, if it furnished it and arranged it in such a manner as to invite passengers to walk over it as they found it convenient while waiting for trains, or for conveyances to take them from the station, or while preparing to leave the station, it must exercise due care towards passengers found upon it. That the plaintiff intended in her mind, after she left the platform, to cross the railroad, at a place where she had no right to cross it, is not conclusive against the right of action. She was not necessarily a trespasser or mere licensee when and where she was struck because she intended afterwards to become either one or the other.

The well-known usages of railroad companies and of the public make it impossible to hold, as matter of law, that it was the duty of the plaintiff, immediately on leaving the cars at the station, to take the shortest practicable course to the nearest highway, and that if she did not she became a trespasser or licensee only. The defendant was bound to keep in safe condition for its passengers all that part of its stations and platforms where passengers were expressly or impliedly invited to go, and was bound, by its servants and agents, to exercise due care towards passengers using its stations and platforms by its invitation.

The point where the plaintiff intended to cross the railroad is supposed to be the same as that mentioned in *Wheelwright v. Boston & A. R. Co.*, 135 Mass. 225, but whether the plaintiff, in crossing, would have been a licensee or a trespasser we think is immaterial. The intention in her mind had not become an act of crossing the railroad at a point where she had no right to cross, and she might never have acted in accordance with that intention. She was still a passenger, leaving the station of the railroad, and may have been walking upon a part of the platform intended for the use of passengers.

Whether the plaintiff backed against the truck, or was struck by it; whether she or the baggage master of the defendant, who was pulling the truck, was, under the circumstances, in the exercise of due care; and whether the platform was properly lighted,—were questions for the jury. Exceptions sustained.



(142 Mass. 316)

## HALEY v. CASE and another.

*(Supreme Judicial Court of Massachusetts. Suffolk. July 8, 1886.)***1. MASTER AND SERVANT—DIRECTION OF WORK BY MASTER—LIABILITY OF MASTER FOR INJURIES TO SERVANT.**

Where a master personally assumes the direction of work which is being performed by his servant, and, in consequence of following the directions, the servant is injured, the former is liable, where the danger incurred was not known to the servant, was not obvious to him from his point of observation, and he had reasonable cause to believe that he could follow the directions in safety, and was in the exercise of due care.

**2. PARTNERSHIP—LIABILITY OF COPARTNERS FOR NEGLIGENCE OF ONE.**

Where A., a member of the firm of A. & B., was negligent in giving directions to a servant regarding the performance of certain work, and the servant used due care in following the directions, B. is equally liable with A. for injuries to the servant resulting from following such directions.

Action of tort to recover damages for personal injuries sustained by the plaintiff while in the employ of the defendants, in driving against a sign across Perry street, in Charleston. The defendants were teamsters, having a stable abutting on Perry street. Plaintiff, on the day of the accident, was in their employ, and had driven a two-horse caravan, laden with hay, from Boston to the defendants' stable, and was undertaking to back up his team to defendants' stable for the purpose of unloading it. Perry street rises somewhat in grade from defendant's stable to the end of the street, across which was the sign against which plaintiff struck. At the trial in the superior court, before ROCKWELL, J., James F. Haley, the plaintiff, testified that he was 27 years of age; was in the employ of the defendants, who were partners in business as teamsters under the style of Case & Dodge; that on the day of the accident he was directed by defendant Dodge to go to Commercial street, and get a load of hay; that he drove there, and loaded a team, which he drove to defendants' stable on Perry street, Charleston; that he was told by defendant Dodge to drive up and unload, and put his horses up; that he (plaintiff) got down from the team, and took the horses by the head; that Dodge said, "Get up on your team, where you belong;" that he (plaintiff) then got up on the team; there were several bales of hay piled on the wagon, and he sat on the top one; that after getting up on the hay he drove along-side of the stable; that he had some difficulty in getting into the stable, and Dodge said he would open a gate of one Mead so that plaintiff could drive into the latter's yard and back around; that he (Dodge) opened the gate, and said to plaintiff, "I want you to drive up there and back down,—drive up under that gate and back down;" that he (plaintiff) started his horses with the reins; that it was hard pulling, and he had to watch the horses; that he had all he could do to watch them; that when he got within two or three feet of the gate he saw he was going to get hurt, and tried to stop his horses, but could not, and ducked down, going underneath the fence; that he "got" his "back broke,"—his head went clear; that the lower part of his back, about half way or a little below, was struck by the sign which was across

the gate, on the top of it; that he had delivered hay at defendants' stable before that time, four or five times, but had never gone under the gate or sign before; that he had been accustomed to drive up, and suit himself about putting his team in; that the night after the accident Dodge called upon him, and said he was sorry that it happened, and, in reply to plaintiff's saying that if he (Dodge) had let plaintiff do as he wanted to it would not have happened, Dodge said: "That is so, Jim; I know it is my fault." The distance from the gate over which the sign extended to the hay-shed door was eight feet. There was evidence, also, that the plaintiff was experienced in driving horses, and several witnesses testified to the conversation between the plaintiff and defendant Dodge as given in plaintiff's evidence.

One Macomber testified to hearing Dodge, after he opened the gate, tell plaintiff to drive up and back down; and that he (witness) had driven teams through the gate, and that it was a common thing to deliver hay in that way. There was evidence of other witnesses that plaintiff did not wish to drive through the gate, but that Dodge told him to do as he said.

The defendant Dodge testified that he opened the gate, and told plaintiff to drive through, but to look out for the sign; that the latter said nothing, but went ahead and was struck; that it was not necessary to drive the van under the sign; that the usual way of getting the caravan into position for unloading had been to drive up into the gate, or sometimes, when there have been no pungs there, they could drive up and swing the horses off without driving through the gate at all, and back under, but on the day of the accident this could not be done; that he did not say to plaintiff that if he had let him (plaintiff) do as he wanted to the accident would not have occurred. On cross-examination witness testified that he told plaintiff to look out for the sign, when he was 20 or 25 feet away from it; that he did not expect he would go under it.

One Samuel Wood, a witness for defendant, testified that he was in defendants' employ, and on the day of the accident was at the yard of the defendants' stable; that plaintiff, Haley, swung his horses round, and tried to turn; he was then on his team; he pulled his horses round to the right, got around a little further, and collided with some old sleds on the opposite side; that Mr. Dodge and witness tried to help plaintiff out, but could not do it; then Dodge said to plaintiff, "You will have to go up through Mr. Mead's yard; get back again, and go up through Mr. Mead's yard;" Mr. Dodge said, "I will go up and open Mr. Mead's gate, and let you go up through there," and he (Dodge) went up and opened the gate; that plaintiff drove right up to Mead's gate, stopped within a very few feet of the gate, bowed himself down, and got his shoulder under; that he went right under, and, when the team came to cramp, it cramped him right up double.

The presiding judge instructed the jury fully, and a verdict was returned for the plaintiff, and the defendant alleged exceptions.

*R. M. Morse, Jr., and B. E. Perry, for defendant.*

*W. Gaston and J. F. Dore, for plaintiff.*

FIELD, J. It is not denied that if Dodge was personally negligent in giving directions to the plaintiff in the performance of his work, and if the plaintiff used due care, both the defendants are liable. *Ashworth v. Stamvix*, 3 El. & El. 701. As the plaintiff was of full age and an experienced teamster, if the danger of driving the horses, with the van, under the gateway, was well known to him, he cannot recover, although he was acting under the immediate personal direction of Dodge. The fear of the plaintiff that he would be discharged from his employment if he did not obey the orders of Dodge, his employer, would not justify him in running a risk which was well known to him, and then, if injured, in recovering damages from his employer. *Russell v. Tillotson*, 140 Mass. 201; S. C. 4 N. E. Rep. 231; *Taylor v. Carey Manuf'g Co.*, 140 Mass. 150; S. C. 3 N. E. Rep. 21; *Leary v. Boston & A. R. Co.*, 139 Mass. 580; S. C. 2 N. E. Rep. 115; *Moulton v. Gage*, 138 Mass. 390; *Williams v. Churchill*, 137 Mass. 243. The principle is said to be that, "where the servant has as good an opportunity as the master of ascertaining and obviating the danger for himself, he will have no recourse against the latter." *Fraser, Master & Serv.* (3d Ed.) 176; *Woodley v. Metropolitan District Ry. Co.*, 2 Exch. Div. 384; *Ogden v. Rummens*, 3 Fost. & F. 751.

From the testimony it was competent for the jury to find that the defendant Dodge assumed the personal direction and control of the plaintiff in determining where the team should be driven, and that he was familiar with the practice of driving loaded vans under the gateway; that the plaintiff had never driven under the gateway before; that the danger was not obvious from the place where the plaintiff started his team, in any such sense that it was not a reasonable opinion, from observation at this place, that he could drive through the gateway in safety; that the plaintiff's attention was necessarily chiefly devoted to the management of the horses, and that he did not discover the danger until it was too late to save himself; and that the defendant had better means of observation, and of seasonably appreciating the danger, and either did not warn the plaintiff at all, or warned him when it was too late. On such findings we cannot say that the plaintiff was not in the exercise of due care, or that defendant was.

The test is not only what each knew, but what each reasonably ought to have known, concerning the risk; and we cannot say that identically the same duty rested on the servant and on the master seasonably to ascertain the extent of the danger involved in performing the work in the manner ordered by the master. If the master personally interferes in the performance of work, and in consequence of his negligence a servant is injured, the master is liable, unless the carelessness of the servant is a defense, (*Roberts v. Smith*, 2 Hurl. & N. 213;) and, when the master undertakes to direct specifically the performance of work in a particular manner, we cannot say, as matter of law, that the servant is not justified in relying to some extent upon the knowledge and carefulness of his employer, and in relaxing somewhat the careful examination and vigilance which otherwise would be incumbent upon him. The servant's attention must be principally directed to the performance of the work in

the manner in which he is ordered to perform it, and he may be in a less favorable position to see and judge of the surrounding dangers; and, when he is suddenly called to perform a piece of work in a particular manner, under the eye of his employer, he may not reasonably have time for the most careful observation.

This court has perhaps recognized that the servant may put some reliance upon the master when he assumes control of the work, and gives specific orders, and that there is not precisely the same obligation resting upon each to ascertain what the dangers are. In *Coombs v. New Bedford Cordage Co.*, 102 Mass. 572, 585, although the case was decided on the ground that the servant was incapable of understanding and appreciating the danger to which he was exposed, and that the employer set him to work without properly instructing him in regard to his work, and the dangers attending it, the court say: "Some allowance should be made for his youth, his inexperience in business, and for the reliance which he might have placed upon the directions of his employers."

In *Atlas Engine-works v. Randall*, 100 Ind. 293, it is said that "if the attention of the appellee had been, as in the Massachusetts case, withdrawn from the source of danger by the requirements of his employment, the case would involve considerations which are conspicuously absent."

*Keegan v. Kavanaugh*, 62 Mo. 231, is the case of a hod-carrier who, in obedience to a positive order of his master, went down to build a stone wall at the foot of an embankment of earth which was not shored or propped, and which fell upon the plaintiff. The court say that "if the risk is such as to be perfectly obvious to any man, whether servant or master, then the servant assumes the risk;" but that "the superior information of the master was relied on, and his better means of information as to the character of the ground;" and a verdict for the plaintiff was sustained.

In *Lee v. Wolsey*, 20 Reporter, 469, it is said that, "if an employe is in haste called upon to execute an order requiring prompt attention, he is not to be presumed to recollect a defect in machinery, or a particular danger connected with his employment, so as to avoid it."

The plaintiff in this case was an experienced teamster; but he may not have had the same experience as the defendant Dodge of the possibility of driving safely the loaded van under the gateway. The more important matter, however, is that he might not have had the same opportunity of estimating the danger; and from his employment he was required to devote his attention principally to the management of his horses, while his master had assumed the responsibility of directing where the plaintiff should drive, and was free to observe carefully all the dangers which the plaintiff incurred in executing his orders. We think the requests for instructions were properly modified by the consideration of the fact that the plaintiff was acting in the presence and under the directions of one of the defendants, who was his master. If the charge in this respect is not so definite as might be desired, it was not erroneous or misleading. Exceptions overruled.

(107 Ind. 280)

WEED S. M. CO. v. WINCHELL and another.<sup>1</sup>

(Supreme Court of Indiana. June 15, 1886.)

## 1. BONDS—BOND AND CONTRACT OF AGENT CONSTRUED TOGETHER—LIABILITY OF BONDSMEN.

Where a bond is executed concurrently with a contract of agency, they should be construed together, and the bondsmen can only be held liable for the acts or default of the agent in matters contemplated in the contract of agency.

## 2. PRINCIPAL AND SURETY—RELEASE—NEW CONTRACT.

Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor, without the consent of the sureties, enter into a new contract, the creditor accepting notes for the damages, payable at a future time, and upon terms differing from the original contract, the new contract supersedes the old, and the sureties will be released.

Appeal from Grant circuit court.

W. W. Woolen and J. F. McDowell, for appellant.  
Steele & St. John, for appellees.

MITCHELL, J. This suit was brought by the Weed Sewing-machine Company, against Winchell and Murphy, to recover on a bond executed by them, with and as the sureties of one Sale. The plaintiff sought to recover the amount of a judgment it had previously recovered against Sale, and also the amount of three promissory notes, executed by him, payable to the sewing-machine company, all of which, with interest, it was averred remained due and unpaid. Sale was alleged to be insolvent. The case having been put at issue, a jury was required to return the facts to the court in the form of a special verdict. The merits of the controversy may be fully determined by a consideration of the facts thus returned, without regard to some questions which have been discussed relating to the pleadings.

Shortly stated, the facts found within the issues are as follows: On the twenty-second day of November, 1872, the Weed Sewing-machine Company appointed one Dennis S. Sale, of Marion, Indiana, its local agent. The appointment was by a writing which embraces minute and detailed stipulations, covering the terms of the agency. The company agreed to consign sewing-machines to Sale. These were to be sold or leased by him as its property, on certain prescribed terms. Sales or leases were to be made for cash, or to responsible parties, whose notes were to be taken, payable to the company, and indorsed by the agent. An account of all sales and leases, together with all cash and notes received, was to be forwarded weekly; the agent having the right to retain, either in cash or notes, a stipulated commission on all sales or leases. Concurrently with the contract of agency the bond sued on was executed. It was in the penal sum of \$3,000, and recited that it was executed by Sale as principal, and Winchell and Murphy as sureties. The condition of the bond was that Sale would well and truly pay "every indebtedness or liability now existing, or which may hereafter in any manner exist or be incurred, on the part of said Dennis S. Sale,

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to the said Weed Sewing-machine Company, whether such indebtedness shall exist in the form of book-accounts, notes, renewals or extensions of notes or accounts, acceptances, indorsements, or otherwise, hereby waiving presentment for payment, notice of non-payment, protest, and notice of protest, and diligence upon all notes now or hereafter executed, indorsed, transferred, guarantied, or assigned by the said Dennis S. Sale to the Weed Sewing-machine Company." It was also stipulated in the bond that it was to "remain in full force and effect, and a continuing guaranty, until after notice in writing shall have been given and received by said Weed Sewing-machine Company." On the fifteenth day of November, 1875, Sale, having ceased to transact business for the company as agent, purchased two machines of it, and gave his note for \$80. After paying \$40 on the note so given, a judgment was recovered against him by the company for the unpaid balance and interest. In April, 1876, the agency having terminated in September, 1874, upon an accounting and compromise of the matter involved in the business, \$600 was agreed to be due from Sale to the company. This indebtedness grew out of the failure of Sale to pay over money which had been received by him from time to time, and which belonged to the company, as appeared by his reports made from week to week, as his contract required. These defalcations, beginning about 30 days after the agency commenced, and increasing gradually until the agency terminated, were exhibited on the weekly reports. They were known to the company, and unknown to the bondsmen. When the accounting and compromise were had, Sale was solvent, and the company took his three notes, due in 12, 24, and 30 months, for \$200 each, with 8 per cent. interest, and 10 per cent. attorney's fees. This settlement did not include the note for the machines sold to him in 1875.

The jury returned that Sale executed the notes in settlement of his account with the company. The notes were payable at a bank in this state. The sureties had no knowledge of the indebtedness, and gave no consent to the settlement. If they had known of the indebtedness, Sale being then solvent, they could have secured themselves. Before they were informed of their liability, Sale went into bankruptcy, and was, at the time of the trial, a non-resident of the state. The sureties had given no notice of a desire to be released from the bond. Reckoning the judgment and notes, the principal, interest, and attorney's fees amount to about \$1,300.

Upon the facts returned a judgment for the defendants was entered. To reverse the judgment this appeal is prosecuted.

The question is suggested incidentally whether the obligation of the bondsmen is that of guarantors or of sureties. The bond is essentially a collateral engagement, into which the sureties have entered with their principal, the performance of whose original contract is thereby guarantied. It stipulates on its face that the principal shall "well and truly" perform certain enumerated things, and that the bond shall be a "continuing guaranty" until after notice. In its nature, and by the very terms of the writing, this was a contract of guaranty. *La Rose v. Logansport Nat.*

*Bank*, 102 Ind. 332; S. C. 1 N. E. Rep. 805; *Singer Manuf'g Co. v. Litter*, 56 Iowa, 601; S. C. 9 N. W. Rep. 905.

Whether their obligation was strictly that of guarantors or sureties is, however, in this case, of secondary importance, as in either event the conclusion, upon the facts returned, must have been the same. The bond and the contract of agency, having been executed concurrently, must be construed together. It cannot be assumed that the bond was intended as a security for the payment of debts which were not contemplated in the contract of agency, or a guaranty for the performance of obligations wholly outside of the contract with which it was executed. Its scope must therefore be restrained to the terms of the contract between the sewing-machine company and Sale. *Burns v. Singer Manuf'g Co.*, 87 Ind. 541; *Irwin v. Kilburn*, 104 Ind. 113; S. C. 3 N. E. Rep. 650; *City of La Fayette v. James*, 92 Ind. 240. The bond having been executed presumptively with reference to, and to secure the performance of, the contract of agency, the liability of the sureties cannot be extended so as to embrace transactions beyond the scope of the contract with which it was executed; nor can they be held to answer for the failure of the agent, except such failure relates to some duty imposed by the contract creating the relation of principal and agent.

This leads to a consideration of the terms of this contract. It nowhere contemplates that the agent shall become the purchaser of machines. On the contrary, it stipulates expressly that machines were to be consigned to him, to be sold or leased as the property of the consignor, and that such as should remain unsold should be returned to the company at the termination of the agency. Plainly, then, the sureties were not liable to pay the judgment recovered on the note given for the machines sold after the agency terminated. It could be claimed with as much reason that the bond was a security for a loan of money, or any other transaction wholly disconnected from the agency, as that it covered the sale of those machines.

The sureties are not liable for the payment of the notes taken in settlement of the agent's account. The contract of agency provides for no contingency in which the agent was to execute his notes to the sewing-machine company. He was to receive consignments of machines, and sell or lease them as the property of his principal. He was authorized to receive, on such sales, either cash or the notes of the purchasers payable to the company. If he took notes, his contract required him to indorse them, and to transmit the cash and notes, less his commissions, weekly, to his principal. For any failure to pay notes thus indorsed, or to account for and pay over cash received, the sureties were liable on the bond. For the payment of notes so taken and indorsed by the agent, or for renewals, extensions, etc., of such notes, the bond was a continuing guaranty, as it was also that the agent would faithfully account for and pay over the cash which he should receive upon sales or leases. It will be observed, the notes were governed by the law-merchant. They were taken, as the jury find, in settlement of the account of the agent. Without determining whether or not the implication arises from this that the

account was thereby paid or extinguished, the notes were at least obligations different from those provided for in the original contract. The non-payment of these notes and the judgment against Sale are assigned in the complaint as the breach of the bond, thereby authorizing the inference that the account was regarded by the plaintiff as liquidated and merged, if not entirely extinguished. It thus appears that the sureties are sought to be held for the failure of their principal to discharge new obligations, not contemplated by the contract to secure the performance of which the bond was given. Into these are imported new terms. They suspended the right of the creditor to proceed against the principal to collect the original liability, in settlement of which they were given. Because they are new obligations, different in character from those the performance of which were guaranteed by the bond, the sureties are not liable for their payment. *Weed S. M. Co. v. Oberreich*, 38 Wis. 325; *Haskell v. Burdette*, 35 N. J. Eq. 31; *Victor S. M. Co. v. Scheffler*, 61 Cal. 530; *Brandt*, Sur. §§ 316, 317.

Guarantors and sureties are exonerated if the creditor, by any act done without their consent, alters the obligation of the principal in any respect, or impairs or suspends the remedy for its enforcement. Where, after breach of a contract, the performance of which is guaranteed, the creditor and principal debtor enter into a new contract, by which the amount of damages then due is made payable on a future day, and upon terms different from those imposed by the original agreement, such new contract presumptively merges the old. In such a case, the new obligation, having been taken upon a sufficient consideration, becomes the exclusive medium by which the rights of the parties in respect to the payment of damages are to be ascertained. Such a contract is not collateral to the original, but, in respect to the subject to which it appertains, it merges and supersedes the other. *Bailey v. Boyd*, 75 Ind. 125.

The case is clearly distinguishable from *Lindeman v. Rosenfield*, 67 Ind. 246.

Without considering other grounds upon which it is claimed the sureties were legally exonerated, upon the reasons already given the judgment is affirmed, with costs.

(107 Ind. 62)

#### MULREAD v. STATE.

(*Supreme Court of Indiana*. June 15, 1886.)

##### 1. CRIMINAL LAW—JURY MAY TAKE COPY OF STATUTES TO JURY-ROOM.

It seems that in criminal cases it is not error, under the constitution of Indiana, to allow the jury to take an annotated copy of the Statutes with them to the jury-room.

##### 2. SAME—APPEAL—WAIVER OF ERROR.

Errors not objected and excepted to are generally considered as waived on appeal.

##### 3. INTOXICATING LIQUORS—SELLING LIQUOR TO MINOR—APPEARANCE—SELLER MUST USE DUE CARE.

In order to escape conviction for selling intoxicating liquors to a minor, the accused must show that he used due care to ascertain the minor's age, and mere appearance may not always be sufficient.



Appeal from Delaware circuit court.

*Jas. N. Templer and John T. Sanders*, for appellant.

*The Attorney General*, for the State.

Howk, C. J. In this case the appellant was indicted, tried, and convicted for an unlawful sale of intoxicating liquor to a certain person who was then and there under the age of 21 years. From the judgment of conviction he has appealed to this court, and has here assigned as error the overruling of his motion for a new trial. A number of causes for such new trial were assigned by appellant in his motion therefor, and these causes we will consider and pass upon in the same order his counsel have presented and discussed them in their exhaustive brief of this case.

1. It is first insisted by appellant's counsel that the verdict of the jury was not sustained by sufficient evidence, and was contrary to law. The indictment charged that appellant, on the eleventh day of October, 1884, at Delaware county, unlawfully sold to one George Ross, who was then and there a person under the age of 21 years, one gill of intoxicating liquor, to-wit, beer, at and for the price of five cents. The cause was tried on April 23, 1885, and only two witnesses testified on the trial, namely, George Ross, to whom the unlawful sale was made as charged, and the appellant. There is no conflict in the evidence as it appears in the record. It is conclusively shown by the testimony of both witnesses that, about the time charged in the indictment, appellant sold George Ross a glass of beer for the price of five cents, and Ross testified that he "was 19 years old at that time, and under 21 years old."

In section 2094, Rev. St. 1881, it is provided as follows:

"Whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquors to any person under the age of twenty-one years, shall be fined in any sum not more than one hundred dollars, nor less than twenty dollars."

It is apparent from what we have said that the evidence in the record of this cause, without conflict therein, makes a case against the appellant fairly within the letter of our statute. It is claimed, however, by appellant's counsel that the verdict is not sustained by the evidence, because, they say, it is shown thereby that appellant made the sale to George Ross, as charged in the indictment, in the honest and reasonable belief that Ross was of the full and lawful age of 21 years at the time of such sale. If the evidence fairly showed, without conflict, that appellant made such sale to George Ross, after exercising proper caution, in the reasonable and honest belief that Ross, at the time of such sale, was of full and lawful age, then the verdict would not be sustained by the evidence, and for this cause it would have been error to have overruled the motion for a new trial. This would be so, because, in such case, there could be no criminal intent on the part of appellant, and, in the absence of such intent, there could be no criminal violation of our statute making the sale of intoxicating liquor to a minor a public offense. This is settled by our decisions. *Goetz v. State*, 41 Ind. 162; *Payne v.*

*State*, 74 Ind. 203; *Hunter v. State*, 101 Ind. 241; *Kreamer v. State*, (at the last term,) 6 N. E. Rep. 841.

In the case in hand it was shown by the evidence that, at the time of the sale charged in the indictment, George Ross was five feet ten inches in height, weighed 165 pounds, and had a heavy beard and a man's voice. Appellant testified about Ross as follows:

"I thought from his appearance and size, the beard on his face, his voice, and his general appearance and manner, that he was more than 21 years old; and, so believing in good faith, I didn't ask him his age, but drew the glass of beer and gave it to him, and he drank it and paid me five cents for it, and left. I had no doubt of his age being over 21 years; he looked like it and acted like it."

Notwithstanding this strong showing in favor of appellant on the point we are now considering, we are of opinion that the jury were fully authorized, by appellant's own testimony, to determine such point against him. On his cross-examination appellant testified as follows:

"I have known the witness George Ross, when I would see him, for ten or a dozen years; have not been much with him during that time. I did some ditching for his father ten or a dozen years ago, and saw the witness then at his home. He was then a lad seemingly about ten or twelve years old."

In this testimony appellant was speaking of and concerning facts, and was not expressing his belief merely, as a part of his defense. As against himself, the jury were justified in saying that, by his testimony, he admitted that he knew the witness George Ross 10 years ago, and he was then a lad 10 years of age, which would make him only 20 years old at the time of the trial of this cause, or only 19 years of age at the time of the sale charged in the indictment. With this testimony of appellant before the jury, we cannot say they were not justified in finding, as they must have done under the instructions of the court, that appellant did not make the sale charged in the indictment, after exercising proper caution, in the reasonable and honest belief that George Ross, at the time of such sale, was of full and lawful age. We cannot disturb the verdict on the evidence.

2. Appellant's counsel next insist, in argument, that the trial court erred in modifying three written instructions requested by appellant, and in giving the jury such instructions so modified, and in refusing to give the jury the instructions asked for without such modification thereof. These instructions, as modified by the court, and given, were substantially as follows:

"(1) If the jury believe from the evidence that the defendant, when he sold the beer in question, *after exercising due care to ascertain his age*, had good reason to believe, and in good faith did believe, George Ross to be then 21 years old or over, they should find the defendant not guilty.

"(2) One important question in the case is, whether the defendant was acting in good faith in supposing George Ross, the purchaser, to have been 21 years old, or over, at the time he sold him the beer. A sale of intoxicating liquor to a minor, under the belief entertained in good faith, *after exercising due care to ascertain his age*, that he was 21 years old, or over, at the time of the sale, is not a violation of the law.

"(3) If the jury believe from the evidence that the defendant sold the

beer in question under the belief, entertained in good faith, *after having used due care to ascertain his age*, that George Ross, the purchaser, was 21 years old or over, they should acquit the defendant."

In each of these three instructions we have italicized the court's modification thereof. It will be seen that by such modification the court instructed the jury that the defendant, in such a case as this, could not escape the punishment prescribed by law for the unlawful sale of intoxicating liquor to a minor upon his *bona fide* belief that such minor was of lawful age, based solely upon appearances; but it must also be shown that he had used due care to ascertain the minor's age. This is in substantial harmony, we think, with our decisions upon the question under consideration. Thus, in *Goetz v. State, supra*, the court said:

"A sale of intoxicating liquor to a minor, under the belief, entertained in good faith, that he *was* an adult, is not within the statute. But the burden of proof on this subject is on the defendant; and to make out this defense such facts must be shown as will justify the inference of such *bona fide* belief."

So, in *Kreamer v. State, supra*, where the defendant made a sale to a minor, "after exercising proper caution, in the reasonable and honest belief that he was, at the time of such sale, of full and lawful age," it was held by the court that there was no criminal violation of our statute which makes the sale of intoxicating liquor to a minor a public offense. We conclude, therefore, that the court did not err in modifying the instructions requested by appellant; nor in giving the jury the instructions as modified; nor in refusing to give the jury the instructions asked for, without modification.

3. Finally it is claimed the court erred in permitting the jury to take to their room, and to consider, while deliberating on their verdict, an annotated copy of the Revised Statutes of 1881. The record before us fails to show, however, that appellant either objected or excepted, at the time, to the action of the trial court of which his counsel now here complain as erroneous. The question, therefore, is not properly presented for our decision. If it were so presented, it would seem to us that as the jury are authorized by our fundamental law, in all criminal cases whatever, to determine the law as well as the facts, it could hardly be regarded as an available or reversible error, if any error at all, for the trial court to permit the jury, in any criminal cause, to read, in their retirement, the statute defining the offense for which the defendant is prosecuted in such case. The "annotations" complained of are merely references to decided cases, and could afford the jury no possible information, and could do the defendant no possible harm in the absence of the books referred to.

We have found no error in the record of this cause which authorizes or requires the reversal of the judgment. The judgment is affirmed, with costs.

(110 Ind. 31)

**BROWN and another, Ex'rs, v. CRITCHELL and others.**<sup>1</sup>*(Supreme Court of Indiana. June 16, 1886.)***1. PLEADING—DEMURRER—GROUNDS FOR.**

The want of legal capacity to sue, as a cause for demurrer, has reference to plaintiffs under legal disabilities, and not to a case where the facts alleged show that the plaintiff has no right to sue in that particular case. In such case the assignment should be that the complaint does not state facts sufficient to constitute a cause of action.

**2. COURTS—CONSTRUCTION OF WILL ON FORMER APPEAL.**

Where a will has been necessarily construed on a former appeal, such construction must govern as the law of the case, although the complaint may have been amended in other particulars.

**3. WILL—WHEN HEIRS CANNOT SUE TO RECOVER LEGACY DUE ANCESTOR.**

The heirs of a married woman who died while the Revised Statutes of 1848 were in force, her husband surviving her, cannot maintain an action to recover a legacy left her, although there are no other persons entitled to share therein, and no executor or administrator has been appointed.

Appeal from Floyd circuit court.

*A. Dowling*, for appellants.

*John H. Stotsenburg* and *F. H. Collier*, for appellees.

**NIBLACK, J.** In the latter part of the year 1878 Mary Ayers Critchell, with her husband, Robert S. Critchell, and John W. Moody, filed the complaint in this cause as a claim against Jesse J. Brown and Silas C. Day, executors of the last will of Mary A. Lapsley, deceased, for the recovery of a legacy of \$5,000 alleged to be due to the said Mary Ayers Critchell and John W. Moody, in right of their mother, Catherine S. Moody, deceased, under the provisions of the will of Elias Ayers, also deceased, who was the first husband of the said Mary A. Lapsley, and of whose will she was the executrix. At the May term, 1879, of the court below, a demurrer was sustained to the complaint, and there was a final judgment upon demurrer in favor of the defendants. That judgment was afterwards reversed by this court, and the cause was remanded for further proceedings. *Critchell v. Brown*, 72 Ind. 539.

Briefly stated, the complaint as it was originally filed, averred that Elias Ayers, on the twenty-ninth day of December, 1840, executed and published his last will, by which he devised and bequeathed to his wife, Mary A. Ayers, all his estate, both real and personal, of the probable value at that time of \$50,000, subject to certain trusts and charges, one of which was the payment to his niece Catherine Silliman Hillger of the sum of \$5,000, which payment was to be made either during the lifetime of his wife and future widow, in her discretion, or at the time of her death; that the said Elias Ayers died on the tenth day of January, 1842, leaving his will so executed and published in full force; that said will was duly probated, and that the said Mary A. Ayers (afterwards Lapsley) qualified as the executrix, and took upon herself the execution of said will; that the said Catherine S. Hillger, on the tenth day of September, 1844, intermarried with one James C. Moody, and on the twenty-fifth day of April, 1850, died intestate in the county of Floyd, in this state, leaving the said Mary A. Critchell and John W. Moody

<sup>1</sup>Rehearing denied, 11 N. E. 436.

and an infant child, who died a few months later, her only children surviving her; also leaving the said James C. Moody as her surviving husband; that the said Mary A. Lapsley, executrix as above stated, died at said county of Floyd on the first day of June, 1878, testate, without having ever paid the amount so bequeathed to the said Catherine S. Moody, or having made any provision for the payment of the same; that the said James C. Moody had, by a proper instrument in writing, assigned to the plaintiffs, Mary A. Critchell and John W. Moody, all his interest in the amount of money so bequeathed to his late wife, which he had become entitled to receive as the surviving father of the infant child which had died as hereinabove stated. For further particulars as to the original complaint, and as to the will of Elias Ayers, see the opinion in the case of *Critchell v. Brown*, above referred to.

After the cause was remanded to the court below the complaint was amended by the insertion of the averments that besides the plaintiff there was no executor, administrator, widower, or other person entitled to control or share in the chose in action herein sued upon, and that the said Catherine S. Moody, at the time of her death, was not indebted to any person, or in any manner; also that since commencement of this suit, that is to say, on the tenth day of October, 1879, the said James C. Moody had died intestate, leaving a widow and children as the result of a second or subsequent marriage, who were also made defendants to answer as to any interest they might claim in the matters in controversy.

Brown and Day, as the representatives of the estate left by Mrs. Lapsley, demurred to the complaint as amended—*First*, because the plaintiffs had no legal capacity to sue; *second*, *third*, and *fourth*, for alleged defects of parties severally indicated; *fifth*, for want of sufficient facts to constitute a cause of action; but their demurrer was overruled. The widow of James C. Moody and her children having disclaimed any interest in this suit, no further notice was taken of them in the proceedings which ensued.

Brown and Day answered in denial, and the circuit court, after hearing the evidence, made a finding for the plaintiffs, and thereupon ordered and adjudged that the said Brown and Day should pay to the plaintiffs the sum of \$5,000, as above demanded, with interest thereon, out of the estate in their hands left by Mrs. Lapsley, as well as the costs of suit.

Brown and Day, appealing to this court, first complain that the circuit court erred in overruling their demurrer to the amended complaint, upon the grounds—*First*, conceding that there might be a right of action in some person to recover the alleged legacy of \$5,000 in right of the deceased Mrs. Moody, the facts averred showed no right of action in that respect in the appellees, and hence they were and still are under a legal incapacity to sue in this action; *secondly*, that the facts averred failed to show a cause of action either in favor of the appellees, or any one else, against the estate of Mrs. Lapsley in right of Catherine S. Moody.

The want of legal capacity to sue, referred to and allowed as a cause

of demurrer by the second clause of section 339 of the present Civil Code, has reference to plaintiffs under legal disabilities, and not to cases in which the facts alleged show that the plaintiff has no right to sue in a particular action. *Gates v. Brattle*, 1 Root, 187.

It is a well-settled rule of practice that, to make a complaint sufficient upon demurrer, it must present a good cause of action in favor of the plaintiff, or in favor of all the plaintiffs where there are more than one. *Harris v. Harris*, 61 Ind. 117; *Hyatt v. Cochran*, 85 Ind. 231; *Holzman v. Hibben*, 100 Ind. 338. The question, therefore, as to the proper parties to this action, sought to be raised by the demurrer to the complaint, was sufficiently presented by the fifth cause of demurrer.

As to whether Catherine S. Moody became lawfully entitled to receive at some time a legacy of \$5,000 under the will of Elias Ayers, and consequently as to whether, if she had survived Mrs. Lapsley, she might have recovered the amount of such supposed legacy out of the estate in the hands of Brown and Day, exhaustive arguments have been submitted, and we are asked to reconsider that question for the alleged reason that, as the complaint was amended after the cause was remanded, the construction given to the will of Elias Ayers at the former hearing is no longer obligatory as a precedent, and is, in consequence, not now the law of this case. But as to so much of the original complaint as involved a construction of the will in question there has been no material, if any, amendment, and in that respect the cause is again before us upon at least substantially the same facts as those contained in the original complaint. Consequently the construction we gave to the will of Elias Ayers at the former hearing continues to be, as it must to the end of this controversy, the law of this case. *Dodge v. Gaylord*, 53 Ind. 365; *Gerber v. Friday*, 87 Ind. 366; *Case v. Johnson*, 91 Ind. 477; *Jones v. Castor*, 96 Ind. 307.

No question was, however, made at the former hearing as to the right of the appellees to sue for and recover the legacy then held to have been left to Catherine S. Moody, and consequently nothing on that subject was either considered or decided at that hearing. The question is now made that under certain provisions of the Revised Statutes of 1843, which were in force when Catherine S. Moody died, James C. Moody, her surviving husband, became entitled, in virtue of his marital rights, to demand and to receive, for his own use, the proceeds of such legacy, to the exclusion of all other persons, and that for that reason no interest in the legacy descended to the children of Catherine S. Moody.

It may be of interest to note that by the common law, and the earlier statutes enacted in aid thereof, title to personal property was not acquired directly by descent, as under existing statutes of our state. The methods of obtaining title to such property, recognized by that system of jurisprudence, were (1) by occupancy; (2) by prerogative; (3) by forfeiture; (4) by custom; (5) by succession; (6) by marriage; (7) by judgment; (8) by gift or grant; (9) by contract; (10) by bankruptcy; (11) by testament; (12) by administration. See 2 Bl. Comm. tit. "Personalty."

Kent, in his Commentaries, in volume 2, at marginal page 135, states the common-law rule of this country, as regards choses in action belonging to a married woman, to be as follows:

"As to debts due to the wife at the time of her marriage or afterwards, by bond, notes or otherwise, and which are termed choses in action, they are not vested absolutely in the husband, but the husband has power to sue for and recover, or release or assign, the same; and when recovered and reduced to possession, and not otherwise, it is evidence of a conversion of the same to his own use, and the money becomes, in most cases, absolutely his own. The rule is the same if a legacy or distributive share accrues to the wife during coverture. So he has power to release and discharge the debts, and to change the securities, with the consent of the debtor. But if he dies before he recovers the money, or alters the security, or by some act reduces the chose in action into possession, the wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for his debts. If his wife dies, and he survives her, before he has reduced the chose in action to possession, it does not strictly survive to him; but he is entitled to recover the same to his own use by acting as her administrator. By the statute of distributions of 22 & 23 Charles II., and the twenty-fifth section of the statute of 29 Charles II., c. 3, in explanation thereof, and which have in substance been enacted in New York and the other states of the Union, the husbands of *femes covert* who die intestate have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute, it is held that the husband is entitled *jure mariti* to administer and to take all her chattels real, things in action, and every other species of personal property, whether reduced to possession, or contingent, or recoverable only by suit. \* \* \* It is also settled that, if the husband who has survived his wife dies before he has recovered the choses in action, his representatives are entitled to that species of property. \* \* \* So if, after the husband has administered in part on his wife's estate, and dies, and administration *de bonis non* of the wife should be obtained by a third person, or by the next of kin of the wife, he would be deemed a mere trustee for the representatives of the husband."

We have not inquired as to what the earliest statutes of this state prescribed on the general subject of the descent of property, but we find that the "Act regulating descents, distribution, and dower," approved February 17, 1838, by its first section provided "that the real and personal estate of any person dying intestate shall, if he or she have a child or children living, descend, in equal proportions, to said children, and to the descendants of any of them who may be deceased; the children of a deceased child inheriting the share of their deceased parent."

In the case of *Coldron v. Rhode*, 7 Ind. 151, it was held that under this statute, upon the death of an intestate, his personal as well as his real property descended to his heirs, and vested in them, in the absence of an administrator authorized to take charge of such property.

The Revised Statutes of 1843 adopted, nevertheless, a different policy concerning the distribution of the personal estates of intestates, and particularly as to the disposition of the personal estates of married women, and substantially re-enacted the American common law upon those subjects as it is hereinabove stated by Chancellor KENT. By the fifth article of this last named revision of the statutes, provision was made for the descent of, and the transmission of the title to, the real estate of per-

sons dying intestate. The fourteenth article constituted a statute for the distribution of the personal estates of decedents not disposed of by will, as contradistinguished from a statute of descents, and provided for the distribution of the surplus of such estates. The concluding section of that article was as follows:

"The preceding provisions respecting the distribution of estates shall not apply to the personal estates of deceased married women; but their husbands may demand, recover, and enjoy the same as if the provisions of this article were not in force."

Sections 96 and 97 of chapter 30 of the same revision of the statutes were in the following words:

"Sec. 96. A husband, as such, if otherwise competent according to law, shall be solely entitled to administration on the estate of his wife, but shall be liable, as administrator, for the debts of his wife contracted before marriage only to the extent of the assets received by him as administrator. If he shall not take out letters of administration on her estate in his hands, he shall be presumed to have assets in his hands sufficient to satisfy her debts, and shall be liable therefor; and, if he shall die, leaving any assets of his wife unadministered, they shall pass to his executor or administrators as part of his personal estate, but shall be liable for her debts to her creditors, in preference to the creditors of the husband.

"Sec. 97. If letters of administration shall be granted on the estate of a married woman to any other person than her husband, by reason of his neglect, refusal, or incompetency to take the same, such administrator shall account for and pay over the assets and moneys remaining in his hands, after the payment of debts and expenses of administration, to such husband, or his personal representatives."

The act regulating descents, and the apportionment of estates, approved May 14, 1852, (1 Rev. St. 1876, 408,) re-established the rule for the descent and transmission of personal property prescribed by the act of February 17, 1838, by enacting "that the real and personal property of any person dying intestate shall descend to his or her children in equal proportions; and posthumous children shall inherit equally with those born before the death of the ancestor;" and that provision, together with an amended section enacted in 1853, declaring that a married woman's personal property shall descend in the same manner as her real estate, is still in force. Rev. St. 1881, §§ 2467-2488. Since the act of May 14, 1852, went into effect, this court has frequently held that an heir may maintain an action upon a chose in action which belonged to his ancestor, where there is no executor, administrator, widow, creditor, or other person entitled to control or to share in such chose in action. *Walpole v. Bishop*, 31 Ind. 156; *Bearss v. Montgomery*, 46 Ind. 544; *Schneider v. Piessner*, 54 Ind. 524; *Church v. Grand Rapids & I. R. Co.*, 70 Ind. 161; *Begien v. Freeman*, 75 Ind. 398; *Cooper v. Cockrum*, 87 Ind. 443. But we know of no case in which this court has held that an heir may maintain an action upon a chose in action, under like circumstances, where the ancestor died when the Revised Statutes of 1843 were in force, and especially where the ancestor thus dying was a married woman, and was survived by her husband.

Upon the facts stated in the complaint our conclusion is that James



C. Moody, in virtue of his marital rights, succeeded to whatever claim Catherine S. Moody held to a legacy under the will of Elias Ayers, at the time of her death, and that consequently no right of action upon such claim survived to the appellees. The demurrer of the appellants to the amended complaint ought, therefore, to have been sustained.

The judgment is reversed, with costs, and the cause remanded, with instructions to sustain the demurrer which was filed to the complaint.

Howe, C. J., took no part in the decision of this cause.

(107 Ind. 89)

**BELT RAILROAD & STOCK-YARD CO. v. MANN.**

(*Supreme Court of Indiana*, June 17, 1886.)

**1. TRIAL—VERDICT ON ENTIRE COMPLAINT WHERE ONE PARAGRAPH IS BAD.**

Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad, the judgment will be reversed.

**2. NEGLIGENCE—WHEN WANT OF CONTRIBUTORY NEGLIGENCE NEED NOT BE ALLEGED—WILLFUL INJURY.**

Where specific facts are stated in a complaint for damages for negligence, a mere general averment that the injuries complained of were inflicted by the "willful negligence" of the defendant, is not sufficient, in the absence of an averment of freedom from contributory negligence on the part of the plaintiff. It must be shown that the injurious act was purposely and intentionally committed, with a design to produce injury, or that the natural and probable consequences would be to produce injury.

Appeal from Marion superior court.

*A. C. Harris, E. H. Lamree, and W. H. Calkins*, for appellant.

*Baker, Winter & Herod*, for appellee.

**MITCHELL, J.** James E. Mann recovered a judgment against the appellant in the court below for damages sustained on the twenty-fifth day of June, 1882, by coming in collision with one of appellant's locomotive engines at a point where a highway crosses the Belt Railroad near the city of Indianapolis.

The complaint is in three paragraphs. In the first and third it is charged that the plaintiff's injury was occasioned by the negligence of the railroad company; the plaintiff being without fault or negligence on his part. The second paragraph does not aver, either directly or indirectly, that the plaintiff was without fault, but proceeds upon the theory that the injury was willfully and purposely committed, and that the plaintiff was entitled to maintain an action against the railroad company, notwithstanding he may have been subject to the imputation of contributory fault.

With their general verdict the jury returned answers to a number of special interrogatories submitted by each of the parties. These indicate that the verdict and judgment rest on the complaint generally. Indeed, it might well be inferred, in view of the facts specially found, that the general verdict and judgment find their support in that paragraph of the complaint which authorized a recovery without regard to the fact that the plaintiff may not have exercised due care.

Upon the assumption that the second paragraph, to which a demurrer

had been overruled, charged the infliction of a willful injury, the court, after giving the jury instructions pertinent to the other paragraphs, charged them in substance that, if the plaintiff's injuries were the result of willful acts on the part of the defendant's employees, then they might find for him, without reference to whether he had, by his negligent conduct, contributed to the injury. The jury were further told, in that connection, that if the defendant's misconduct was such as to evince an utter disregard for consequences, and to imply a willingness to inflict the injury suffered by the plaintiff, then they were authorized to find that the injury was willfully inflicted. It will thus be seen that the correctness of one of the theories upon which the case was distinctly put to the jury depends upon whether the complaint presented the issue of an injury willfully or purposely inflicted. If there was no such issue legitimately presented, it was manifestly erroneous, and necessarily hurtful to the appellant, to permit the jury to determine its liability for an injury resulting from alleged negligence, upon the theory that the plaintiff was entitled to a verdict notwithstanding the injury may have occurred through his contributory fault.

Where a verdict is based upon an entire complaint, which contains two or more paragraphs, if either paragraph is bad, the judgment will be reversed. *Pennsylvania Co. v. Holderman*, 69 Ind. 18; *Lang v. Oppenheim*, 96 Ind. 47; *Caylor v. Roe*, 99 Ind. 1; *Railroad Co. v. Lockridge*, 93 Ind. 191; *Ethel v. Batchelder*, 90 Ind. 520. In such a case, the ruling must stand or fall upon its own merits. The evidence, or the result reached, cannot be considered in determining whether the complaint was sufficient. *Pennsylvania Co. v. Marion*, 104 Ind. 239; S. C. 3 N. E. Rep. 874; *Pennsylvania Co. v. Poor*, 103 Ind. 653; S. C. 3 N. E. Rep. 253. We are therefore to determine whether or not the second paragraph of the complaint charges the injury to have been willfully inflicted; and, since the paragraph assumes to state the specific acts which occasioned the injury, the quality of those acts must be determined, not by considering the vituperative epithets with which the complaint abounds, but by a consideration of the acts which are charged as having caused the injury.

That part of the complaint which is material in this connection is as follows:

"That on the twenty-fifth day of June, 1882, while said plaintiff was traveling along a public thoroughfare running south from the city of Indianapolis, which crosses defendant's road just south of said city, and while plaintiff was crossing said road, he being seated in a two-wheeled vehicle drawn by one horse, said defendant, by its servants and employees, ran a locomotive belonging to said defendant \* \* \* over and along said road at a great rate of speed, and said defendant so negligently and carelessly operated said locomotive," etc., "as to cause the same to run into and against plaintiff's vehicle; thereby hurling said vehicle and horse to one side of the road, and running against, upon, and over this plaintiff, crushing and mutilating his right arm," etc. "That said accident occurred, and said injuries were inflicted, by said defendant, its servants and employees, through their gross and willful negligence, and through their wantonness and recklessness in the management of said locomotive and train. Plaintiff avers that by reason thereof he was cruelly.

wantonly, and willfully permanently maimed and injured by said defendant's said employes, to his great and irreparable damage," etc.

Conceding that an action cannot be maintained for an injury occasioned by "simple negligence" unless the plaintiff was himself without fault, the appellee contends that the paragraph in question exhibits a case of willful misconduct, and that it was therefore sufficient on demurrer.

The aid of sections 338-376 and 658 of the Code is invoked in support of this contention. These sections provide, in substance, that the complaint shall contain a statement of the cause of action in plain and concise language, so as to enable a person of common understanding to know what was intended; that in the construction of a pleading its allegations shall be liberally construed, with a view to substantial justice between the parties; further, that no judgment shall be reversed for any defect in form, variance, or imperfections contained in the record, etc. The foregoing sections have often been resorted to, but without success, in aid of the complaint which failed to state facts sufficient to constitute a cause of action. Where a demurrer to a complaint which fails to state a cause of action has been overruled, the error in so ruling cannot be cured by resorting to the sections relied on. The reasons have been so often stated that to state them again would serve no useful purpose. *Johnson v. Breedlove*, 72 Ind. 368, and cases cited; *Sims v. City of Frankfort*, 79 Ind. 446; *Weir v. State*, 96 Ind. 311, and cases cited.

The use of the phrase "willful negligence," in the connection in which it is frequently employed, is, to say the least, inapt. Whatever idea the word "willful" may express when so used, it is beyond question that, to entitle one to recover for an injury to which his own negligence may have contributed, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been so committed under such circumstances as that its natural and probable consequence would be to produce injury to others. There must have been either an actual or constructive intent to commit the injury. The act must have involved conduct *quasi* criminal in character.

Following recent and well-considered decisions of this court, we arrived at the conclusion, in *Louisville, etc., Ry. Co. v. Bryan*, ante, 807, (present term,) that to constitute a willful injury the act or omission which produced it must have been purposed and intentional, and must have been committed under such circumstances as evinced a reckless disregard for the safety of others. Where one is injured at a railroad crossing by coming in collision with a train, an inference of negligence arises; and unless this inference is rebutted by a general averment of due care, or a specific statement of the facts showing due care, or unless it appears that the injury was intentionally committed, the complaint is not sufficient. *Cincinnati, H. & I. R. R. v. Butler*, 103 Ind. 31; S. C. 2 N. E. Rep. 188.

There is no language in the paragraph under consideration which can be said to charge that the appellant's employes had an intent, either actual or constructive, to commit the injuries complained of. It does not

appear that they had knowledge of the plaintiff's presence in time to have avoided the collision, or that the crossing was of such a character as that the natural and probable consequence of running an engine, in the manner described, would be to produce an injury such as that suffered by the plaintiff. The demurrer to the second paragraph of the complaint should have been sustained.

Some of the instructions given, and some of those refused, are the subjects of discussion. We are also asked to consider the answers to the special interrogatories returned by the jury. As, however, it is apparent from what has already been said that one theory upon which the case was tried was erroneous, we deem it more consistent with the rights of both parties that a new trial should be ordered, without embarrassing the case with any suggestion in respect to the other questions discussed.

For the error in overruling the demurrer to the second paragraph of the complaint the judgment is reversed, with costs.

And afterwards, to-wit, on the twenty-first day of June, 1886, came appellee, by attorneys, and files a waiver of right to file a petition for rehearing, a copy of which is as follows:

"STATE OF INDIANA, SS.—IN THE SUPREME COURT.

*Belt Railroad & Stock-yard Company vs. James E. Mann.*

"Comes now James E. Mann, the appellee herein, and waives the filing of a petition for a rehearing in said cause, and asks that the opinion in said cause may be certified to the court below at once.

"JAMES E. MANN.

"Per J. P. BAKER and F. WINTER, his Attys."

(107 Ind. 71)

### WAGNER v. STATE.

(*Supreme Court of Indiana. June 18, 1886.*)

1. CRIMINAL LAW—GOOD CHARACTER OF ACCUSED—EFFECT OF.  
Proof of previous good character is admissible on behalf of the defendant in a criminal prosecution, as tending to mitigate or cast a doubt upon his guilt, but its value must depend on the peculiar circumstances of each particular case.
2. LARCENY—PROOF OF GOOD CHARACTER—POSSESSION OF STOLEN GOODS.  
Proof of previous good character *held* not sufficient to rebut the presumption of guilt arising from the possession of stolen property under the circumstances of this case.

Appeal from Porter circuit court.

*L. A. Cole and Wile & Osborn*, for appellant.

*The Attorney General*, for the State.

NIBLACK, J. This was a prosecution against Lawrence Wagner for grand larceny, based upon an affidavit made by the prosecuting witness, and an information filed by the prosecuting attorney. The property charged to have been stolen was a horse of the estimated value of \$100, belonging to John Nelson and Charles P. Nelson. The cause was, by agreement, tried by the court without a jury. The defendant was found

guilty as charged, and, in addition to the assessment of a fine against him, he was adjudged to be imprisoned in the state's prison for the term of two years, and to be disfranchised for a definite period of time.

The only question here is upon the sufficiency of the evidence to sustain the finding of the circuit court. John Nelson, the prosecuting witness, testified that the horse belonged to him and Charles P. Nelson, and was, with a bridle, taken from his stable, in Porter county, during the night succeeding the first day of January, 1886. Herman Stibbe and John Pike respectively testified that they were out hunting the next morning, that is to say, on the morning of the second day of January, 1886, and found the horse tied to a tree in the woods in Porter county, about three miles west of Michigan City, and several miles from where it was taken, where the undergrowth was thick; that a sack was lying on the ground near by containing horse-feed, and marked "Lorans Wagner;" that there was also a fire near by, at which some cooking seemed to have been done; that, as they approached the horse, they saw the defendant walking rapidly away from the opposite side. Stibbe claimed to have been acquainted with the defendant for several years previously, and that he recognized him when he thus saw him walking away. Pike had no previous acquaintance with the defendant, but identified him at the trial as the person he saw hastening away from the horse at the time referred to. An hour or two later the marshal of Michigan City, finding the horse apparently abandoned, and still hitched in the woods, took charge of it, and on the following day caused it to be returned to its owners. In short, the evidence for the state made a well-defined *prima facie* case of grand larceny against the defendant.

On behalf of the defendant several witnesses, more or less acquainted in the neighborhood in which he had lived, testified to his previous good character, and other witnesses claimed very particularly to have been with him, or to having seen him, as late as midnight on the night during which the horse was stolen, and again next morning, at his house, in La Porte county, 14 miles from where the horse was found in the woods. Still other witnesses claimed to have accompanied him, during the forenoon of the second day of January, 1886, to the city of La Porte, where still others insisted he remained until the next day. As a witness in his own behalf, the defendant denied having been away from his own house during the night on which the horse was alleged to have been taken, or during the next morning, until he started to La Porte, and hence all connection with the taking or attempted concealment of the horse.

Conceding, therefore, the truth of all that was sworn to on the subject, proof of an *alibi* on the part of the defendant was complete. The case presented is, in consequence, one resting upon irreconcilably conflicting evidence, and is for that reason a case in which the judgment cannot be reversed upon the evidence.

Counsel arguing in support of this appeal concede that the possession of recently stolen property raises a presumption against the person so found in possession of such property, to the extent of requiring him to

give at least a reasonable account of the manner in which he came into such possession, but insist that proof of previous good character is sufficient to rebut the presumption of guilt thus raised, and that, under that rule of evidence, the defendant became entitled to an acquittal in this case; citing *Clackner v. State*, 38 Ind. 412, in support of their position. Whatever the case thus cited may be construed as really deciding, we regard the doctrine contended for above as against the great weight of authority. Proof of previous good character is admissible, in this state, on behalf of the defendant in all criminal prosecutions, as tending to have, or as likely to have, at least a mitigating influence in some respects favorable to the defendant; but the value of such proof, and especially its relative value, must always depend upon the circumstances of each particular case. Such proof may in some cases create a doubt in favor of the defendant where the circumstances, in other respects, tend to establish his guilt; but as to when such proof ought to be accepted as creating such a doubt no definite rule can be stated. 1 Tayl. Ev. § 326; Whart. Crim. Ev. §§ 60-67; *Kistler v. State*, 54 Ind. 400; *Rollins v. State*, 62 Ind. 46; *McQueen v. State*, 82 Ind. 72.

In the cause in hearing the defendant did not admit his possession of the stolen property, and hence offered nothing in explanation of such a possession. If, in fact, he had possession of the horse in the woods, as claimed by Stibbe and Pike, his hastening away and abandonment of the possession of the animal was, under the circumstances, seemingly inconsistent with an honest possession, and with previous good character. The theory of his defense was that, as to him, the case was one of mistaken identity, and, in support of that theory, evidence tending to prove an *alibi* was introduced. The proof of previous good character, relied upon by counsel, was not, consequently, in legal contemplation, admitted to rebut the presumption arising from the possession of the stolen property, but was rather to strengthen the evidence tending to prove an *alibi*, and in this way to increase the probabilities that the case was one of mistaken identity.

Unsatisfactory as the case may be in some of its features, and as all cases resting upon irreconcilably conflicting evidence upon a vital point must be to an appellate court, no sufficient reason has been shown for a reversal of the judgment. The judgment is affirmed, with costs.

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(107 Ind. 152)

#### MILLER v. STATE.

(*Supreme Court of Indiana. June 19, 1886.*)

1. **CRIMINAL LAW—AFFIDAVIT AND INFORMATION—AMBIGUOUS USE OF PRONOUN.**  
Where a personal pronoun is so used in an affidavit and information that it may refer to either of two persons, it does not necessarily refer to the person whose name immediately precedes it, but to the one to whom the entire affidavit shows it was intended to refer.
2. **INTOXICATING LIQUORS—SELLING INTOXICATING LIQUORS—FAILURE OF PROOF.**  
There being an entire failure of the evidence to support the finding of the court on several material points, judgment is reversed.

Appeal from Fountain circuit court.  
S. F. Wood, for appellant.  
The Attorney General, for appellee.

MITCHELL, J. Section 2093, Rev. St. 1881, provides that "whoever, directly or indirectly, sells, barter, or gives away any spirituous, vinous, malt, or other intoxicating liquor to any person who is in the habit of being intoxicated, after notice shall have been given him, in writing, by any citizen of the township or ward wherein such person resides, that such person is in the habit of being intoxicated, shall be fined," etc. The appellant was prosecuted and convicted for a violation of this statute.

The affidavit and information charged that John Miller, on a day named, sold intoxicating liquor to one John Stevenson, "who was then and there a person in the habit of being intoxicated, and after notice in writing had been given him, the said John Miller, by Fannie Stevenson, who was then and there a citizen of the township in which *he* lived, to-wit, Troy township, in said county, that said John Stevenson was then and there a person in the habit of being intoxicated." The objection to the affidavit and information is that, according to proper grammatical construction, the pronoun "*he*," above italicized, refers to the appellant, Miller, and that the affidavit and information are therefore fatally defective in not averring that the person who gave the notice in writing concerning Stevenson's habit was a citizen of the township in which *he*, Stevenson, resided. The statute contemplates that the notice in writing shall be given by a citizen of the township or ward wherein the person who is in the habit of being intoxicated, resides. *Engle v. State*, 97 Ind. 122.

In the case of *Steeple v. Downing*, 60 Ind. 478, this statement is found:

"There is no rule of legal or grammatical construction which necessarily requires that a pronoun shall relate to the last noun mentioned for its antecedent. This is a matter which is governed by the sense and meaning intended to be conveyed."

Applying this rule to the construction of the language quoted, and it is fairly evident that "*he*" refers to John Stevenson. *State v. Hedge*, 6 Ind. 330. The motion to quash the affidavit and information was properly overruled.

A bill of exceptions purporting to contain all the evidence given in the case is set out in the record. On the material points there is an entire failure in the evidence, as it appears in the record, to sustain the finding of the court. There is not a syllable of testimony tending to prove that John Stevenson was a person who was in the habit of being intoxicated. No evidence was given on that subject. It was admitted of record that notice in writing had been given the appellant, prior to the date of the alleged sale, by the wife of Stevenson, that he was in the habit of being intoxicated; but to sustain a conviction some proof of the fact that he was so habituated must have been made. In this regard the proof fails wholly.

The other point upon which proof is entirely lacking is this: there is a total absence of evidence to show that the appellant, at any time, either directly or indirectly, sold, bartered, or gave to Stevenson any intoxicating or other liquor. The extent to which the evidence goes on that subject is that Stevenson was seen in company with others to drink some liquor in the appellant's saloon, but there is no evidence that the appellant was present, either in person, or by an agent or servant, or that he had any knowledge whatever that Stevenson obtained or drank any liquor there.

The motion for a new trial should have been sustained. Judgment reversed.

(107 Ind. 276)

**DAGGETT v. BONEWITZ and others. 1**

(*Supreme Court of Indiana. June 22, 1886.*)

**1. SCHOOLS AND SCHOOL-DISTRICTS—LANDS—GRANTS BY THE GENERAL GOVERNMENT.**

The grant of school lands to the state by the act of congress of April, 1816, vested an immediate seizin in the grantee.

**2. PUBLIC LANDS—GRANT—PATENTS FOR LAND.**

Where land has been previously disposed of by an act of congress, a patent issued by the federal officers is invalid.

**3. SAME—ACCEPTANCE BY STATE.**

After the state has accepted a grant of lands made by the general government, it cannot be withdrawn.

**4. EVIDENCE—CERTIFICATE OF PUBLIC OFFICER.**

A public officer may certify as to matters contained in a record in his custody, but he cannot recite matters not appearing of record.

Appeal from Knox circuit court.

*Cullop, Shaw & Kessinger*, for appellant.

*Cobb, Cobb & Goodman and Canthorn & Boyle*, for appellees

**ELLIOTT, J.** The appellant asserts title to the land in controversy upon a patent issued by the United States to his immediate grantor on the fifteenth day of May, 1877. The appellees claim title to the land under the act of congress enabling the people of the territory of Indiana to form a state government, adopted April 19, 1816. That act, among other things, provides "that the section numbered sixteen in every township, and, when such section has been sold, granted, or disposed of, other lands equivalent thereto, and most contiguous to the same, shall be granted to the inhabitants of such township for the use of schools." The land in dispute is in section 16, township number 2 N., of range 8 W. In 1851 a petition for the sale of the land in section 16 was presented to the board of commissioners of Knox county, and a sale of the land ordered. Under this order a sale was made, and a deed executed by the auditor of the county. As it appears that the land is in section numbered 16, and that it was accepted as school land prior to the issue of the patent under which the appellant claims, a *prima facie* title was made out by the appellees, and, unless this title has been defeated, this appeal must fail. The grant made to the state by the federal government vested an imme-

<sup>1</sup> Rehearing denied.



mediate seizin in the grantee. *Fletcher v. Peck*, 6 Cranch, 87; *Cooper v. Roberts*, 18 How. 173; *Schulenberg v. Harriman*, 2 Dill. 398; *State v. Springfield Tp.*, 6 Ind. 83; *Proprietors of Enfield v. Permit*, 8 N. H. 512; S. C. 31 Amer. Dec. 207. The effect of this grant can only be defeated by evidence that the land in section 16 did not pass under the act of April 19, 1816; and it seems to us that this could only be done by evidence that the land in section 16 had been "sold, granted, or disposed of" prior to that time. The act operates upon all land not "sold, granted, or disposed of" in any section numbered 16, and we cannot perceive any ground upon which it can be justly held that land in such a section owned by the United States did not pass to the inhabitants of the township. The public officers had no authority to take or grant other lands than those indicated in the act of congress, and by virtue of that act the title to every section 16 not previously disposed of vested immediately in the inhabitants of the township. *State v. Portsmouth Sav. Bank*, ante, 379, (this term.) The act of congress does not vest authority in any officer to make a selection of land, but in express terms grants every section 16, so that it conveys the land at once, for there is no act to be done to determine what lands are granted. The grant is complete and perfect in itself.

If we are correct in affirming that the act of congress at once vested a title to section 16 in the inhabitants of the township, then the patent issued in 1877 is without force; for it is settled that a patent is of no effect if it appears that the land described in it has been previously disposed of by the government. *U. S. v. Carpenter*, 111 U. S. 347; *Wilcox v. Jackson*, 13 Pet. 516; *Doe v. Watts*, 45 Amer. Dec. 308. It is perfectly clear that where a public law grants lands to the inhabitants of a township for school purposes, that no officer, however high his station, can defeat the legislative grant. It is difficult, therefore, to perceive any other way of defeating the claim to lands in section 16 than by showing that they were disposed of prior to April 19, 1816; for it is only the lands in section 16 previously disposed of that did not immediately vest under the act of congress of that date. Even if the officers had undertaken to substitute lands for those in section 16, their acts would be without effect, unless it appeared that the lands in that section had "been sold, granted, or otherwise disposed of."

The evidence relied on by the appellant to prove that other lands were substituted for those in section 16 is a letter written by John Badollet, the register of the land-office at Vincennes, in June, 1821; but there are at least two reasons why this letter is not competent to establish the fact that the lands in that section were disposed of, and others substituted for them. The first of these reasons is that the provisions of the act of congress of April 19, 1816, were accepted by the representatives of the state on the twenty-ninth day of June of that year, and after this acceptance the grant could not be withdrawn. Rev. St. 1843, 36. Section 16 had therefore fully vested in the township prior to Mr. Badollet's letter of June, 1821, and the grant bound both the federal and state governments. Where the nation enters into a contract, it is as much

bound as an individual citizen. *Lessieur v. Price*, 12 How. 59; *Murray v. Charleston*, 96 U. S. 432; *Gray v. Coghlen*, 72 Ind. 567. It was therefore necessary for the appellant to prove that the grantee had assented to the substitution. The second reason is that a mere recital of a past occurrence in a letter is not evidence to prove that it actually occurred. A public officer may doubtless certify as to matters contained in the records of his office, but he cannot recite facts not appearing of record. 1 Greenl. Ev. § 498. The recital in Mr. Badollet's letter was consequently nothing more than the statement of an individual, and was unsworn testimony, and to this infirmity must be added the further one that it is mere hearsay evidence.

The instructions of the trial court were correct, but the case is so plainly with the appellees on the evidence that we could not reverse, even if they had been wrong. Judgment affirmed.

NIBLACK, J., was not present when this case was considered.

(107 Ind. 117)

#### ATKINSON v. DAILEY.

(*Supreme Court of Indiana*. June 23, 1896.)

1. TRIAL—INSTRUCTIONS—HOW CONSTRUED.  
Instructions should be construed together, and taken as a whole.
2. ATTORNEY AND COUNSELOR—ATTORNEY'S FEES—ACTION TO RECOVER—JURY MUST BE GOVERNED BY EVIDENCE OF VALUE.  
Upon the trial of an action to recover compensation for services as an attorney, the jury should be governed, as in other cases, by the evidence, and not by preconceived notions of the reasonable value of such services.
3. SAME—REFERENCE TO THIRD PERSON TO FIX VALUE.  
Where services have been performed, and there is no dispute as to their value, a mere oral reference to a third person to fix their value is not conclusive.
4. INSTRUCTION—HARMLESS ERROR—NO REVERSAL.  
The supreme court will not reverse a judgment because of an instruction technically incorrect, if it could not have misled the jury.

Appeal from Benton circuit court.

*Walker & Phares* and *D. Fraser*, for appellant.

*Straight, Wiley & Carter*, for appellee.

MITCHELL, J. This was a suit on an account for services rendered by the appellee, at the request of the appellant; in bringing and prosecuting an action for a divorce, and in assisting about the adjustment of some property rights between the appellant and her husband. The account included a small sum for rent. There was a plea of payment, an answer of general denial, with other special answers, one of which set up a special contract under which it was alleged the services were performed. Another answer set up that the services were worth the sum of \$25; and no more, and that that sum had been tendered the plaintiff, and brought into court for his benefit. These special answers, although not the subject of question here, were in the nature of answers in mitigation. All the evidence applicable to them was admissible under the

general denial. *Blizzard v. Applegate*, 61 Ind. 368; *Smith v. Lisher*, 23 Ind. 500. The plaintiff below had a verdict for \$100, upon which, over a motion for a new trial, judgment was rendered.

Certain instructions given by the court, and the refusal to give others requested on the appellant's behalf, are the chief, if not the only, subjects of contention.

The second instruction, given at plaintiff's request, after defining the nature of the action, informed the jury that, to enable the plaintiff to recover, he must have proved, by a preponderance of the evidence, all the material allegations of his complaint; and, further, that in the event they should find from the evidence that services were performed by the plaintiff as attorney for the defendant, and that the reasonable value of such services had been proven, then the plaintiff was entitled to a verdict for the amount which the evidence proved his services were worth. It is said this instruction ignores the defense that the services were performed under a special contract. This may be conceded. It did not purport to do more than define the plaintiff's rights under the complaint. Coupled with the other instructions, it must have been so understood. The seventh instruction, given at the request of the defendant, presented the law of the case as applicable to the defense that a special contract existed. Construing both of these with those given by the court, and the jury must have understood this feature of the defense. *Boyle v. State*, 105 Ind. 469; S. C. 5 N. E. Rep. 203.

The jury were further instructed that, in determining the value of the plaintiff's services, they should be governed wholly by the evidence in the case, and not by their judgment or preconceived opinions as to the value of such services. The objections to this instruction are not well founded. In determining the value of the services of an attorney, as of any other person, the evidence in the case, and not the preconceived opinion of the jury, is to control.

One of the defendant's answers presented the somewhat novel defense that the services were performed under a special contract, the effect of which was that, in consideration that the defendant in the divorce suit would not resist the granting a divorce, the appellee agreed to submit the amount of compensation which he shall receive as attorney in the divorce case to the determination or judgment of the attorneys for the defendant, and that the defendant's attorneys had fixed the plaintiff's compensation at \$25, which had been tendered. There was some proof tending to show that, if any agreement of that description was made, it was not made until after the services were performed. As bearing upon that feature of the case, the court instructed the jury, in substance, that if an agreement of the character mentioned was made, yet if it was without consideration, it would not be binding on the plaintiff. Upon the assumption that an agreement such as that stated would be valid under any circumstances,—a proposition we do not decide,—it certainly would be without consideration, and therefore invalid, if it was not made until after the services had been performed. Where services have been performed, and no dispute exists as to the price or value, a mere oral

reference to a third person to fix the value is not conclusive. There was evidence to which the instruction was relevant, and it was correct.

Without examining in detail such of the defendant's instructions as the court refused, it is sufficient, in this connection, to say, the court having given others pertinent, fully covering all that was proper or material in those asked, no error was committed in that regard.

The court of its own motion instructed the jury that, as no payment had been proved, the plea of payment need not be considered by them. The plaintiff in his testimony admitted that the defendant was entitled to a credit of \$1.50 on the account for rent; that amount having been paid to plaintiff's wife. A reversal is insisted upon because of this instruction. It is apparent that the court, as also the appellant's counsel, overlooked the small sum above mentioned. It would doubtless have been corrected if an instruction for that purpose had been asked. The jury could not have understood that the court meant to tell them, as a proposition of law, that the defendant was not entitled to a credit on the rent for the sum admitted to have been paid. This is so plainly a harmless inadvertence, involving an amount so trifling, that we decline to reverse the judgment, even though the instruction was technically erroneous. The statute enjoins upon us not to reverse judgments where it appears that the merits of the cause have been fairly determined in the court below. Section 658, Rev. St. 1881; *Billingsley v. Groves*, 5 Ind. 553.

There is nothing in the other instructions given which requires a reversal of the cause. The judgment is affirmed, with costs.

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(102 N. Y. 726)

LIDDY v. LONG ISLAND CITY.

(Court of Appeals of New York. June 8, 1886.)

APPEAL—UNDERTAKING ON APPEAL—CODE, §§ 798, 1885.

Where appellant obtains leave to file undertaking on appeal to this court, and serves notice thereof on respondent by mail on the 7th, and the latter, on the 17th, mails a notice that he excepts to the same, and requires the sureties to justify, the service is properly made, and unless the sureties justify the appeal will be dismissed.

A. T. Payne, for the motion.  
James M. Liddy, opposed.

PER CURIAM. Leave was granted the appellant to file an undertaking on this appeal, *nunc pro tunc*, and such undertaking was filed, and notice thereof given to the respondent, who resided at Long Island City, on August 7, 1885, by depositing the same, properly directed, in the post-office of the city of New York, where the appellant's attorney resided. The proof shows that the respondent's attorney excepted to the sureties, and mailed notice thereof to the appellant's attorney, addressed to him at New York city, in the post-office at Long Island City, on the seventeenth day of August, 1885. This notice was properly served within 10 days, even without the allowance of the double time authorized in case

of the service of the precedent notice by mail, (section 798, Code Civil Proc.,) and required the appellant to cause the sureties on his undertaking to justify, in order to retain his appeal. This he did not do. Code Civil Proc. § 1335.

The appeal must therefore be dismissed, unless the appellant perfect his undertaking within 20 days from the service of this order, and pay \$10 costs of this motion.

(All concurred.)

(102 N. Y. 572)

MAYOR, ETC., OF THE CITY OF NEW YORK v. SECOND AVE. R. CO.

(Court of Appeals of New York. June 22, 1886.)

1. MUNICIPAL CORPORATIONS — RAILROADS IN STREETS — PAVEMENT BETWEEN DOUBLE TRACK—MONEY EXPENDED BY CITY IN PAVING MAY BE RECOVERED.

This action was brought to recover moneys which the city of New York had expended in repairing the pavement between defendant's double tracks between Houston and Forty-second streets, and is founded on an agreement by defendants "to pave the streets in and about the railroad to the satisfaction of the street commissioner." *Held*, that this covenant bound the company to pave and keep in repair the space between the double tracks.

2. EVIDENCE—TIME-BOOK KEPT BY FOREMAN.

W., a foreman in employ of department of public works, offered in evidence a time-book kept by him of the work done, made from information given him daily by the gang foremen, containing a list of the men's names, and the time; and the gang foremen testified that they correctly reported such names and time to W. Upon this proof the trial judge admitted the time-book in evidence. *Held* no error; that, while the book was not admissible upon the testimony of the foremen or of W., separately considered, on combining the two it was.

3. SAME—MEMORANDUM OF MATERIAL USED IN PAVING STREET.

W. also offered a memorandum of materials used, made from daily information presented by gang foremen, and testified that he correctly entered the amounts as reported. The foremen testified that they reported the correct amounts. *Held* admissible.

4. SAME—MUST BE IN ORDINARY COURSE OF BUSINESS.

To admit such evidence the account must have been made in the ordinary course of business, and cannot be extended so as to admit a mere private memorandum.

5. MUNICIPAL CORPORATIONS—MEASURE OF DAMAGES.

The court directed a verdict for the sum expended by the city. *Held* no error; that, where a covenantee has made repairs which the covenantor was bound but neglected to make, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is *prima facie* the sum which he is entitled to receive.

Appeal from judgment general term supreme court, First department, affirming verdict for plaintiff at circuit.

Austen G. Fox, for appellant, Second Ave. R. Co.

D. J. Dean, for respondent, Mayor, etc., of the City of New York.

ANDREWS, J. The construction of the covenant of the defendant, the Second Avenue Railroad Company, contained in the instrument of December 15, 1852, to pave the streets "in and about the rails," in a permanent manner, and to "keep the same in repair to the satisfaction of the street commissioners," was considered in the *Case of McMahon*, 75

N. Y. 235, and it was held that the covenant bound the company to pave and keep in repair so much of the space between the tracks as was disturbed in the original construction of the road. Upon this construction of the covenant the defendant was bound to keep in repair the whole space between the tracks of its road on Second avenue, between Houston and Forty-second streets, as it was shown that, while the laying of the road originally would only require the actual displacement of the pavement for a distance of about 18 inches on the side of each rail, nevertheless it would so disturb the belt of intermediate pavement as to require it to be relaid. The trial judge therefore correctly ruled that the covenant extended to the entire space between the tracks.

It is insisted, however, that, conceding this to be the true construction of the covenant, the court erred in directing a verdict for the sum expended by the city, and for the value of the new materials used, as proved by the account kept by the city. The objection is twofold: *First*, that the rule of damages for a breach of a covenant to repair, where the covenantor has neglected to perform his covenant, and the repairs have been made by the covenantee, is the reasonable cost of the repairs, and not the sum expended by the covenantee in making them, and that the question of reasonable expense should, under the evidence, have been submitted to the jury; and, *second*, that improper evidence was admitted to prove the amount of labor and materials used in the work.

In reference to the first ground, it was shown, on the part of the city, without contradiction, that the street was out of repair, and that the defendant, having neglected, after due notice, to put it in repair, as required by its covenant, the city proceeded to make the repairs at a cost, for labor and materials, of \$1,971.72. It employed laborers at the usual wages paid by the city, and purchased materials for the work. It does not affirmatively appear that the labor and materials employed did not exceed the necessary amount. But the work appears to have been done in the usual manner, and by the agencies usually employed by the city in the prosecution of street repairs. We think the learned counsel for the defendant is correct in the proposition that the measure of damages for the breach of the defendant's covenant was the reasonable cost of the work. The city could not proceed in a reckless or extravagant manner, and charge the defendant for expenses unnecessarily or unreasonably incurred. *State v. Ingram*, 5 Ired. 441; *Rutland v. Dayton*, 60 Ill. 58. But where a covenantee has made repairs which the covenantor was bound, but has neglected, to make, and has proceeded in the usual way, and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is, we think, *prima facie* the sum which he is entitled to recover. In the absence of proof, neither fraud, recklessness, nor extravagance will be presumed, and this measure of recovery presumptively gives the covenantor actual indemnity only.

But it is insisted that the facts proved on the part of the defendant tended to show that the cost of the repairs exceeded a reasonable sum,

and that the question, therefore, should have been submitted to the jury. We think there was no question for the jury upon this point. The defendant proved, by its track-master, that the cost to the company of paving with cobble-stone was, in respect to the item of labor, much less per square yard than the sum paid by the city for laying the pavement in question. But the pavement laid was Belgian pavement, and it was proved on the part of the city, and the proof was uncontradicted, that the laying of Belgian pavement involved much more labor and expense than paving with cobble-stones. There was no evidence showing that the charge for labor in the account of the city was excessive, or that more laborers or materials were provided than were reasonably required. We are of opinion, therefore, that the direction of the verdict for the sum actually expended by the city in making the repairs was not error.

A more serious question is raised by exceptions to the admission in evidence of a time-book kept by one John B. Wilt, and of a written memorandum or account made by him, offered to prove the number of days' work performed, and the quantity of materials used. Wilt was a foreman in the employ of the department of public works, and had general charge of the repairs in question. Under him were two gang foremen, or head pavers, Patrick Madden and Charles Coughlan, each having charge of a separate gang of about 10 men employed on the work. Wilt kept a time-book, in which was entered the name of each man employed. He visited the work twice a day,—in the morning and afternoon,—remaining from a few minutes to a half an hour each time; and he testified that while there he checked on the time-book the time of each man as reported to him by the gang foremen. He also testified that he marked the men's names as he saw them, and that he knew their faces. The gang foremen did not see the entries made by Wilt, but they testified that they correctly reported to him each day the names of the men who worked, and, if any did not work full time, they reported that fact also. Upon this proof the trial judge admitted the time-book in evidence, against the objection of the defendant.

The trial judge also admitted in evidence, under like objection, a written memorandum or account, in the handwriting of Wilt, of materials used. Wilt testified that the entries in the account were made from daily information presented by the gang foremen on the occasions of his visiting the work, and that he correctly entered the amounts as reported. It does not appear that he had any personal knowledge of the matters to which the entries related. The gang foremen were called as witnesses in support of the account. Neither of them saw the entries, and on the trial neither claimed to have any present recollection of the specific quantities so reported by them. Madden testified that he reported the correct amounts to Wilt, and it is inferable from his evidence that, when the reports were made, he had personal knowledge of the facts reported. Coughlan also testified, in general terms, that he reported the items correctly. But on further examination it appeared that his reports to Wilt, of the stone delivered at the work, were made upon information derived

by him from the carmen who drew the stone, and who counted them, and who reported the count to Coughlan, who in turn reported to Wilt. Coughlan saw the carmen dump the stone, but he did not verify the count, but appears to have assumed its correctness. The carmen who delivered the stone were not called as witnesses.

The exception to the admission of the time-book presents a question of considerable practical importance. The ultimate fact sought to be proved on this branch of the case was the number of days' labor performed in making the repairs. The time-book was not admissible as a memorandum of facts known to Wilt and verified by him. His observation of the men at work was casual, and it cannot be inferred that he had personal knowledge of the amount of labor performed. His knowledge from personal observation was manifestly incomplete, and the time-book was made up, mainly at least, from the reports of the gang foremen. The time-book was clearly not admissible upon the testimony either of the gang foremen or of Wilt, separately considered. The gang foremen knew the facts they reported to Wilt to be true, but they did not see the entries made, and could not verify their correctness. Wilt did not make the entries upon his own knowledge of the facts, but from the reports of the gang foremen. Standing upon his testimony alone, the entries were mere hearsay. But, combining the testimony of Wilt and the gang foremen, there was—*First*, original evidence that laborers were employed, and that their time was correctly reported, by persons who had personal knowledge of the facts, and that their reports were made in the ordinary course of business, and in accordance with the duty of the persons making them, and in point of time were contemporaneous with the transactions to which the reports related; and, *second*, evidence by the person who received the reports that he correctly entered them, as reported, in the time-book,—the usual course of his business and duty. It is objected that this evidence, taken together, is incompetent to prove the ultimate fact, and amounts to nothing more than hearsay. If the witnesses are believed, there can be but little moral doubt that the book is a true record of the actual fact. There could be no doubt whatever, except one arising from infirmity of memory, or mistake or fraud. The gang foremen may, by mistake or fraud, have misreported to Wilt, and Wilt may, either intentionally or unintentionally, have made entries not in accordance with the reports of the gang foremen. But the possibility of mistake or fraud on the part of witnesses exists in all cases, and in respect to any kind of oral evidence.

The question arises, must a material ultimate fact be proved by the evidence of a witness who knew the fact, and can recall it, or who, having no personal recollection of the fact at the time of his examination as a witness, testifies that he made, or saw made, an entry of the fact at the time, or recently thereafter, which, on being produced, he can verify as the entry he made or saw, and that he knew the entry to be true when made; or may such ultimate fact be proved by showing, by a witness, that he knew the facts in relation to the matter which is the subject of investigation, and communicated them to another at the time, but had



forgotten them, and supplementing this testimony by that of the person receiving the communication to the effect that he entered, at the time, the facts communicated, and by the production of the book or memorandum in which the entries were made?

The admissibility of *memoranda* of the first class is well settled. They are admitted in connection with and as auxiliary to the oral evidence of the witness; and this, whether the witness, on seeing the entries, recalls the facts, or can only verify those entries as a true record made or seen by him at or soon after the transaction to which it relates. *Halsey v. Sinsabaugh*, 15 N. Y. 485; *Guy v. Mead*, 22 N. Y. 462.

The other branch of the inquiry has not been very distinctly adjudicated in this state, although the admissibility of entries made under circumstances like those in this case was apparently proved in *Payne v. Hodge*, 71 N. Y. 598. We are of opinion that the admissibility of *memoranda* may properly be extended so as to embrace the case before us. The case is of an account, kept in the ordinary course of business, of laborers employed in the prosecution of work, based upon daily reports of foremen who had charge of the men, and who, in accordance with their duty, reported the time to another subordinate of the same common master, but of a higher grade, who, in time, also in accordance with his duty, entered the time as reported. We think entries so made, with the evidence of the foreman that they made true reports, and of the person who made the entries that he correctly entered them, are admissible. It is substantially by this method of accounts that the transactions of business in numerous cases are authenticated, and business could not be carried on and accounts kept, in many cases, without great inconvenience, unless this method of keeping and proving accounts is sanctioned. In a business where many laborers are employed, the accounts must, in most cases, of necessity, be kept by a person not cognizant of the facts, and from reports made by others. The person in charge of the laborers knows the fact, but he may not have the skill, or for other reasons it may be inconvenient that he should keep the account. It may be assumed that a system of accounts based upon substantially the same methods as the accounts in this case, is in accordance with the usages of business. In admitting an account verified as was the account here, there is little danger of mistake, and the admission of such an account as legal evidence is often necessary to prevent a failure of justice.

We are of opinion, however, that it is a proper qualification of the rule admitting such evidence that the account must have been made in the ordinary course of business, and that it should not be extended so as to admit a mere private memorandum, not made in pursuance of any duty owing by the person making it, or when made upon information derived from another who made the communication casually and voluntarily, and not under the sanction of duty or other obligation. The case before us is within the qualification suggested.

In *Peck v. Valentine*, 94 N. Y. 569, the memorandum there admitted was not an original memorandum, but a copy of a private memorandum

made by an employe of the plaintiff for his own purposes and not in the course of his duty, or in the ordinary course of business. The original memorandum was delivered, by the one who made it, to the plaintiff, who lost it, but testified that the paper produced and received in evidence was a copy. The person who made the original memorandum was unable to verify the copy. The court held that the copy was improperly admitted in evidence. The decision in *Peck v. Valentine* rests upon quite different facts from those in this case.

In respect to the admission of the account of material, we think that part of the account based upon the reports of Madden was admissible on the same grounds upon which we have justified the admission of the time-book. Madden in substance testified that he knew the facts and properly reported them, and Wilt testified that he entered them as reported.

The part of the account of materials, the items of which were furnished by Coughlan, was not strictly admissible. Coughlan does not appear to have had personal knowledge of the quantity of stone delivered on his part of the work, but took the count of the carman, and his reports to Wilt were based upon the reports of the carman to him. The carman was not called, and the evidence of Wilt and Coughlan was mere hearsay. If the attention of the court had been called by the defendant to this part of the account, and objection had been specifically taken to the items entered upon the reports of Coughlan, the objection would, we think, have been valid. But the objection was a general objection to the whole account. It was clearly admissible as to the items reported by Wilt, and we think the general objection and exception is not available to raise the question as to the admissibility of the items entered on the report of Coughlan, independently of the others. The whole amount of materials embraced in the recovery was small, and we think no injustice will be done by affirming the judgment. The judgment is therefore affirmed. (All concur.)

(102 N. Y. 588)

PEOPLE *ex rel.* GILBERT v. LAIDLAW, Co. Treas., etc.

(Court of Appeals of New York. June 22, 1886.)

1. BAIL AND RECOGNIZANCE—CODE CRIM. PROC. §§ 568, 586—DEPOSIT IN LIEU OF BAIL.

N. having been arrested for assault, G. deposited \$800 with the county treasurer in lieu of bail. N. was convicted and sentenced to pay \$250. The fine was ordered to be paid from the money deposited, and was so paid. G. then applied for a writ of alternative *mandamus* directing the county treasurer to pay him \$800 or show cause, and the trial judge refused the writ. *Held*, that as section 586, Code Crim. Proc., only authorizes the deposit in lieu of bail to be made by the defendant, the money deposited must be presumed to have been deposited by him, and was liable to be applied to the satisfaction of the judgment.

2. CRIMINAL LAW—APPEAL—PRACTICE.

Where there is an appeal to the general term from a judgment after trial of the issues joined, and an appeal to the court of appeals from an order reversing judgment and granting a new trial, it should be placed on the general calendar, and not on the motion calendar.

Appeal by defendant from a judgment of the general term, First department, reversing order of the special term denying application for *mandamus*.

D. J. Dean, for appellant, Henry B. Laidlaw, Co. Treas., etc.  
George Norris, for the People, etc.

EARL, J. Charles Nye, having been arrested in the city of New York on the charge of assault, was held to bail by a police justice in the sum of \$300 for his appearance for trial at the court of special sessions. The relator, Gilbert, was offered as bail, but for some reason was not accepted, and he then deposited with the county treasurer \$300, the amount of bail required, and took from him the following certificate signed by him:

"Whereas, heretofore, and on the thirtieth day of December, 1884, an order was made by Justice SMITH, First district police, admitting the above-named defendant to bail on giving an undertaking in the sum of three hundred dollars on a certain charge of assault, this is to certify that William R. Gilbert, for the defendant above named, has deposited with me the amount of three hundred dollars, the sum mentioned in said order as security for his appearance pursuant to such order, instead of the said undertaking of bail, pursuant to section 586 of the Code of Criminal Procedure."

A few days thereafter Nye appeared at the court of special sessions for trial, and was convicted and sentenced to pay a fine of \$250. The fine was ordered to be paid from the money deposited with the county treasurer, and the surplus of the deposit was ordered to be refunded to the defendant, and the fine was so satisfied. Thereafter Gilbert applied for a writ of alternative *mandamus*, addressed to the county treasurer, commanding him to return to him the \$300, or to show cause. The defendant filed a return to the writ, and the issue thus formed came on for trial, and it was shown, among other things, that the money deposited with the county treasurer was in fact Gilbert's money, and was not by him actually loaned to the defendant. But the trial judge decided that the relator was not entitled to the writ of *mandamus*, and rendered judgment against him for costs. From that judgment he appealed to the general term, and there the judgment was reversed, and a new trial granted; and then, by leave of the court first obtained, the defendant appealed to this court, and embodied in his notice of appeal an assent that in case the order should be affirmed judgment absolute should be rendered against him.

It is to be observed that this appeal was not properly upon the motion calendar. It is not an appeal from such an order as is mentioned in section 192 of the Code. The appeal to the general term was from a judgment after trial of the issues joined, and the appeal to this court is from an order reversing that judgment, and granting a new trial. Such appeals are required to be placed upon the general calendar. If this were to be treated as a special proceeding, then there could be no appeal to this court, as the order is not a final one. But as the case has been submitted, and is now before us, we will dispose of it upon its

merits. This must not, however, be a precedent for the repetition of such practice.

Section 568 of the Code of Criminal Procedure prescribes the form of the undertaking of bail when bail is authorized to be taken in criminal cases by a magistrate, and subsequent sections specify the qualifications of bail, and provide how they are to justify.

Section 586 is as follows:

"The defendant, at any time after an order admitting him to bail, instead of giving bail, may deposit with the county treasurer of the county in which he is held to answer, the sum mentioned in the order; and, upon delivering to the officer in whose custody he is a certificate of the deposit, he must be discharged from custody."

This section authorizes the deposit to be made by the defendant, and by no one else; and, considering this section and other sections, we think it was the plain purpose of the statute to require that the money thus deposited should, for the purposes of the deposit, in fact be the money of the defendant. Section 587 provides that if the defendant has given bail he may, at any time before the forfeiture of the undertaking, in like manner deposit the sum mentioned in the undertaking. Section 588 provides:

"If money be deposited as provided in the last section, bail may be given in the same manner as if it had been originally given upon the order for admission to bail at any time before the forfeiture of the deposit. The court or magistrate before whom the bail is taken must thereupon direct, in the order of allowance, that the money deposited be refunded by the county treasurer to the defendant; and it must be refunded accordingly."

Section 592 provides that "if money has been deposited, instead of bail, and the defendant, at any time before the forfeiture thereof, surrender himself to the officer to whom the commitment was directed, in the manner provided in section 590, the court must order a return of the deposit to the defendant upon producing the certificate of the officer showing the surrender, and upon a notice of five days to the district attorney, with a copy of the certificate." Then section 589 provides that "when money has been deposited, if it remain on deposit and unforfeited at the time of a judgment for the payment of a fine, the county treasurer must, under direction of the court, apply the money in satisfaction thereof; and, after satisfying the fine, must refund the surplus, if any, to the defendant."

All these sections treat the money deposited as belonging to the defendant, and in all cases where money is deposited in lieu of bail it may be applied in payment of any fine imposed, and the surplus, if any, after the fine has been satisfied, must be returned to the defendant.

The relator, when he deposited this money, must be assumed to have known the provisions of these statutes, and the deposit must have been made in compliance with them. There is no authority for the county treasurer to take a deposit in lieu of bail except by virtue of these statutes, and the deposit must be made in strict compliance with the statutes. The statutes may have been framed as they are for the very pur-

pose of avoiding a dispute like that which has arisen in this case. If the contention of the relator be upheld, then disputes may frequently arise as to whose money was deposited, and the county treasurer can never know with certainty to whom the money is to be returned, and the court cannot know, in passing sentence, or in making its order, whether the money is properly applicable upon the fine imposed. It is therefore wiser that the provisions of the statute should have their obvious meaning, to-wit, the money is deposited as the money of the defendant, and, if a fine is inflicted upon him, it may be used to pay the fine, and the surplus is to be returned to him. When any party other than the defendant makes the deposit for him, it is a deposit in compliance with the statute, and the money is thus devoted to the purposes of the statute, and to the use of the defendant. The certificate which was issued to the plaintiff in this case certifies that the money was deposited for the defendant. It must therefore be treated as if it were furnished to the defendant, and the deposit had been made by him. So far as the relator is deprived of his money, it is by his voluntary act and implied assent.

We see no fatal informality in the proceedings of the police magistrate, and we are therefore of opinion that the order of the general term should be reversed, and the judgment of the special term affirmed, with costs.

(All concur, except ANDREWS and MILLER, JJ., absent.)

(102 N. Y. 583)

PEOPLE *ex rel.* KOPP v. FRENCH and others, Police Com'rs, etc.

(Court of Appeals of New York. June 22, 1886.)

1. MUNICIPAL CORPORATIONS—NEW YORK CITY—POLICE—LAWS 1882, CH. 410, § 250.

Where the New York police commissioners discover that an officer had been convicted of a *crime* previous to his appointment on the force, they need not try or discipline him as a member of the force, but may investigate his case to ascertain whether he was legally a member of the force, and, if they find that he was not, may summarily dismiss him.

2. SAME—INTOXICATION A CRIME.

The appellant had, previous to his appointment, been found guilty in a police court of intoxication, and fined five dollars. *Held*, that it was a "crime."

Appeal from an order general term supreme court, First department, affirming order special term affirming proceedings of the police commissioners.

John E. Burke, for the People, etc.

D. J. Dean, for respondents, Stephen B. French and others, Police Com'rs, etc.

EARL, J. Section 268 of the New York consolidation act (chapter 410 of the Laws of 1882) provides that no person shall ever be appointed to membership in the police force, or permitted to hold membership therein, or be appointed a patrolman, "who shall have been convicted of any crime." Robert Kopp, the relator, was on the twelfth of April, 1880, arrested for public intoxication in the city of New York, and taken before a police justice, and there charged with such intoxication. v.7N.E.no.10—58

tion, and convicted thereof, and fined five dollars, which fine he paid. Thereafter, in July, 1883, he applied to the board of police commissioners to be appointed a patrolman of the police force in the city of New York, and, in answer to questions put to him, stated that he had never been arrested for or convicted of any crime; and he was thereupon appointed patrolman. Subsequently, in October, 1885, it having come to the knowledge of the police commissioners that he had been convicted of the alleged crime, they passed the following resolution:

"Resolved, that Patrolman Robert Kopp, 22 precinct, be directed to appear before this board on the thirtieth inst., at 12 m., and that the attendance of Knox McAfee, clerk 2d district police court be requested."

In pursuance of that resolution Kopp was requested to appear before the board on the thirtieth of October, and he appeared there with his counsel, and his counsel, at the opening of the proceedings, stated as follows:

"If your honors please, I appear for the defendant, and we have to say this: that, although we admit there that the officer had been arrested and fined in a police court, we now contend that there has never been a conviction of any crime."

It thus appears that the relator was informed of the charge against him, and understood perfectly the purpose for which he had been summoned to appear. It was clearly shown, by the examination of the relator and other evidence, that he was arrested and duly convicted of being intoxicated in a public place, and that he was fined five dollars, and paid the fine. Thereupon the board resolved "that the name of Robert Kopp be stricken from the roll of the police department and force, and that the superintendent be directed to issue the necessary order for the return of his shield and manual, and to not allow him to perform any further duty as patrolman." It is now claimed that the action of the board was illegal for three reasons.

*First.* It is said that they had no jurisdiction to try the relator, and discharge him from the police force, without written charges, as required by section 250 of chapter 410 of the Laws of 1882, as amended by chapter 180 of the Laws of 1884, which provides that no member of the police "shall be fined, reprimanded, removed, suspended, or dismissed from the police force until written charges shall have been made or preferred against him." This is not, we think, such a case as is contemplated by that section. Kopp was not legally a member of the police force. He was ineligible. The police commissioners had no right, under the statute, to appoint him; and when it came to their knowledge that he had been convicted of a crime, and was therefore ineligible to the office, they had the right summarily to vacate his appointment, discharge him from the police force, and refuse longer to recognize him as a member thereof. This was not a case in which the commissioners were authorized or required to try or discipline Kopp for any offense committed by him as a member of the force, but it was simply an investigation to ascertain whether he was legally a member of the force, and that was an investigation to be conducted by them in their own way. If they should thus

wrongfully dismiss a police officer, he would have his remedy for restoration by *mandamus*.

But, if our views were different, we would still reach the same conclusion. The provision in the section above quoted requiring written charges to be made against a police officer before he can be punished or discharged from the police force is made for the benefit of the officer, and it may be waived by him. In this case the relator appeared by his counsel, understanding perfectly the charge which was to be investigated, and proceeded to trial upon the merits, in no way making objection that written charges had not been preferred against him. Under such circumstances we think he clearly waived the presentation of written charges, and that it is now too late for him to make this objection.

*Second.* It is claimed that Kopp was not convicted of any crime. The offense for which he was convicted is created by section 17 of the excise act of 1857, as amended by chapter 856 of the Laws of 1869, which declares it to be the duty of every officer, whenever he shall find a person intoxicated in any public place, to apprehend such person, and to take him before some police magistrate, whose duty it shall be to try him for such offense; and, upon his conviction by the magistrate of such offense, it is declared that such person shall be fined not less than three nor more than ten dollars in the discretion of the magistrate trying him; and provision is made for his imprisonment in case the fine is not paid. The section then proceeds:

"The offense of intoxication being hereby declared to be an offense against the provisions of this act, and punishable as above provided, it shall be the duty of such officer to arrest, or cause to be arrested, all such persons found so intoxicated, and of the magistrate to enter such complaint, and to make such examination, under a penalty of \$50, with full costs of suit for any neglect to comply with the provisions of this section."

The relator was therefore legally arrested for the "offense of intoxication," and the question for our determination is, was such offense a crime? It certainly has all the elements of a crime. Public intoxication is offensive to public decency, and dangerous to the good order and well being of society. The officers charged with the arrest of other criminals are empowered to arrest persons guilty of this offense, and they are required to be tried as criminals, and punished as criminals. Public intoxication is declared to be an offense, and in the statutes ordinarily, the words "offense" and "crime" are synonymous. Various violations of the excise act are made crimes punishable as misdemeanors, and yet in the act they are always called offenses. In the Revised Statutes it is declared that the words "crime" and "offense," when used in the statute, "shall be construed to mean any offense for which any criminal punishment may by law be inflicted,"—3 Rev. St. (7th Ed.) p. 2539, § 32;—and in Pen. Code, § 3, a crime is defined as follows: "An act of omission forbidden by law and punishable, upon conviction," among other ways, by "a fine." So, taking the manner in which this offense is required to be dealt with, and the language used in the statutes in reference thereto, we are of opinion that public intoxication, under the excise act of 1857,

as subsequently amended, is a crime, and therefore that the defendant was convicted of a crime, which made him ineligible to the office of patrolman in the police force.

*Third.* It is further claimed that there was no competent evidence before the board to show that the relator was lawfully convicted. The evidence was sufficient to show that the police magistrate had jurisdiction of the offense, and that, therefore, the conviction was legal.

The order should be affirmed.

(All concur, except ANDREWS and MILLER, JJ., absent.)

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(102 N. Y. 734)

*In re* COMMISSIONERS OF STATE RESERVATION AT NIAGARA, etc.<sup>1</sup>

(*Court of Appeals of New York.* June 22, 1886.)

APPEAL—COMMISSIONERS TO TAKE LANDS AT NIAGARA—NO APPEAL FROM SECOND REPORT OF—LAWS 1883, CH. 836.

The appointment of commissioners by the supreme court to ascertain and report the compensation to be paid owners of property taken by the state under chapter 836, Laws 1883, as amended by chapter 109, Laws 1884, to preserve the scenery about Niagara falls, is analogous to the proceeding under the general railroad act, and this court is concluded, by the decisions under that act, from entertaining this appeal.<sup>2</sup>

Appeal from judgment of general term supreme court, Fifth department, affirming an appraisal and report made by commissioners, and the order of confirmation.

*Anstey Wilcox*, for the motion.

*Calvin Frost*, opposed.

PER CURIAM. We think we are concluded by the decisions under the general railroad act from entertaining this appeal. There is no such difference between the language of that act and the language of the act under which these proceedings were instituted as to require or authorize a different construction of the two acts. There is no public policy and no reason for authorizing appeals to this court under the one act which do not apply to the other. Decisions which have been so long and uniformly adhered to should not now be departed from or disregarded. The appeal should be dismissed.

(All concur.)

<sup>1</sup> See 37 Hun, 537; 16 Abb. N. C. 159.

<sup>2</sup> Section 9, c. 336, Laws 1883, provides that 20 days after the confirmation of the report of the commissioners, to be appointed therein, any party may appeal therefrom to the general term of the supreme court, which may direct a new appraisal before the same or new commissioners, in its discretion. It further provides that "the second report shall be final, and conclusive on all the parties interested."



(142 Mass. 235)

## FITZGERALD v. LIBBY.

*(Supreme Judicial Court of Massachusetts. Middlesex. July 2, 1886.)*

## 1. DEED—DESCRIPTION—"ALL THE LAND BY ME OWNED."

Where a conveyance is made with no particular description of the land, the words "all the land by me owned" are more naturally understood to mean "all the land now owned by me," which is equivalent to "all the land which I have not heretofore conveyed."

## 2. MORTGAGE—DESCRIPTION—"ALL THE LAND OWNED BY ME."

Where A. executed a mortgage to B., embracing four different parcels or clusters of land, and in respect to the first three of these there was a description of land, or a reference to deeds, which were designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by A., from which he had conveyed certain portions or lots, but in respect to the fourth parcel the land was described as "all the land owned by me in my New City, so called, in said L." which description included certain lots previously conveyed to C. and D., but the deeds of which had not been recorded at the time the mortgage was recorded, *held*, that the intention of the mortgagor was to include only such land as he owned at the time of the execution of the mortgage, and did not include the lots previously conveyed to C. and D.

Contract to recover the sum of \$100 paid by plaintiff to defendant at an auction sale of real estate held by the defendant, who was mortgagee of the premises, under a power of sale contained in a mortgage to the defendant from one Clarke. The land is composed of lots 288 and 289 on a plan of a large tract of land formerly belonging to Daniel Ayer, and known as "Ayer's New City," situated in Lowell, westerly of the Boston & Lowell Railroad, and southerly of the Chelmsford road, so called, and said lots 288 and 289 were a part of said large tract called, as aforesaid, "New City." Said Daniel Ayer was originally the owner of the whole of said large tract. Said lots were struck off to the plaintiff as the highest bidder at said auction, and the plaintiff paid the defendant \$100 in cash at the time of the sale, in accordance with the advertised terms of sale. The plaintiff afterwards refused to accept his deed, and brought the present action to recover his deposit. The question of the right of the plaintiff to maintain his case on exceptions depended solely upon the further question whether the defendant was able to pass a good title to the plaintiff. The question whether the defendant was able to give the plaintiff a good title depended solely upon the construction of an old mortgage, under which defendant's title had accrued, given by Daniel Ayer to D. S. and W. A. Richardson, dated October 20, 1854, recorded at Cambridge registry, October 24, 1854. About two years before the execution of the mortgage Daniel Ayer sold off both lots, 288 and 289, to outside parties, but the deeds thereof were not recorded until after the date of recording said mortgage. At the hearing in the superior court before KNOWLTON, J., the defendant claimed that the description in said Richardson mortgage included, in legal effect, said two lots 288 and 289, and passed the same as against prior deeds, and asked the court so to rule. The plaintiff claimed that the said description did not include, in legal effect, said two lots, and did not pass the same as against said prior deed, and asked the court so to rule. The court refused to rule as re-

quested by the plaintiff, and did rule as requested by the defendant, and ordered a verdict for defendant, and plaintiff alleged exceptions. The substance of the description in said mortgage, together with other facts, appear in opinion.

*John J. Hogan and A. G. Lamson, for plaintiff.*

*F. W. Qua, for defendant.*

C. ALLEN, J. The only question is whether, by the true construction of the mortgage, lots 288 and 289 are to be deemed to have been included in the description of the land conveyed thereby. If they are, the plaintiff cannot recover. If they are not, his exceptions must be sustained. In determining this question, we must look at the whole of the mortgage in the light of the circumstances under which it was given. It embraces four different parcels, or clusters of parcels, of land. In respect to the first three of these there is, in each case, a description of land, or a reference to deeds, which are designated, sufficient to enable one to ascertain the boundaries of a larger quantity of land originally owned by the grantor, from which he had conveyed certain portions or lots to former purchasers; that is to say, the grantor, having bought, in each case, a large lot of land, and having sold portions thereof, then granted the residue by a mortgage in effect describing the whole of the large lot, and excepting therefrom such portions as he had already conveyed. By a somewhat cumbersome process, any one familiar with the premises would ascertain precisely what was intended to be included in the mortgage.

In respect to the fourth parcel, however, the phraseology was changed, and the language of the conveyance is as follows:

"Also all the land by me owned and situate in my New City, so called, in said Lowell, being land situate in said Lowell, westerly of Boston & Lowell Railroad, and northerly of the Chelmsford road, so called. For boundaries and description reference is made to deeds to me, recorded in said registry."

No deeds are specifically designated, and there is no exception of lots already conveyed by him. In point of fact it appears that there was a large tract of land in Lowell, formerly belonging to Ayer, the grantor, and known as "Ayer's New City," which was the same "New City" mentioned in the mortgage, and the lots 288 and 289 were a part of said New City, and were shown on a plan of the whole tract, and had been sold by the grantor, prior to the giving of the mortgage, by warranty deeds not then recorded. Whether or not other lots had also been sold by him does not appear in distinct terms. But it may be inferred that the large tract was either actually improved, or was designed to be improved, by laying it out into streets and lots for sale. The bill of exceptions is rather meager in its facts. But, taking such facts and circumstances as we have, it seems to us that the change in the phraseology when the fourth parcel was to be described, shows that the intention was to include only such land as the grantor then owned. There is no specified description of land, and no specific designation of deeds where a description can be found. The conveyance is a mortgage, and not an absolute

deed. The reference to the source of the grantor's title is of the most general description: "For boundaries and descriptions reference is made to deeds to me, recorded in said registry." This reference, while certainly entitled to some weight, is entitled to less than if it were more specific; and, in view of the whole instrument, it is not sufficient to lead to the conclusion that the grantor intended to convey all that was conveyed to him by these deeds. In all the earlier instances, where there was a definite exception of lots already conveyed away by the grantor which otherwise would prove a part of the premises described, the description of the whole original tract was also more definite. In this last instance, where, for some reason, the original tract is not described, the change of phraseology, and the omission of such an exception, support the inference that a similar result was intended to be reached, and that the grant was understood to be limited to such portion of the large tract as was then owned by the grantor. It can hardly be supposed that he would intend to include in the mortgage land which he had already granted to others. The grantee in the mortgage was fairly put upon inquiry. If he was content to take a grant with so indefinite a description, he must take the risk. Otherwise, if the grantor had sold all of the large tract but two or three scattered lots, and then made a deed like the present for the purpose of conveying what was left, it would take effect in priority to any former deeds which might chance to remain unrecorded; thus working a practical fraud on the earlier grantees, and entirely subverting the grantor's intention. Where a conveyance is made with no particular description of the land, the words "all the land by me owned" are more naturally understood to mean "all the land now owned by me," which is equivalent to "all the land which I have not heretofore conveyed;" and such, we think, is the true construction of the present mortgage.

We do not find that the case of *Woodward v. Sartwell*, 129 Mass. 210, which is principally relied on by the defendant, decides anything to the contrary of this; while the construction above given to the mortgage derives more or less support from numerous other decisions in this state and elsewhere. *Worthington v. Hytzer*, 4 Mass. 196; *Adams v. Cuddy*, 13 Pick. 463; *Sweet v. Brown*, 12 Metc. 175; *Chaffin v. Chaffin*, 4 Gray, 280; *Horie v. Finney*, 11 Gray, 511; *Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 159; *Mills v. Shepard*, 30 Conn. 98; *Brown v. Jackson*, 3 Wheat. 449; *Hamilton v. Doolittle*, 37 Ill. 473; *McConnel v. Reed*, 4 Scam. 117; *Starling v. Blair*, 4 Bibb, 288; *Morrell v. Fisher*, 4 Exch. 591.

For these reasons, in the opinion of a majority of the court, the entry must be, exceptions sustained.

(142 Mass. 246)

#### LIBBY v. NORRIS.

(*Supreme Judicial Court of Massachusetts. Middlesex. July 8, 1886.*)

**EQUITY—CREDITORS' BILL TO ENFORCE A TRUST—CREDITORS, JOINDER OF.**

A bill in equity, brought by a creditor of an insolvent debtor, in behalf of himself and other creditors of the insolvent, to enforce a trust, where the in-

terest of all the creditors in the question to be tried is the same, may properly be entertained, in the discretion of the court, although there are persons who may be made parties that have not been made parties to the suit.

Bill in equity seeking to enforce an alleged trust in personal estate. After the reading of the pleadings in the superior court before KNOWLTON, J., and before any evidence was introduced, the defendants asked the court to rule that plaintiff could not maintain his bill as framed—*First*, because it appeared by the bill itself that there were persons who ought to have been made parties to the suit who had not been made parties; *second*, because it did not appear by the bill that plaintiff had in fact any authority to bring the suit on behalf of creditors mentioned in the bill. The court refused so to rule, and, after hearing evidence in support of the bill, found for plaintiff, and defendant alleged exceptions.

*Chas. H. Conant and Jas. H. Carmichael*, for defendant.

*F. W. Qua and A. G. Lamson*, for plaintiff.

MORTON, C. J. It is at least doubtful whether exceptions taken in the course of the trial in a suit in equity in the superior court can properly be entered in this court until there has been a final decree in the case. But, waiving this, it is clear that these exceptions cannot be sustained. The bill is brought by the plaintiff, on behalf of himself and numerous other creditors of Vital Roberts, to enforce a trust. The interest of all the creditors in the question to be tried is the same. It is well settled that such a bill may properly be brought, or, at least, that it is within the discretion of the court to entertain it. *Sears v. Hardy*, 120 Mass. 524; *Smith v. Williams*, 116 Mass. 510; *Birmingham v. Gallagher*, 112 Mass. 190; *Bryant v. Russell*, 23 Pick. 508; Story, Eq. Pl. § 102. In such cases the court will take measures to see that all the creditors interested have the opportunity to come in, and protect their rights. This had been done by the interlocutory decree entered in the superior court, which guards the rights of all parties in interest. Exceptions overruled.

(142 Mass. 274)

#### MINOT and others v. CITY OF BOSTON.

(*Supreme Judicial Court of Massachusetts. Suffolk. July 3, 1886.*)

MUNICIPAL CORPORATIONS—BOSTON WATER SCRIP—SINKING FUND—WATER RENTS—CONSTRUCTION OF St. 1846, CH. 167; St. 1861, CH. 105; St. 1871, CH. 159; St. 1872, CH. 85, § 2; St. 1873, CH. 286; St. 1875, CH. 80; St. 1875, CH. 209; PUB. ST. CH. 29.

By St. 1846, c. 167, § 9, the city council of Boston was authorized to issue Boston water scrip to a certain amount, and by section 10 to issue, in addition to this sum, whenever and so far as necessary, notes, scrip, etc., to meet payments of interest, provided, however, that "no scrip shall be issued for the payment of interest aforesaid after the expiration of two years from the completion" of certain water-works; the payment of interest after that time to be met by the net income from water rents, etc.; the rates to be regulated by the city council, and the net income to pay, not only interest, etc., but, ultimately, the principal of the Boston water scrip; the net surplus above interest charges, etc., to be set apart as a sinking fund. St. 1875, c. 209, (Pub. St. c. 29,) provided, in reference to municipal indebtedness, that "the interest on all debts [of cities] shall be raised by taxation, annually," \* \* \* and that the principal of said indebtedness is to be paid by a sinking fund provided for by taxation. *Held*, that St. 1875, c. 209, (Pub. St. c. 29,) was not intended to repeal St. 1846, c. 167, and that the city of Boston properly paid from the current water rates of each year certain sums for creating a sinking fund for

the extinguishment, at maturity, of such part of the Boston water scrip as was issued subsequently to the passage of the municipal indebtedness act of 1875, (St. 1875, c. 209.)

This was a petition for the appointment of three commissioners under section 13 of chapter 167 of the Acts of 1846, and section 1 of chapter 80 of the Acts of 1875. Hearing in the supreme court before W. ALLEN, J., who reserved the case for the consideration of the full court.

*J. L. Stackpole*, for petitioners.

*A. J. Bailey*, for respondent.

FIELD, J. By St. 1846, c. 167, § 9, the city council of the city of Boston was authorized to issue, "from time to time, notes, scrip, or certificates of debt, to be denominated on the face thereof 'Boston Water Scrip,' to an amount not exceeding in the whole the sum of three millions of dollars, bearing interest;" and, by section 10, to issue, in addition to this sum of three millions of dollars, whenever and so far as may be necessary, notes, scrip, or certificates of debt, in the manner prescribed in the preceding section, "to meet all payments of interest which may accrue upon any scrip by them issued: provided, however, that no scrip shall be issued for the payment of interest as aforesaid after the expiration of two years from the completion of said aqueducts and other works, but payment of all interest that shall accrue after that time shall be made from the net income, rents, and receipts for the use of the water, if they shall be sufficient for that purpose; and, if not, the payment of the deficiency shall be otherwise provided for by the city council." By section 11, Id.: "The city council shall from time to time regulate the price or rent for the use of the water, with the view to the payment, from the net income, rents, and receipts therefor, not only of the semi-annual interest, but ultimately of the principal, also, of the Boston water scrip, so far as the same may be practicable and reasonable; and the said net surplus income, rents, and receipts, after deducting all expenses and charges of distribution, shall be set apart as a sinking fund, and shall be appropriated for and towards the payment of the principal and interest of said scrip," etc. By section 12, Id., if, at any time after two years from the completion of the works, "the surplus income and receipts for the use of the water distributed under the provisions of this act at the price established by the city council, after deducting all expenses and charges of distribution, shall, for any two successive years, be insufficient to pay the accruing interest on the said scrip, then the supreme judicial court, on the petition of one hundred or more of the legal voters of said city praying that the price may be raised and increased so far as may be necessary for the purpose of paying from the said surplus income and receipts the said accruing interest," "may appoint three commissioners, who" "may raise and increase the said price, if they shall judge proper, so far as may be necessary, in their judgment, for the purpose aforesaid, and no further," etc. By section 13, Id.: "If the surplus income and receipts for the use of the water distributed under the provisions of this act, after deducting all expenses and charges of distribution, shall, for any two successive years, be more than suffi-

cient to pay the accruing interest on the Boston water scrip, hereinbefore mentioned, then the supreme judicial court," on a similar petition, "may appoint three commissioners," who "may, if they shall judge proper, reduce the price established by the city council: provided, that such reduction shall not be so great that the surplus income and receipts aforesaid will, in the judgment of the said commissioners, be thereafter insufficient for the payment of the said accruing interest." It is under this last section that this petition was brought. By subsequent statutes the city was authorized to issue additional amounts of scrip.

By St. 1861, c. 105, the city of Charlestown was authorized to take the waters of Mystic pond, etc., to regulate the use of the whole, and "establish the prices or rents to be paid for the use thereof;" and by section 11 the city council was authorized to issue scrip, etc.; and by section 12 it was provided that "the city council shall from time to time regulate the price or rent for the use of the water, with a view to the payment from the net income and receipts not only of the semi-annual, but ultimately of the principal, of the debt, so contracted, so far as the same may be practicable and reasonable." The subsequent acts, giving additional power to the city of Charlestown, need not be noticed, except that St. 1871, c. 159, § 2, is: "The income derived from water rates under the several acts authorizing the construction and extension of water-works in said city, after deducting cost of maintenance and interest on the water bonds, shall be applied to the reduction of the water debt, and shall not be used for any other purpose whatever;" and a similar provision is contained in St. 1872, c. 85, § 2.

The cities of Boston and Charlestown were united by St. 1873, c. 286, and by section 12 the Mystic water board, established in Charlestown, continued to be a separate organization from the Cochituate water board, established in Boston, "until the said city council shall determine to unite it with the Cochituate water board of Boston."

By St. 1875, c. 80, the city council was authorized to establish the Boston water board, and to confer upon that board the powers granted to the city by the statutes "with reference to supplying said city with water, and the powers of the Cochituate and Mystic water boards;" and by section 1 "said board may also establish and regulate the price or rents for the use of said water, subject to the provisions of sections twelve and thirteen of chapter one hundred and sixty-seven of the Acts of the year 1846, and the words 'Boston water scrip,' in said sections, shall be construed to include the whole amount of outstanding loans representing the cost of the water-works;" and by section 2 the Cochituate water board and the Mystic water board were, upon the appointment of the Boston water board, abolished. This Boston water board was established by the city council of the city of Boston by an ordinance passed March 22, 1876, and it may be assumed that, pursuant to St. 1865, c. 80, § 1, the powers conferred upon the city of Boston by St. 1846, c. 167, and the acts in addition thereto, and upon the city of Charlestown by Acts 1861, c. 105, and the acts in addition thereto, and upon the city councils respectively of these cities, were, with limitations not material to be

here noticed, delegated to the Boston water board, and that the regulation of the water rates for the whole water supply of the city, after the two cities were united, was thus put under the control of the Boston water board, subject to the power reserved to the city council, and to the provisions of sections 12 and 13 of chapter 167 of the Statutes of 1846.

At the argument, perhaps in consequence of a change in the water rates made after the petition was filed, the petitioners waived all their complaints, but one, which, as stated in the report, is "that the sums paid from the current water rates of each year for creating a sinking fund for the extinguishment, at maturity, of such part of the Boston water scrip as was issued subsequently to the passage of the municipal indebtedness act of 1875 were improperly and illegally taken."

St. 1875, c. 209, has been incorporated into the Public Statutes, (chapter 29.) By the ninth section it is provided that "the interest on all debts shall be raised by taxation annually. When a debt is payable at a period exceeding ten years, the city or town shall, and when payable at a period not exceeding ten years, may, at the time of contracting the same, establish a sinking fund, and contribute thereto from year to year an amount raised annually by taxation, sufficient, with its accumulations, to extinguish the debt at maturity; and, when payable at a period not exceeding ten years, the city or town shall raise, by taxation, annually, not less than eight per cent. of the principal thereof, and shall set apart the same for a sinking fund until an amount is raised sufficient, with its accumulations, to extinguish the debt at its maturity; and shall raise any balance necessary for such extinguishment by taxation in the year before the maturity of the debt," etc. Section 14 is that "nothing contained in the first seventeen sections shall be construed as prohibiting the inhabitants of towns, or city councils, from paying, or providing for the payment of, any debts at earlier periods than is therein required, \* \* \* or from adding to any sinking fund \* \* \* any sums, derived from taxation or other sources, which are not required by law to be otherwise expended, and such additions may be made for the purpose of reducing the entire debt for the redemption of which the sinking fund was established, or of reducing the amount to be raised by the taxation for such fund."

By Pub. St. c. 11, § 34, "the assessors shall each year assess taxes to an amount not less than the aggregate \* \* \* of all sums which are required by law to be raised by taxation by the said cities or towns during said year, \* \* \* and the assessors may deduct, from the amount required to be assessed, the amount of all the extinguished receipts of their respective cities and towns (except from loans and taxes) which are lawfully applicable to the payment of the expenditures of the year, but such deduction shall not exceed the amount of such receipts during the preceding year."

It is not necessary to decide that in the expenditures mentioned in this section are included the contributions to sinking funds which towns and cities are required each year to make, however much might be said in favor of such a construction, because Pub. St. c. 29, § 14, enacts that city councils may provide for the payment of debts at earlier periods

than is in that chapter required, and may add to any sinking fund any sums derived from other sources than taxation, "for the purpose of reducing the entire debt for the redemption of which the sinking fund was established," as well as for "reducing the amount to be raised by taxation for such fund." There is nothing in St. 1875, c. 209, or in Pub. St. c. 29, that indicates that the legislature intended to repeal any of the provisions relating to the establishment of water rates contained in St. 1846, c. 167, and St. 1861, c. 105, and both those acts, as well as many other acts passed for supplying other cities with pure water, provide that the city council shall regulate the price or the rent for the use of the water, with a view to the payment from the net income, not only of the semi-annual interest, but ultimately of the principal of the water debt.

The different provisions of the statutes may well stand together. St. 1875, c. 209, gives greater security to the holders of the indebtedness that it will be paid at maturity, but there is nothing in it inconsistent with the policy of making the water rates extinguish the debts incurred in procuring a supply of water.

It may also be assumed, without deciding, that the provisions for a petition to the supreme judicial court found in St. 1846, c. 167, §§ 12 and 13, although not found in St. 1861, c. 105, are now applicable to all water rates established by the Boston water board, because, by St. 1875, c. 80, the board, in establishing rates, is expressly made subject to these provisions. By these sections of the statute of 1846 the legislature apparently intended that the rates established should be sufficient, after deducting all expenses and charges of distribution, to pay the accruing interest on the water debt, unless both the city council and the commissioners established a lower rate; but that if, for two successive years, the rates should be more than sufficient for this purpose, then the commissioners to be appointed by the supreme judicial court might, if they judged proper, reduce the rates, but not so that the surplus income should be insufficient to pay the accruing interest on the debt.

The argument was not pressed that the court must necessarily appoint commissioners if it were shown that for two successive years the income and receipts for the use of the water, after deducting all expenses and charges of administration, were more than sufficient to pay the accruing interest of the water debt, although that question is reserved in the report. The learned counsel for the petitioners apparently desired to raise only the question whether payments can lawfully be made, out of the water rates, to the sinking fund for the redemption of bonds issued since the passage of St. 1875, c. 209. It is not, perhaps, significant that the words of St. 1846, c. 167, §§ 12, 13, are that the court may appoint commissioners, and not that it shall appoint them. These sections, however, provide that the award of the commissioners, on "being returned to the said court at the then next term thereof for the county of Suffolk, and accepted by the said court, shall be binding and conclusive for the term of three years," etc. Some judicial power, therefore, the court has over the award before it can become binding, and a case might be stated in the petition, or proved at the hearing, in which the court would not feel imperatively compelled to appoint commissioners, although it were



shown that for two successive years there had been a slight excess in the water rates over the expenses of distribution and the accruing interest on the debt. But, as the petitioners do not insist upon maintaining their petition if the payments to the sinking fund were lawful, we do not consider the competency of the evidence offered, or the extent of the discretion which the court might exercise in determining whether commissioners should be appointed, or whether their powers and duties, if appointed, have been modified by any special legislation since the passage of St. 1846, c. 167. Petition dismissed.

(142 Mass. 191)

## PORTER v. STANDARD MEASURING MACH. CO.

(Supreme Judicial Court of Massachusetts. Suffolk. July 1, 1886.)

## 1. PATENTS FOR INVENTIONS—ASSIGNMENT—ROYALTY—INFRINGEMENT—MANUFACTURE BY AGENT.

A. assigned to the S. Company all right, title, and interest to a certain patented invention; the S. Company agreeing to pay to A. "the sum of ten dollars on each and every machine manufactured by said company, its agents, successors, or assigns, and containing said patented improvements, or either of them." *Held*, that the phrase "manufactured by said company, its agents, successors, or assigns," should be construed so as to cover, not merely the case where a previous authority to manufacture was given, but also that which exists when, the article having been manufactured without previous authority, the owner of the patent, for a valuable consideration, adapts it, consenting to its use, and confers upon it all the privileges of the patent. *Held, also*, where the S. Company brought suit against D. for infringement of the patent, and it was adjudicated that there was an infringement, and the S. Company had effected a settlement with many parties who had purchased such infringing machines, as fully and completely as if they had originally purchased them from the company, that the company should pay to A. the royalty upon all machines so sold and permitted to be sold by the S. Company.

## 2. SAME—SALE OF, IMPLIES AUTHORITY TO VEND OR TO USE—AUTHORITY TO MANUFACTURE IMPLIES RIGHT TO USE OR VEND.

The sale of a patented article conveys, by implication, the right to use, or vend it to others to be used. An authority to manufacture a patented article conveys impliedly the right to use it, or vend it to others to be used.

## 3. SAME—PROMISE TO PAY ROYALTY—IMPLICATION.

A promise to pay a royalty on every machine manufactured by one to whom the invention and the patent is transferred, or his agents, etc., implies a promise to pay it whenever, by his authority, such manufacture is justified.

## 4. SAME—ASSIGNMENT—WHERE ASSIGNEE SANCTIONS USE OF COMPETING MACHINE.

Where one to whom all right, title, and interest in a certain patented invention has been assigned upon his agreeing to pay to the assignor a royalty upon each and every machine manufactured by his (the assignee's) agents, successors, or assigns, sanctions the use of an infringing machine after collecting damages for the infringement, he has, as between himself and the owner of the royalty, treated it as manufactured by his agent, and is liable for the amount of the royalty on each machine so used.

This was an action of contract in which the plaintiff sought to recover a royalty from the defendant company by virtue of a written assignment containing an agreement with said defendant to pay to the plaintiff a certain sum of money "on each and every machine manufactured by the defendant, its agents, successors, or assigns, and containing said patented improvements, or any of them." Hearing in the superior court before ROCKWELL, J., who ruled that plaintiff could not recover upon the facts

alleged in his declaration. The plaintiff alleged exceptions to this ruling. The facts appear in the opinion.

*Wm. A. Macleod and M. F. Stevens*, for plaintiff.

*T. L. Wakefield*, for defendant.

DEVENS, J. The exceptions are somewhat confused, but we interpret them, as the parties have done at the argument, as raising the question, irrespective of what is alleged in the answer, whether the plaintiff can recover upon the facts stated in the declaration; the court having ruled that he could not.

The declaration sets forth an agreement by which, in consideration of an assignment to it by one Taply of all right, title, and interest to a certain invention in surface measuring machines, and the letters patent previously assigned to Taply by the plaintiff, the defendant, in part payment therefor, would pay to the plaintiff "the sum of ten dollars on each and every machine manufactured by said company, its agents, successors, or assigns, and containing said patented improvements, or either of them." The defendant further agrees to keep regular accounts of the machines manufactured by it, its agents, etc., to make regular returns thereof every three months to the plaintiff, and within 10 days after such returns to pay plaintiff his royalty. The declaration further avers that in a suit brought by defendants against Trague and others in the circuit court of the United States it was adjudicated that such parties had manufactured and sold machines which infringed the letters patent owned by the defendants; that by virtue of such adjudication the defendant "had been enabled to control the machines manufactured by Trague and others;" that, by means of the rights thus adjudicated to belong to it, the defendant had effected a settlement with many parties who had purchased such infringing machines, and had given them thereafter the right to use such machines as fully and completely as if they had originally purchased them from defendant, and that, although the defendants recovered pay for such machines, (prior to the date of its last accounting,) it refused on demand to account for such machines, the use of which it had thus sanctioned or permitted, or to pay the plaintiff any royalty thereon.

The defendant was, by the agreement thus set forth, the owner of the patent. It had a right to bring the action against Trague and others for the infringement, and, while the contract imposed no duty on the defendant thus to defend and protect the patent, if it saw fit to do so at its sole risk and expense it would be entitled exclusively to the proceeds of the suit, as the injury was done to the property which it alone owned. The fact that, if such property could not be protected, the defendant would not be likely to continue the manufacture, however important to the plaintiff, would not entitle him, in the absence of any contract to that effect, to bring the suit, or share in the damages obtained by defendant for injury to the patent.

But the plaintiff does not, as we construe his declaration, seek any portion of the damages that may have been collected of Trague and others, if any have been collected, which does not very distinctly av-

pear; nor, apparently, does he seek any which may have been received from the users of the infringing patented article, who were the vendees of Trague, for any use made by them previous to suit brought against, or settlement made with, them. His claim is that, when the defendant sanctions and permits an article to be thereafter used which would otherwise be an infringement of the patent, the defendant adopts the manufacturer of it as its agent. If this contention is correct, it is not important that the declaration does not set forth in terms that by its acts the defendant had recognized or made of the manufacturers of the machines thus licensed its agents. There was no demurrer to the declaration, and the ruling of the court was not upon the form of it, but upon the facts there alleged, however they might be set forth.

The phrase "manufactured by said company, its agents, successors, or assigns," which occurs in the agreement, should be construed so as to cover, not merely the case where a previous authority to manufacture was given, but also that which exists when, the article having been manufactured without previous authority, the owner of the patent, for a valuable consideration, adopts it, consenting to its use, and confers upon it all the privileges of the patent. The manufacture, an act originally unauthorized, is thus ratified and affirmed. The party entitled to the royalty should receive it, as all the benefit of his monopoly has been granted by the owner of the patent, who holds it on the agreement to pay such royalty on each article manufactured by himself or his authority."

In *Wilder v. Adams*, 16 Gray, 478, where a royalty was to be paid by defendants for each safe manufactured and sold by them, it is said by Mr. Justice HOAR:

"If a person had tortiously taken a manufactured safe from defendants, and an action was brought, and the value of the safe recovered by them, this would certainly be equivalent to a sale, and certainly ought to subject them to the payment which they had contracted to make to the patentee in case of a sale."

In a similar way, when the defendant in the case at bar permits articles made in violation of the patent to be used as if made under it, and receives compensation therefor, he should be liable to the royalty contracted to be paid by him in case of manufacture. Thenceforth such machines are, by the power vested in the defendant to control the patent, and the authority it exercises in sanctioning their use, to be treated as manufactured under the patent, and not in hostility to it. The clause "manufactured by said company, its agents, successors, or assigns," must have a reasonable construction, so as to protect the plaintiff whenever the defendant exercises its rights under the monopoly transferred to it. The sale of a patented article conveys by implication the right to use, or send it to others to be used. An authority to manufacture a patented article conveys impliedly the right to use it, or vend it to others to be used. *Marsh v. Dodge*, 66 N. Y. 533; *Sizer v. Ray*, 87 N. Y. 220; *Steam Stone Co. v. Shortsleeves*, 16 Blatchf. 382; *Thomas v. Hunt*, 17 C. B. (N. S.) 183. Conversely, a promise to pay a royalty on every machine manufactured, by one to whom the invention and the patent

is transferred, or his agents, etc., implies a promise to pay it whenever, by his authority, such manufacture is justified.

It is the contention of defendant that, if actual damages were collected of the user of an infringing machine, it would, to that extent, reduce the amount for which the maker and seller would be liable, and that the collection of full damages from the maker and seller of infringing machines for the term of the patent authorizes the use of the infringing machine during the life of the patent. Hence the defendant argues the collection from such users is only another way of collecting the damages for the infringement of Trague and others, who were the makers of the infringing machines, and would give the same right to the user as would any settlement with him. But the defendant had no right to collect damages from Trague and others, the makers of the infringing machines, or from the user thereof, in such manner, or to such an extent, as would invest the party infringing with a right to continue the use of the machine. As between the defendant and the owner of the royalty the defendant, as owner of the patent, was entitled to receive compensation for the injury inflicted thereto; but when, either by express license, or by receiving compensation therefor, he grants and sanctions the subsequent use of the infringing machine, he has, as between himself and the owner of the royalty, treated it as manufactured by his agent. That which the absolute owner of a patent may recover in an action against an infringer, whether maker, seller, or user, depends upon the question whether he intends to grant the right to subsequently use the infringing machine. The consequences of a recovery with respect to the subsequent rights of parties are modified by the measure of damages sought and adopted. If the patentee had an established patent fee or royalty for which he permits any one to use his patent, and he recovers this, the right to use his invention would pass. If, on the other hand, he seeks only the profits derived from the use of the patent, or the injury done to him up to the time of suit by its use, the right to its continued use would not pass. In the case at bar a recovery against the users of the machine for the profits made by them, or the injuries done to the defendant as owner of the patent, would only be for the use of the machine up to the time of recovery. It would not cover the value of the use for the entire period over which the patent-right extends, or the period during which the particular machine was capable of being used. If the defendant undertook to recover these, to that extent he would recover, not for the injury done to the patent, or himself as owner of it, but compensation for a use which he himself had authorized. *Sickels v. Borden*, 3 Blatchf. 535, 543; *Perrigo v. Spaulding*, 13 Blatchf. 392; *Stone Cutter Co. v. Windsor Manuf'g Co.*, 17 Blatchf. 31; *Spaulding v. Page*, 1 Sawy. 708; *Stutz v. Armstrong*, 25 Fed. Rep. 147.

Where the defendant had permitted, for a compensation, the use of otherwise infringing machines, we are of opinion that plaintiff might require him to account for the royalty thereon, or on machines manufactured by himself or agents. Exceptions sustained.

END OF VOLUME 7.







